A QUESTION OF TRUST:
The Role of Alaskan Native Tribes in Natural Resource Damage Actions

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I. Introduction

In response to the largest and most damaging oil spill in North American history,[2] Congress in 1990 enacted the Oil Pollution Act (OPA).[3] Among other authorities, OPA provides for the recovery and restoration of natural resources affected by a release of oil into navigable waters or adjoining shorelines.[4] Congress modeled the natural resource damage recovery provisions in OPA after those applicable to the release of hazardous substances found in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) enacted ten years earlier in 1980.[5] Together, these two statutes provide comprehensive authorities for responding to and restoring damages to natural resources caused by oil spills and the release of hazardous substances.

Natural resource trustees play a central role in this scheme because both statutes charge the trustees with the responsibility of assessing the extent and value of damage to natural resources in which they claim an interest, as well as developing and implementing plans for restoration activities.[6] The law also provides that trustees may pursue damage actions in federal court to recover assessment and restoration costs from those responsible for the contamination.[7]

Substantively similar provisions in both acts attempt to delineate which natural resources are subject to these authorities,[8] and who can act as a natural resource trustee.[9] Agencies of federal, state and local governments, Indian tribes and, in some circumstances, governments of foreign nations may act as trustees.[10] A cursory glance at this list reveals one definitive limitation on the universe of candidates for trusteeship: only governmental or sovereign entities may act as trustees.

In contrast to the limited class of entities who may act as trustees, the statutes adopt an apparently expansive concept of the corpus of a natural resource trusteeship. The statutes define natural resources as "land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the trustee.[11] This definition serves two functions. First, it identifies various environmental media which may become subject to a trust. Second, it identifies a variety of types of interests in those media which supports an assertion of trusteeship.[12]

These definitions create substantial opportunities for assertion of trusteeship by Indian tribes in the lower-48 states[13] because a broad range of statutorily sanction interests may support trusteeship over virtually any contamination in Indian Country.[14] The availability of these opportunities for Alaskan Native tribes, however, is less clear. When read in combination with the definition of "Indian Tribe" included in these same statutes,[15] these provisions potentially preclude Alaskan tribes from participating as natural resource trustees in the vast majority of natural resource damage scenarios that arise in Alaska. This is because Alaskan tribes do not generally enjoy the kind of relationship to land and resources envisioned by the statute. While Alaskan Native tribal governments are not statutorily precluded from acting as trustees, in general, Alaskan Native tribal governments do not own, manage, or assert governmental control over the bulk of Native lands.[16] Instead, these lands and resources are for the most part owned, managed and controlled by private, for profit Native Regional or Village corporations set up under the Alaska Native Claims Settlement Act (ANCSA).[17] As private entities, these corporations have no statutory authority to pursue natural resource damage

claims. Nor may they participate as natural resource trustees in response or remediation actions.[18]

In some ways the subsistence and natural resource interest of Alaska Natives and the Alaska tribal governments are comparable to those of Indian tribes with treaty-reserved or aboriginal rights to hunting, fishing and gathering in usual and accustomed areas in the lower-48 states. Moreover, the Alaska National Interest Lands Conservation Act (ANILCA)[19] provides subsistence use rights to Alaska Natives, and the members of Alaska Native tribes are also shareholders of the corporations that own the ANCSA lands. In addition, canons of construction of federal Indian statutes and a number of federal Indian policies support federal recognition of Alaskan Native tribes as natural resource trustees.[20] In sum, many of the legal and policy arguments for affording Indian tribes in the lower 48 states the opportunity to serve as natural resource trustees carry over to Alaskan Native tribes as well.

This paper evaluates each of these bases for affording Alaskan Native tribes recognition as natural resource trustees under OPA and CERCLA. Part II outlines the statutory roles, responsibilities and rights of natural resource trustees, including the important role of the Environmental Protection Agency in notifying trustees of natural resource injury and coordinating response and restoration activities. Part III explores the tension between the public trust rational behind the natural resource damage provisions and the unique history and legal status of Alaskan Native peoples, lands, and resources. This discussion analyzes the relationship of Alaskan Native tribes to the federal government, the system of land ownership created by ANSCA, and the relation of Alaskan Natives both to that system and to the land and resources

from which they draw their subsistence. Part IV assesses the effect of relevant federal Indian policies and canons of construction on EPA's notice and coordination obligations and Alaskan Native trusteeship assertions. Part V concludes that there is ample legal and policy support for EPA and the courts to recognize Alaskan tribes as natural resource trustees.

II. Statutory Roles, Responsibilities and Rights

A. Role of Natural Resource Trustees: Assessment, Recovery and Restoration

The natural resource damage provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act (OPA) establish three interdependent roles for natural resource trustees. First, trustees are charged with assessing damages for injuries to natural resources that result from a release of oil or hazardous substances. This may include quantifying the extent and value of natural resources injured, destroyed or lost due to the release,[21] the cost of restoring resources to their baseline condition, the cost of the interim loss of resources between injury and recovery, and the reasonable costs of a conducting a damage assessment.[22]

Once the extent of damage suffered has been quantified, the law provides that trustees may recover these damages from potentially responsible parties (PRPs).[23] Trustees may recover these damages through litigation to recover compensation directly from PRPs or negotiation with PRPs to obtain a PRP-financed assessment and restoration.[24] Sums recovered under the natural resource damage provision may be used only to restore, replace or acquire natural resources equivalent to those damaged.[25] Trustees thus have a subsidiary obligation

under the statute to restore natural resources to their pre-release approximate condition, or to acquire equivalent resources.

These three obligations—assessment, recovery of damages, and restoration of resources—are not only interdependent but are intimately related, both in timing and content, to the assessment and selection of appropriate removal and remediation actions taken by PRPs or the federal government in response to a release of hazardous substances or oil. In order to avoid conflict between government or PRP-led response actions and trustee activities, or the possibility that the rights of trustees could be impaired by such actions, coordination between trustees and others involved in cleanup activities is essential.

B. Role Of The Environmental Protection Agency: Notice and Coordination

For releases or spills on land or inland waterways, CERCLA and OPA assign to the Environmental Protection Agency (EPA) the task of ensuring effective coordination between cleanup operations and natural resource trustees' activities.[26] Unlike the federal resource agencies, the Environmental Protection Agency is not itself designated as a trustee. Rather, EPA's role is one of coordinating the assessment activities of trustees with other activities conducted concurrently at the site of a release, such as emergency response, removal and site remediation, investigations and planning.[27]

An essential element of this coordination is ensuring trustees have access to information in the control of or generated by PRPs or others involved in the cleanup.[28] Thus EPA is obligated to make available any information that can assist trustees in assessing natural resource

damages.[29] EPA must also coordinate with trustees in requiring PRPs to comply with requests for information.[30]

As a necessary precursor to effective coordination, EPA is obligated to notify trustees when the potential for damage to natural resources arises due to a release of hazardous substances.[31] When natural resources are affected by a discharge of oil, EPA is similarly obligated to consult with natural resource trustees prior to initiating a removal action.[32] As a matter of policy, EPA has determined that it will make "every effort to encourage Trustee participation at all stages" of the CERCLA process.[33]

These authorities serve a variety of functions. By contacting natural resource trustees at an early stage of site investigations, EPA can access the specialized knowledge and technical expertise of trustees who, in most cases, are intimately familiar with the ecosystem dynamics of the areas and resources under their control or management. This information is invaluable in characterizing the extent and effect of contamination on, for example, sensitive species and habitats.[34] Without this information, remedy selection could proceed with little or no consideration of the effects on natural resources.

Notice and coordination also enable trustees to preserve and quantify damage claims by providing trustees access to information that will be helpful in assessing injury[35] and identifying actions that will trigger statutes of limitation.[36] As in any damage action, the ability of trustees to secure fair compensation depends in part on how well the nature and extent of the injury can be assessed and quantified. In many cases, a damage assessment conducted after completion of

removal and remediation actions would inadequately measure pre-release value or lost interim value.

Early and continued involvement in cleanup operations and decision-making processes also aids trustees in determining the scope of necessary restoration.[37] Trustees participation ensures that natural resource values are considered in the selection of appropriate removal and remediation actions.[38] Because certain removal and remediation alternatives may be inconsistent with the pre-release uses of the natural resource injured, participation of natural resource trustees in the remedy selection phase is essential. This participation allows trustees the opportunity to ensure that that selected response actions and settlement agreements include measures that are compatible with trustees' obligations to restore natural resources to their pre-release state, and that restoration plans do not duplicate or conflict with cleanup efforts.[39]

In recognition of the importance to trustees of notification and coordination, EPA has adopted an aggressive policy of encouraging participation of all potential trustees in all stages of oil and hazardous substance response.[40] A number of factors, such as where the release or spill is located, what habitats or species may be affected, and the proximity of federally, state or tribally managed lands or resources may guide site managers in identifying entities that may claim a trust interest in affected resources.[41]

However, notification of and participation in response actions, while providing access to information necessary to establish natural resource claims, does not itself provide a legal basis for assertions of trusteeship. In other words, EPA does not confer statutory standing to pursue a natural resource damage action by sending a notice letter to a potentially interested entity. Nor

does EPA require that trustees substantiate their claim to trustee status prior to receiving notification. Rather, EPA takes the position that trustees themselves are in the best position to determine whether a given release affects resources under their management or control, and all potentially interested entities should thus be notified in the event of a release.[42] In the end, trustees bear the ultimate burden of substantiating their assertion of trusteeship in court. To claim natural resource damages in court, a trustee must show that it meets the statutory requirements for recovery,[43] regardless of whether the trustee benefited from proper notice and coordination by EPA.

C. Designations and Assertions of Trusteeship

Many commentators have noted that the natural resource damage provisions of CERCLA and OPA and the associate notions of trusteeship draw inspiration and historical legitimacy from the common law public trust doctrine.[44] This doctrine holds that certain natural resources are held by governments in trust for the benefit of their people.[45] The legislative history of CERCLA also indicates that the purpose of natural resource liability is to "preserve the public trust in the Nation's natural resources."[46]

It is not surprising then, that natural resource damages are recoverable only for resources in which the public holds a primary beneficiary interest, and are not recoverable for purely privately held resources. However, at least one court has held that the statutory language of the NRD provisions "does not limit the definition of 'natural resources' to resources owned by a government."[47] In promulgating regulations governing natural resource damage assessment

procedures, the Department of the Interior has likewise taken the position that the statutory language "managed by, held in trust by, appertaining to, or otherwise controlled by," should be read broadly to apply to "a wide range of legitimate government interest in natural resources that may, in fact, be held in private ownership."[48] Recovery is intended, however, to compensate for the loss to the public, and thus only representatives of the public, i.e. governmental or sovereign entities, may exercise the duties of natural resource trustee.[49]

By executive order and through promulgation of the National Contingency Plan[50] (NCP), the authority of the President of the U.S. to act as a trustee for natural resources under CERCLA and OPA is delegated to the heads of various executive departments, including the Secretaries of Interior, Commerce, Defense, Energy and Agriculture.[51] These officials are authorized to act as federal trustees for resources controlled or managed by their respective agencies.[52] State governors are also required to designate state officials who are authorized to serve as trustees for resources under state control or management.[53]

While CERCLA and OPA clearly designate federal and state governments as natural resource trustees, the corresponding authority of tribal governments to serve as trustees is statutorily mandated only under OPA. Under sections 1002 and 1006 of OPA, tribal trustees may recover damages from responsible parties for injury, destruction, loss or loss of use[54] of natural resources "belonging to, managed by, controlled by, or appertaining to such Indian tribe."[55] Section 1006 of OPA provides for designation of tribal trustees and assigns to tribal trustees the same functions as are assigned to federal and state trustees.[56] In contrast, CERCLA does not specifically authorize tribes to act as trustees, although the liability provisions clearly

state that liability for natural resource damages "shall be to . . . any Indian tribe."[57] The authority of tribes to receive notice and coordination benefits in the case of a release of hazardous substances derives from EPA's interpretation of this liability provision.

In 1990, EPA proposed revisions to the National Contingency Plan that would reconcile the NCP with statutory changes made by the 1986 amendments to CERCLA. In the preamble to the proposed revisions, EPA made the following statement:

> The amendments to CERCLA provide that an Indian Tribe may bring an action for injury to, destruction of, or loss of "natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation." . . . The revisions in [40 C.F.R.] § 300.610 reflect these statutory changes.[58]

The revisions arguably do much more than simply reflect the statutory authority of tribes to bring actions for recovery of natural resource damages. First, the new NCP defines "trustee" as "an official of a Federal natural resources management agency . . . or a designated State official or Indian Tribe who may pursue claims for damages under section 107(f) of CERCLA."[59] This language confers trustee status to not only those entities statutorily designated as trustees but also to those entities who can statutorily assert a claim for natural resource damages. EPA thus outlined a conceptualization of natural resource trustee status as depending not on the statutory designation of a trustee but rather on the existence of a trust corpus that has suffered injuries cognizably under the statute.

Second, the regulation directs tribal chairman or their designees to act as natural resource trustees, and authorizes these tribal trustees to act whenever tribal natural resources are injured,

destroyed, lost or threatened by a release of hazardous substance or oil.[60] The NCP thus charges tribal trustees with the same responsibilities for assessing damages and implementing restoration activities as were statutorily assigned to state, federal and tribal trustees under OPA, and to state and federal trustees under CERCLA and OPA. Tribal trustees are also entitled under these regulations to the same notice and participation rights afforded state and federal trustees when tribal trust resources are potentially affected by a release of hazardous substances or oil.[61]

EPA has taken an expansive view of the role of Indian tribes as natural resource trustees, and of its own obligations to promptly notify and coordinate response actions with trustees. Read in concert, these two policies clearly provide ample opportunity for tribes to ensure that the natural resources in which they claim an interest are protected and restored after a release of oil or hazardous substances. Noticeably absent from EPA's arsenal of regulations and guidance documents, however, is any substantial consideration of the unique issues raised by assertions of trusteeship by Alaskan Native tribes. These issues arise out of an inherent tension between the public trust rational behind the natural resource damage provisions and the unique history and legal status of Alaskan Native peoples, lands, and resources.

III. Alaskan Native Natural Resources: Exploring the Frontiers of Tribal Sovereignty

A. The ANCSA Dilemma: Private Ownership and Public Use

The foundation of the natural resource damage claim in the public trust doctrine means that, in general, trustees cannot recover damages for injury to purely privately owned resources.[62] Rather, recovery under these provisions is intended to compensate the public for

the loss of use and benefit from injured public resources. The statutes incorporate this doctrine by defining natural resources as "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled" by a government.[63] The only decision interpreting the scope of this provision, *Ohio v. United States Department of the Interior*,[64] held that while this language excludes "purely private resources" it does not limit recovery to resources owned by a government.[65] Rather, the phrases following "belonging to" indicate that certain types of governmental interest other than ownership may create a trustee interest in even privately-owned resources.[66]

No court or administrative body has definitively addressed the question of how extensive or tenuous an interest may be to substantiate a trusteeship claim. The *Ohio* court did not speculate as to precisely what types of interest in privately-held property would suffice to bring a given resource under the scope of this language. In reviewing the interpretation given by counsel for the Department of Interior in oral arguments, the court paraphrased the apparent position of DOI as being that "a substantial degree of government regulation, management or other form of control over the property would be sufficient to make the . . . natural resource damage provisions applicable."[67] The court then gave the example of a state law requiring tideland owners to permit public access to their property as a kind of state interest in privately-held property that would justify an assertion of trusteeship by the state over those tidelands. Because this more permissive interpretation conflicted with statements made by DOI in the preamble to the regulations under review, the court remanded, with instructions for the agency to clarify its position.

In the preamble to revised regulations promulgated in response to this remand, DOI stated:

> [T]he Department notes that it had not meant to suggest that recoveries under the rule hinge solely on ownership or exercise of a formal document transferring the property to a government entity . . . . The rule repeats the statutory language of "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by," and thus covers a broad range of government interest in natural resources on behalf of the public. Pursuant to that language, general sources of authority for recovery under the rule could include, but not necessarily be limited to, relevant treaty or other provision of international law, constitution, statute, common law, regulation, order, deed or other conveyance, permit, or agreement. The statutory phrase "belonging to" connotes ownership and would cover government-owned lands, as well as resources affixed, i.e., permanently attached, to such lands. However, the remaining terms, "managed by, held in trust by, appertaining to, or otherwise controlled by," ensure a wide range of legitimate government interest in natural resources that may, in fact, be held in private ownership.[68]

This language does little to pin down the precise nature of the government interest required to recover for injury to privately held resources. It does indicate, however, that the *Ohio* court's characterization of "substantial degree of regulation" may be too narrow.

The relevant question in the context of Alaska, then, is whether Native tribal governments can assert an interest in resources sufficient to come within the scope of this definition. Unlike most Indian tribes in the lower-48 states, federally recognized Alaskan Native tribal governments do not reside on or exercise governmental control over reservations; nor is land owned in fee by tribes or tribal members considered Indian Country, the label attached to areas over which tribes in the lower-48 exercise tribal jurisdiction.[69] The lands and resources historically occupied and used for subsistence hunting and fishing are for the most part owned by

private, for-profit regional or village corporations set up under the Alaska Native Claims Settlement Act (ANCSA).[70] As private entities, these corporations have no statutory authority to pursue natural resource damage claims. Nor may they participate as natural resource trustees in response or remediation actions.[71]

This situation presents a dilemma for both EPA and natives whose subsistence resources are injured by a release of oil or hazardous substances. EPA is constrained by law and executive policy from treating ANCSA corporations as trustees. In reality, however, much of the land owned by these corporations is used not as private land but as subsistence hunting and fishing grounds for local Native populations. As governmental entities responsible for protecting the health and welfare of their members, federally recognized tribal governments would appear to be the most logical choice when a release or spill injuries these resources. However, the tenuous nature of tribal governments' jurisdictional claims over ANCSA lands would appear to bar such a choice under the statutory definition of natural resources.

What is needed then, from the viewpoint of Alaskan Native tribes who seek to employ the natural resource damage provisions to protect the resources used by their members, is an expansive interpretation of the definition of natural resources coupled with a re-conceptualization of Alaskan Native tribal jurisdiction. This position recognizes the public nature of subsistence resources located on ANCSA lands, while remembering that the sovereign power of tribal governments does not reset solely on the basis of property ownership and control, but rather finds an independent grounding in notions of tribal inherent sovereignty, self-determination, and protection of tribal members' health, welfare and traditional way of

life.[72] To understand the dilemma and its resolution through such a position requires a clear understanding of the relationship between Alaskan Native tribes and the federal government, the system of land ownership and control created by ANSCA, and the relation of Alaskan Natives both to that system and to the land and resources from which they draw their subsistence.

B. Alaskan Natives and the U.S. Government

When the United States acquired Alaska in 1867, indigenous people from five major cultural groups—Aleuts, Athabaskans , Yupik, Eskimos, and Tlingit/ Haida—resided in over 200 villages scattered throughout the territory.[73] Until recently, courts denied that these village communities constituted tribal organizations akin in structure and legal status to tribes residing in the lower 48 states.[74] However, in 1993 the federal government definitively recognized Alaskan Native tribes as "distinctly Native communities [that] have the same status as tribes in the continuous 48 states."[75] Since this pronouncement, the legal status of Alaskan Native communities as sovereign entities is no longer in question.[76]

One of the main arguments made prior to the 1993 against recognizing the tribal status of Alaskan Natives was the "peculiar nontribal organizations under which the Alaska Indians operate."[77] The Supreme Court of Alaska expressed this sentiment in noting that "the village rather than the ethnological tribe has been the central unit of organization."[78] However, this position ignores the many ways in which Alaskan Native villages resemble historical or ethnological tribes in the lower-48 states.[79]

Scholars have argued that the characteristics of these villages closely track the Supreme Court's "practical legal definition" of an historical tribe.[80] This analysis demonstrates that Alaskan Natives historically organized around racial-family groupings[81] which generally settled at locations providing easy access to subsistence natural resources.[82] These villages governed themselves through a variety of traditional tribal structures which "operated successfully in the absence of specialized political institutions or centralized state governments" and which included means for identifying territory and regulating interactions with neighboring communities.[83] They also inhabited and utilized identified territories, defined by migration routes, language families, and resource-use areas.[84] These territorial associations are estimated to have persisted for over ten thousand years.[85]

As historical tribes, therefore, Alaskan Native societies entered into a political relationship with the federal government upon contact with the United States, and became legal tribes.[86] Although not formally recognized by treaty, statute, or for the most part, the setting aside of reservation lands, Alaskan Native communities assumed the same status of "dependent domestic nations"[87] in relation to the federal government that is the hallmark of tribal-federal relations across the contiguous 48 states.[88]

This relationship was officially recognized by the federal government when the Bureau of Indian Affairs (BIA) published a notice in the Federal Register clarifying that recognized tribes in Alaska are entitled to the same governmental status, and are entitled to the same protection, immunities, and privileges as other acknowledged tribes in the lower-48 states.[89] While prior BIA lists had included some Native entities, the criteria for inclusion was inconsistent from

year to year and preamble language had lead to considerable confusion as to which listed Native entities were considered sovereign tribes.[90] The preamble to the 1993 list sought to resolve these tensions by acknowledging the sovereignty of the listed Alaskan Native tribes and specifying their right, subject to applicable federal Indian law, to exercise the same inherent and delegated authorities as other tribes.[91] Amongst those attributes of inherent sovereignty thus recognized are the authority to act to protect the health and welfare of their members,[92] and to operate on a government-to-government basis with agencies of the U.S. government.[93]

Establishing the status of Alaskan Native tribes as sovereign governments does not answer the question of the extent of the powers that a tribe can exercise in the name of its sovereign status.[94] Under well established principals of federal Indian law, the validity of a tribe's exercise of a given sovereign power is assessed by determining whether and to what extent a given power has been divested by Congressional action or by implication.[95] A Congressional divestiture of sovereign trustee power is not present in either CERCLA or OPA because both statutes allow federally recognized tribes, including Alaskan Native tribes, to serve as natural resource trustees under appropriate circumstances. The next question then, is whether any other Congressional act has divested Alaskan tribes of this authority.[96] Because natural resource trustee activities necessarily touch on issues of land and resource use and management, the set of federal laws governing Alaskan Native land ownership and use are relevant to this question.

C. Corporate Land Ownership and the Indian Country Question

In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA).[97] In return for relinquishing their claims of aboriginal title to lands within the state of Alaska,[98] Alaska Natives received the right to select 44 million acres of lands[99] and to receive payments totaling $962.5 million.[100] ANCSA revoked all reservations in Alaska but one, the Annette Island Reserve of the Metlakatla Indian Community in southeast Alaska.[101]

Although ANCSA expressly did not diminish the political relationship of Alaska Natives to the federal government,[102] the lands and settlement payments were not directed to the tribal governments. Instead, Congress established a complex arrangement where the land grants and payments from the settlement were received by a new set of regional and village corporations, chartered under state law as business for-profit corporations. ANCSA established twelve Regional Corporations to select and take fee title to 16 million acres of land, and 203 Village Corporations to select 22 million acres in and near Native villages.[103] All of the lands were transferred in fee simple with few restrictions on alienation. The rest of the settlement lands were set aside for pending native allotment applications, townsites, historic sites, and other purposes.

Each Alaskan Native alive on the date ANCSA was passed[104] was entitled to 100 shares in a regional corporation and, depending on residency, to become a shareholder in a village corporation. Alaska Natives born after that date may become shareholders only by inheritance. In some cases, the shareholders of some Village Corporations have transferred village corporation lands to the local tribal government for the village.[105]

The legal implications for tribal governments of the new corporatism heralded by ANCSA were, for many years, uncertain at best. The 1998 U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*[106] settled one aspect of this question when the Court definitively held that ANCSA lands are not Indian Country.[107] This means that Native village tribal governments and courts cannot exercise tribal jurisdiction over certain matters even on land held in fee simple by the tribal government.

The primary issue in *Venetie* was whether lands held in fee by the Village of Venetie tribal government constitute a dependent Indian community that is considered Indian Country for jurisdictional purposes.[108] This question arose after the tribal government attempted to asses tribal business activity taxes against a state contractor hired by the State of Alaska to build a school in the village. The tribe based its assertion of jurisdiction to assess taxes on the fact that the Venetie tribal government held fee title to the land in question, having acquired it from the two Village Corporations who themselves had taken title to the land surrounding the Village pursuant to ANCSA.[109] The tribe thus argued that the Village constituted Indian Country over which the tribal government was empowered to assess taxes.

The Supreme Court determined that to be considered a dependent Indian community, and thus Indian Country, two requirements must be met. First, the lands must have been set aside by the federal government for the use of the Indians as Indian land.[110] Second, the lands must be under the superintendence of the federal government.[111] The Court decided there was no federal set-aside in the case of the Venetie lands because ANCSA revoked the former reservation status of the land and transferred unrestricted title to private, for-private corporations, with the

legislative goal of promoting self determination and avoiding any permanent racially defined institutions, rights, privileges or obligations.[112] As to federal superintendence, the Court found that several aspects of ANCSA were inconsistent with continued federal superintendence, and did not agree that the continued provision of federal health, social, welfare and economic programs supported a finding of federal superintendence.[113]

While ANSCA dramatically limited the territorial sovereignty of Alaskan Native tribes by eliminating Indian Country, the Act had little effect on other attributes of tribal sovereignty.[114] No attempt was made in ANCSA to limit the authority of traditional tribal governments in Native villages. Rather, Congress expressed clearly on the face of the Act that it intended the Act to be a land claims settlement. Section 1626(a) states that the payments and corporate land selection provisions "shall constitute compensation for the extinguishment of claims to land, and shall not be deemed to substitute for any governmental programs otherwise available to the native people of Alaska."[115] The 1988 amendments further clarify this intent by stating that no provision of ANCSA either confers or denies "to any Native organization any degree of sovereign governmental authority over lands (including management, or regulation of the taking, of fish and wildlife), or persons in Alaska."[116] Thus ANCSA entirely skirts the issue of Alaskan Native sovereignty.

While the *Venetie* court's interpretation of ANCSA stripped Alaskan Native tribal governments of significant basis for asserting certain governmental powers, the decision does not resolve all questions as to the scope of tribal sovereign powers in Alaska. The ruling may be definitive for those powers which federal law limits to exercise within the boundaries of Indian

Country, such as taxation and criminal jurisdiction. However, the decision has little import for those aspects of tribal sovereignty that do not depend upon the existence of Indian Country. Amongst these are tribes' sovereign power to act in situations where there is a "direct effect on the political integrity, economic security, or the health or welfare of the tribe."[117] When the natural resources that a tribe's members depend upon for subsistence have been injured, Alaskan Native tribal governments can argue that the power to act as a natural resource trustee falls within this realm.

D. Subsistence Use and Occupancy

Alaskan Natives traditionally enjoy a subsistence lifestyle which relies upon the capture of local fish and wildlife to provide the sustenance of daily life.[118] In general, Alaskan Natives settled and established permanent communities in areas with convenient access to these resources. Native Villages therefore tend to be located near river and coastal areas that provided fishing and marine mammal hunting grounds, near major wildlife migration corridors, or in close proximity to breeding or wintering grounds for species such as caribou.[119] Many Native groups employed a pattern of establishing winter fishing villages along the states' major rivers. During the summer months, various groups would leave and establish seasonal camps in inland areas that were devoted to seasonal fisheries, trapping or hunting.[120] This pattern continues today, as Alaskan Natives exercise their rights along with other Alaskans to engage in "customary and traditional" [121]subsistence uses of natural resources.

These rights were established under federal law in 1980, when Congress passed the Alaska National Interest Lands Conservation Act (ANILCA).[122] This law provides rural residents of Alaska who take fish and wildlife for subsistence use with a priority over other fishing and hunting activities. This priority applies to a broad range of "nonwasteful subsistence uses" on public lands,[123] and may be restricted for conservation purposes.[124] The act also establishes a federal policy of managing public lands in Alaska so as to minimize the impact of land management decisions on subsistence users,[125] and imposes procedural obligations on federal land management agencies designed to ensure that the impact on subsistence use is considered and minimized prior to any disposition which would restrict subsistence uses.[126]

The terms of the subsistence preference provision of ANILCA apply only to federal public lands, which by definition exclude ANCSA lands held by Native Village or Regional Corporations.[127] However, Congress had hoped to provide a broader subsistence protection that would apply on state and private land, including ANCSA lands. Section 3115(d) allowed for state regulations to supersede the federal management regime established under ANILCA if those regulations (1) were generally applicable to activities on state, federal and private land and (2) provided a subsistence preference and participation rights "consistent" with ANILCA's own provisions. In other words, Alaska could avoid a federal takeover of fish and wildlife management on federal lands, which constitute over half the lands in the state, if it adopted a subsistence use management regime generally applicable across the state.[128]

The State of Alaska has not been successful in bringing its state laws into compliance with ANILCA.[129] State regulations adopted in response to ANILCA were struck down by the

Alaska Supreme Court as inconsistent with the state statute under which they were promulgated.[130] The court found that the state's subsistence statute applied to all residents who used fish and game for personal consumption. Because the regulations limited the subsistence provision to rural residents, the regulations were invalid under the statute.[131] In an attempt to avoid falling out of compliance with ANILCA, the state legislature amended the statute to reflect the language in ANILCA limiting the subsistence preference to rural residents.[132] However, the Alaska Supreme Court found this language violated the Alaska Constitution because it employed an impermissible classification scheme that discriminated against urban residents "who have legitimate claims as subsistence users."[133]

The federal Department of Fish and Wildlife thus assumed management authority over subsistence hunting and fishing on federal public lands in 1990, and will continue to enforce the rural subsistence priority on federal lands until such time as Alaska can bring its regulatory framework into compliance with ANILCA.[134] However, a subsistence use preference not limited to rural residents is enforced on state-regulated lands by the state Board of Fish an Game.[135] This statute provides a preference for regulated subsistence use in areas where subsistence is the "principal characteristic of the economy, culture, and way of life of the area or community."[136] Alaskan Natives who depend on natural resources for subsistence purposes thus enjoy hunting and fishing preferences under both the state and federal schemes.

For Alaskan Natives, however, subsistence use of natural resources is not a matter of statutory preference or confined hunting and fishing rights which may or may not apply depending on which side of a property line the caribou herd is grazing on any given day. Rather,

subsistence is a way of life.[137] Subsistence practices and values are deeply imbedded in Alaskan Native culture, and because these values and practices often conflict with pressures from outside the Native community, the preservation of this way of life is intimately tied to the Native struggle for self-determination.[138]

This way of life can also be severely impaired when the natural resources upon which the subsistence lifestyle depends are injured due to a release of oil or hazardous substances. For example, local Alaskan Native populations were severely affected when the Exxon Valdez spilled millions of gallons of oil into Prince William Sound. This spill devastated many populations of birds, marine mammals and aquatic species that local tribes depended upon for their subsistence.[139] Local tribes never recovered natural resource damage from Exxon. However, when the tribes learned that the settlement proposal between Exxon, the state and federal government could potentially cut off their rights to sue Exxon for natural resource damages, the tribes filed suit to enjoin the state or federal officials from settling with Exxon without taking Native interests into consideration.[140] Judge Sporkin recognized the viability of these claims, finding that the proposed civil agreement might interfere with the natural resource and subsistence interests of the tribes, and granted the injunction.[141] The tribes were thus successful in asserting a protectable interest in natural resources used for subsistence. This interest was sufficient to ensure them a seat at the negotiating table between Exxon and the state and federal government, thus ensuring that Native subsistence use values were included in the settlement of natural resource damages.[142]

IV. Indian Law and Policy: Beyond the Statutes

While participation of the Prince William Sound tribes in settlement negotiations may have facilitated a more comprehensive settlement, their negotiating position was weakened by the fact that they were not in fact acting as trustees.[143] Had the tribes been in a position to extract damages directly from Exxon, the tribes would not have had to file a collateral suit in order to ensure that their interests were not overlooked. This is just one example of the many ways in which early and coordinated trustee participation in oil and hazardous substance cleanups can facilitate more efficient and comprehensive response and restoration actions.[144]

The ability to launch a successful trustee action for natural resource damages depends, however, not only on presenting a substantiated basis for asserting trusteeship, but also requires detailed quantification of the extent and value of injury, the cost of restoring resources to their baseline condition, and the cost of the interim loss of use.[145] As discussed above, the process of conducting a natural resource damage assessment is most effectively accomplished if trustees are notified of potential injury and can coordinate assessment activities with response and cleanup operations. The Environmental Protection Agency (EPA) is statutorily obligated to notify and coordinate trustee actions. When potential trustees include Alaskan Native tribes, this statutory obligation is supplemented by a collection of federal policies and cannons which impose special obligations on federal agencies in their dealings with federally recognized tribes.

A. Federal Trust Obligations

First, the federal government, by virtue of its trust responsibilities towards tribes, is obligated to protect the sovereignty of tribes and their rights to govern themselves and their

resources. EPA, as an arm of the federal government, is obligated to act in accordance with this trust responsibility when taking actions that affect tribes.[146] This responsibility is a corollary of the special relationship between tribes and the federal government that arises from tribes' "dependent status"[147] and the history of relations between the United States and tribes.[148] The scope of the trust doctrine is rather vague, and finds its most definitive articulations in the context of specific treaty or statutory obligations.[149]

In Alaska, the federal trust obligation to Native Alaskans includes protecting subsistence hunting and fishing rights.[150] Congress made this responsibility explicit in the legislative history of ANCSA, where it stated although the Act extinguished aboriginal hunting and fishing rights, the Secretary of the Interior was obligated to protect Native hunting and fishing rights.[151] The duty to protect hunting and fishing rights may also include the duty to preserve the wildlife and habitat resources, or at the very least to allow tribes an active management role in the protection of those resources. This argument is forwarded in the context of off-reservation hunting and fishing rights reserved to tribes in the lower-48 states, where the federal trust obligation has been invoked to "substantiate tribes' claim to a legitimate and enforceable expectation that the federal government will not take actions that would degrade reserved rights resources and the habitat upon which such resources depend."[152] A similar argument can be made in Alaska, where Native tribes expect that the federal government will not act to impair the quality or availability of subsistence resources.[153]

EPA's trust obligation to protect Alaskan Native's subsistence use of natural resources creates an obligation to ensure that tribal interests are considered in response and cleanup

operations. Notification of tribal trustees is a logical outgrowth of this obligation because trustee participation in cleanup activities is a critical element in ensuring that natural resource values are incorporated in remedy selection.[154] If there is doubt as to whether a tribe can justify an assertion of trusteeship in a given case, EPA should err on the side of treating the tribe as a trustee in order to assure it is acting consistently with its trust responsibility.

B. Government-to-Government Consultation

Related to the federal trust obligation is the federal government's policy of dealing with recognized tribes on a government-to-government basis. This relationship was codified in the 1994 Federally Recognized Tribes List Act which specified that "the United States…maintains a government-to-government relationship" with federally recognized tribes.[155]

Like the federal trust responsibility, the scope and specific requirements of government-to-government treatment is often amorphous. However, President Clinton offered some guidance in a 1994 memorandum to executive department and agency heads.[156] This memo directed executive agencies to implement activities affecting tribal rights or resources "in a knowledgeable, sensitive manner respectful of tribal sovereignty."[157] Federal agencies are also required to consult with tribal governments prior to taking actions that will affect those governments and assure that tribal rights and concerns are considered during planning and development of federal actions.[158]

The consultation requirement also appears in EPA's 1984 Indian Policy.[159] While the EPA policy speaks in terms of the obligations of the agency with respect to implementing

environmental statutes on reservations, the principals underlying the policy remain relevant in the Alaskan context. The policy specifies "two related themes" of promoting tribal self government and working with tribal governments on a government-to-government basis. In pursuing these themes, EPA obligated itself to consider tribal concerns and interests when making decisions affecting tribal environments.[160]

In addition to these self-imposed consultation commitments, EPA adopted a policy of pro-actively seeking to remove statutory or regulatory barriers:

> A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments . . . . As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.[161]

This policy indicates, at the very least, that when a statutory or regulatory scheme is unclear as to the way in which tribes should be treated, EPA should seek to resolve those ambiguities in favor of dealing with the tribe on a direct government-to-government basis. This policy of expansively interpreting statutes so as to maximize the role of tribal governments in environmental management may explain why EPA chose to recognize tribes as trustees under CERCLA, despite the absence of a clear statutory obligation to do so.

In this same vein, EPA's policy counsels in favor of a broad interpretation of the agency's notice and coordination obligations to Alaskan Native tribes. As sovereign entities whose subsistence resources are affected by response and cleanup operations, EPA is obligated under its own Indian Policy to consider Native concerns through government-to-government consultation. In fulfilling its obligation to deal with tribes on a government-to-government basis,

EPA is similarly obligated to accord Alaskan Native tribes the same notice and coordination rights that EPA accords to other governments, such as states, who might assert a trustee interest in injured resources.

C. Sympathetic Construction of Indian Statutes.

A number of U.S. and Alaska Supreme Court cases establish the general principles of statutory construction in Indian law cases. First, when interpreting statute affecting the rights of Indians, courts are to resolve ambiguities of statutory language in favor of the Indian or Native interest.[162] Second, statutes passed for the benefit of Indians are to be liberally interpreted,[163] while those statutes aimed at terminating or diminishing Native status or rights are to be narrowly construed.[164] The rational behind these cannons is that the federal trust responsibility includes an obligation to treat Indians fairly because, as beneficiaries of the trust relationship, Indians necessarily operate from a position of unequal bargaining power.[165]

These rules of statutory construction apply with equal force to statutes affecting Native Alaskans. For example, ANCSA, as a settlement of aboriginal title claims, is considered to be "Indian legislation".[166] Because it enacted an extinguishment of claims based on aboriginal title to certain lands in exchange for compensation and other rights, ANCSA is also considered a treaty substitute.[167] Issues arising under ANCSA are thus reviewed under standard canons of interpreting Indian legislation.[168]

The tribal trustee provisions of CERCLA and OPA should be interpreted under these same cannons, because these provisions were clearly enacted to provide benefits to Indians. As

such, they should be liberally interpreted to confer the same trustee authorities on Native Alaskan tribes. The "appertaining to" language in the definition of natural resources should also be liberally interpreted under these cannons to encompass the kinds of subsistence uses of resources by tribal members as sufficient to substantiate a Native Tribal trusteeship.

V. Conclusion

The Native tribes of Prince William Sound were eventually barred from pursuing tribal natural resource damage claims against Exxon because the state and federal governments were negotiating a settlement under the Clean Water Act, which does not provide for tribal natural resource trusteeships.[169] However, in an analogous case pursued under CERCLA or OPA, federally recognized Alaskan tribes whose subsistence resources are as severely injured as those in Prince William Sound may be able to successfully assert a tribal trustee interest. This would facilitate effective consideration of Native and natural resource use issues in cleanup and remedy selection, allow the tribe to recover damages for lost subsistence use, and provide funds for restoration to subsistence use levels.

The basis for such a claim rests on two interrelated principles. First, because members of the tribe make continuous use of the injured resources for subsistence purposes, the resources can fairly be said to be "appertaining to" the tribe. This should suffice to establish the necessary connection between the resource and the trustee required by the statutory definition of natural resources.[170] While a historical or aboriginal right to hunt and fish on the land or marine resource can no longer be asserted as an element of this connection,[171] the language of the

natural resource damage provisions is phrased in the present tense. This makes current use or occupancy the touchstone of whether the resource is fairly characterized as appertaining to the tribe. Such an interpretation of the statutory language is not unprecedented, as it closely tracks the expansive interpretations of this language by EPA and DOI.[172] More importantly, such a broad interpretation is required by the generally accepted cannons of federal Indian law that statutes passed for the benefit of tribes be construed in their favor.[173]

Second, because Native subsistence use of resources is intimately ingrained in the welfare of the community, the preservation of these resources falls within the tribal government's inherent sovereign power. Given the unique history of Native land ownership in Alaska, it is imperative to remember that tribal sovereignty includes not only a territorial component, but also an independent obligation and authority to preserve the tribe's political integrity, economic security, health and welfare.

The age-old subsistence lifestyle of Native Alaskans touches on all three of these independent bases for asserting tribal sovereignty. Traditional Native Alaskan organized and regulated themselves on the basis of subsistence use values and practices, and continue to do so today. An event which upsets the continuity of subsistence lifestyle thus threatens not only the economic means employed by many Natives to provide for the sustenance of daily life, but also threatens to shake the very foundations of Native tribal society. Tribal health and welfare is also directly affected when subsistence resources are injured, because such injury impairs members subsistence way of life. Tribes acting to restore resources which are imperative to the welfare of their members' way of life thus act within the commonly recognized scope of their inherent

sovereignty. As the Alaska Supreme Court recently recognized, this authority is retained by tribes regardless of any derogation of territorial jurisdiction accomplished by ANCSA.[174]

This position couples an expansive interpretation of the natural resource damage provisions of CERCLA and OPA with a focused conception of Alaskan tribal sovereignty to resolve the apparent dilemma of who shall serve as natural resource trustee for publicly utilized but privately owned subsistence resources in Alaska. The dilemma arises out of the apparent conflict between the corporate privatization of Native lands heralded by ANCSA and the public trust underpinnings of natural resource damage actions. Resolving this conflict requires neither grand leaps of implausible statutory construction nor dramatic shifts in federal Indian or environmental policy. Rather, the most basic precepts of federal Indian policy and statutory construction provide the framework from within which such a resolution is constructed.

Nor does this resolution deviate from EPA's own rich tradition of encouraging Native responsibility for environmental management. EPA has already taken an expansive view of its notice and coordination obligations to Indian tribes in the lower 48 states; it is but a small step in the same direction to recognize the sovereign interest of Alaskan Natives in enjoying similar treatment. No statute, judicial interpretation, or executive policy prohibits EPA from aggressively working with Alaskan Native tribes as natural resource trustees. Moreover, such a position may be affirmatively required by EPA's trust obligations, its own policy of eliminating barriers to effective cooperation with tribes, and its duty to respect Native Alaskan tribes as sovereigns.

In short, there are ample legal and policy reasons for EPA and the courts to recognize Alaskan Native tribes as natural resource trustees.

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[1] This paper derives from an issue presented to me in the fall of 1999 while serving as a legal extern at the Office of Regional Counsel for EPA, Region 10 in Seattle, Washington. Many thanks to Rich McCallister, Assistant Regional Counsel at EPA, and Professor Michael Blumm, Northwestern School of Law of Lewis and Clark College, for their invaluable guidance and humor throughout my externship and the preparation of this paper.

[2] When the Exxon Valdez ran aground on March 24, 1989, eleven million gallons of oil spilled into the coastal waters of southeastern Alaska, severely damaging the coastal and marine resources of Prince William Sound. Darrin J. Quam, Right To Subsist: The Alaska Natives' Campaign to Recover Damages Caused by the Exxon Valdez Spill, 5 Geo. Int'l Envtl. L. Rev. 177, 177 (1992).

[3] Act of Aug. 18, 1990, Pub. L. 101-380, 104 Stat. 484, *codified in relevant part at* 33 U.S.C. §§ 2701-61 (1994 & Supp. I 1995).

[4] *Id*. at § 2702.

[5] 42 U.S.C. § 9607(f) (1994 & Supp. II 1996).

[6] *Id.* at § 9607(f)(2) (CERCLA); 33 U.S.C. § 2706(c) (OPA).

[7] 42 U.S.C. § 9607(f)(1) (CERCLA); 33 U.S.C. § 2607(a) (OPA).

[8] 42 U.S.C. § 9601(16) (defining "natural resources" under CERCLA); 33 U.S.C. § 2701(20) (same under OPA).

[9] 42 U.S.C. § 9607(f) (CERCLA); 33 U.S.C. § 2706(a)-(b) (OPA).

[10] 42 U.S.C. § 9601(16) (CERCLA); 33 U.S.C. § 2706(b)(3) (OPA).

[11] *Id*.

[12] *See Ohio v. Dept. of Interior*, 880 F.3d 432, 460 (D.C. Cir. 1989) (construing 42 U.S.C. § 9607(f) as excluding purely private property but potentially including "certain types of governmental . . . interests in privately-owned property").

[13] *See e.g. Reynolds Metal Co. v. Aetna Cas. & Sur. Co.*, 696 N.Y.S.2d 563 (N.Y. App. Div. 1999); *Native Village of Chenega Bay, et. al. v. Alaska*, No. A91-454 (D. Alaska, Sep. 24, 1991) (consent decree between intervening corporations and U.S.).

[14] "Indian Country" is a term of art in federal Indian law, which is generally identified under 18 U.S.C. § 1151 (1994). *See infra* note 108.

[15] CERCLA defines "Indian Tribe" as "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." 42 U.S.C. § 9601(36) (CERCLA) (emphasis added).

OPA's definition also excludes Alaska Native regional or village corporations, but adds the requirement that an Indian tribe be "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 tribe." 33 U.S.C. § 2701(15) (OPA). The first of these requirements should not preclude assertions of trustee status, since most Alaska Native tribes are recognized as eligible for federal services pursuant to the Federally Recognized Indian Tribe List Act. 44 U.S.C. § 479(a) (1994). *See* Environmental Protection Agency, Working Effectively With Tribal Governments: Resource Guide 17 (1998); Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 63 Fed. Reg. 71941 (Dec. 30, 1998) (listing federally recognized tribes including Alaska Natives entities).

The second requirement, that a tribe exercise governmental authority over lands belonging to or controlled by the tribe, creates a far more significant hurdle for assertions of trustee status over oil spills after the Supreme Court's determination that Alaskan Native tribes do not exercise jurisdiction over Indian Country. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1988); [hereinafter *Venetie*]. *See also infra* text accompanying note 16, *and infra* notes 106-114 and accompanying text.

[16] *See Venetie*, 522 U.S. at 532 (finding that after ANCSA, even land owned by an Alaskan tribal government did not constitute "Indian Country").

[17] 43 U.S.C. §§ 1601-28 (1994 & Supp. IV 1998).

[18] *See* 33 U.S.C. § 2701(15) (defining Indian tribe as "not including any Alaska Native regional or village corporation" for purposes of OPA); 42 U.S.C. § 9601(36) (same for purposes of CERCLA).

[19] 16 U.S.C. §§ 3101-3133 (1994).

[20] *See infra* Part IV.

[21] 42 U.S.C. § 9607(f)(2); 33 U.S.C. § 2706(c).

[22] Office of Emergency and Remedial Response, Environmental Protection Agency, Natural Resource Damages: A Primer, (last updated Feb. 16, 1999) http://www.epa.gov/superfund/programs/nrd/index.htm [hereinafter NRD Primer]. *See also* 43 C.F.R. Part 11 (1999) and 15 C.F.R. Part 990 (1999). The valuation of natural resource damages is a source of continuing controversy, comment, and litigation that is beyond the scope of this paper. *See, e.g.*, Terry Fox, Natural Resource Damages: The New Frontier of Environmental Litigation, 34 S. Tex. L. Rev. 521 (1993); SuellenKeiner, Implications of Proposed CERCLA Reforms for Recoveries of Natural Resource Damages, 28 Envtl. L. 10089 (1998); *Ohio v. United States Dep't of Interior*, 880 F.2d 432 (D.C. Cir 1989) (challenging regulations governing valuation of injury for minor releases); *Colorado v. United States Dep't of Interior*, 880 F.2d 481 (D.C. Cir 1989) (challenging valuation regulations for large or unusually damaging releases).

[23] 42 U.S.C. § 9607(a)(C); 33 U.S.C. § 2706(a).

[24] NRD Primer, *supra* note 22.

[25] 42 U.S.C. § 9607(f)(1); 33 U.S.C. § 2706(f). Under CERCLA, the sum recoverable is not limited to the cost of restoration, replacement, or acquisition of equivalent resources. 42 U.S.C. § 9607(f)(1).

[26] Under both CERCLA and OPA, EPA exercises this authority for contamination on land and inland waters. For releases and contamination involving the coastal zone, tidal waters, deep water ports and the Great Lakes, these duties are delegated to the U.S. Coast Guard. *See* NRD Primer, *supra* note 22. For the sake of expediency, this paper focuses on the role of EPA, although the duties of the Coast Guard with regard to Alaskan Native Tribes will not vary substantially from those attributable to the EPA.

[27] 42 U.S.C. § 9604(b)(2).

[28] These informational obligations are imposed by the National Contingency Plan at 40 C.F.R. Part 300 (1999).

[29] 40 C.F.R.§ 300.160(a)(3).

[30] 40 C.F.R.§ 300.615(d)(3).

[31] *Id.* at § 9604(b)(2). This obligation is triggered any time an actionable release is under investigation by EPA. *Id.* EPA's investigation authority in turn is triggered by either the release or the substantial threat of release into the environment of: (1) a hazardous substance; or (2) any pollutant or contaminant, which may present an imminent and substantial danger to public health or welfare. *Id.* at § 9604(a)(1)(A)-(B). Additionally, EPA's investigation authority is triggered when there is reason to believe that a release has occurred or is about to occur, or that human health problems or complaints may be attributable to a release of hazardous substance or pollutant. *Id.* at § 9604(b)(2).

[32] 33 U.S.C. § 2711.

[33] Timothy Fields, Office of Solid Waste and Emergency Response, Environmental Protection Agency, CERCLA Coordination with Natural Resource Trustees, OSWER Directive No. 9200.4-22A, at 4 (Jul. 31, 1997) (on file with author).

[34] Office of Emergency and Remedial Response, Environmental Protection Agency, Natural Resource Trustees, https://www.epa.gov/superfund/natural-resource-damages (last updated Feb. 16, 1999).

[35] Id.

[36] Office of Emergency and Remedial Response, Environmental Protection Agency, EPA's Notification and Coordination Activities https://www.epa.gov/superfund/natural-resource-damages (last updated Feb. 16, 1999). Natural resource damage claims must be commenced within three years of the date of discovery of the loss, or in the case of a federal facility, a site listed on the National Priorities List, or a site at which a remedial action is scheduled, within three years of the completion of remedial action. 42 U.S.C. § 9613(g)(1). EPA thus acknowledges that "trustees have a compelling interest in knowing the status of pre-remedial and remedial activities." Fields, *supra* note 33, at 6. EPA policy thus requires notification of trustees of construction completion dates in order to "ensure that trustees have adequate time to evaluate and present claims." *Id.*

[37] Natural Resource Trustees, *supra* note 34**.**

[38] Hazardous Site Evaluation Division, Environmental Protection Agency, The Role of Natural Resource Trustees in the Superfund Process, ECO Update, March 1992, at 7 [hereinafter ECO Update].

[39] *See* NRD Primer, *supra* note 22.

[40] *See* generally Fields, *supra* note 33; ECO Update, *supra* note 38 at 9 (recommending site managers follow a general rule of "when in doubt, notify" when it is unclear who should be notified as trustees for a given site. This

guidance document notes that "if the site is not relevant to a particular agency's trusteeship, the trustee representative will inform the site manager and no further notification will be needed").

[41] ECO Update, *supra* note 38 at 11.

[42] *Id.* at 10.

[43] *See* Bradley M Marten and Cestjon L. McFarland, Litigating CERCLA Natural Resource Damage Claims, [1991] Env't Rep. (BNA) 670, 670-71 (Jul. 19, 1992).

[44] Fox, *supra* note 22 at 523 (citing numerous academic articles drawing comparisons between common law trust doctrine and natural resource liability under CERCA); Thomas L. Eggert and Kathleen A. Chorostecki, Rusty Trustees and the Lost Pots of Gold: Natural Resource Damage Trustee Coordination Under the Oil Pollution Act, 45 Baylor L. Rev. 291, 298 (comparing natural resource damage provisions in CERCLA and OPA and concluding that both may incorporate the general principles of the public trust doctrine).

[45] Fox, *supra* note 22 at 524.

[46] S. Rep. No. 848, 96th Cong., 2d Sess. 84 (1980).

[47] *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 460 (D.C. Cir. 1989).

[48] 56 Fed. Reg. 19752, 19761 (April 29, 1991).

[49] *See* NRD Primer, *supra* note 22.

[50] 40 C.F.R. Part 300.

[51] 42 U.S.C. § 9607(f)(2)(A) *and* Ex. Ord. No. 12580, Jan. 23, 1987, 52 Fed. Reg. 2923.

[52] *ECO Update*, *supra* note 38, at 2. *See* 42 U.S.C. § 9607(f)(2)(A) *and* 33 U.S.C. § 2706(b)(2).

[53] 42 U.S.C. § 9607(f)(2)(B).

[54] 33 U.S.C. § 2702(a) and (b)(2)(A).

[55] 33 U.S.C. § 2706(a)(3).

[56] 33 U.S.C. § 2706(b)(4) (designation by governing body of tribe of tribal official "who may act on behalf of the tribe or its members as trustee for natural resources"); *Id.* at § 2706(c)(3) (Tribal trustee "shall assess natural resource damages . . . for the natural resources under their trusteeship . . . and shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under their trusteeship.").

[57] 42 U.S.C. § 9607(f)(1)

[58] 53 Fed. Reg. 51394, 51460 (Dec. 21, 1988).

[59] *See* 40 C.F.R. § 300.5 (1999).

[60] *See* 40 C.F.R. § 300.610 (1999).

[61] 40 C.F.R. § 300.615 (1999) (outlining authority and responsibilities of trustees without distinction between state, federal or tribal authority).

[62] *See* Eggert, et. al, *supra* note 44, at 298-99; Marten, et. al, *supra* note 43, at 672.

[63] 42 U.S.C. § 9601(16) (CERCLA); 33 U.S.C. § 2701(20).

[64] 880 F.2d 432 (D.C. Cir 1989).

[65] *Id*. at 460.

[66] *Id*.

[67] *Id.* at 461.

[68] 56 Fed. Reg. 19752, 19761 (Apr. 29, 1991).

[69] *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 532 (1998) (finding that after ANCSA, land owned by an Alaskan tribal government did not constitute "Indian Country," thus the tribe could not exercise jurisdiction to assess taxes.)

[70] 43 U.S.C. §§ 1601-28 (1994 & Supp. IV 1998). I will refer in this paper to lands held in fee by Native Regional and Village Corporations as "ANCSA lands."

[71] *See* 33 U.S.C. § 2701(15) (defining Indian tribe as "not including any Alaska Native regional or village corporation" for purposes of OPA); 42 U.S.C. § 9601(36) (same for purposes of CERCLA).

[72] *Montana v. United States*, 450 U.S. 544, 556 (1981); *see also* Eggert, et. al, *supra* note 44 at 300-301 (outlining foundation and scope of Native American trusteeship under OPA and CERCLA as grounded in tribal inherent sovereignty. Under this analysis, "tribal trustee interests seem to attach to natural resources on tribal land, and may extend to natural resources on [non-tribal land] if those natural resources are necessary for tribal health, welfare or economic security.").

[73] Anne Shinkwin, Traditional Alaska Native Societies, in David S. Case, Alaska Natives and American Laws 333 at 334, 339, 344, 349, 354 (1984).

[74] See e.g. Native Village of Stevens v. Alaska Management and Planning, [hereinafter Stevens Village] 757 P.2d 32, 34-36 (Alaska 1988) (citing Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977) and Metlakatla v. Egan, 362 P.2d 901 (Alaska 1961), rev'd in part, 369 U.S. 45 (1962)).

[75] Bureau of Indian Affairs, Department of Interior, Indian Entities Recognized and Eligible to Receive Services form the United States Bureau of Indian Affairs, [hereinafter 1993 List] 58 Fed. Reg. 54364, 54365-66 (1993).

[76] *See* Eric Smith and Mary Kancewick, The Tribal Status of Alaska Natives, 61 U. Colo. L. Rev. 455 (1990); Bureau of Indian Affairs, Department of Interior, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 63 Fed. Reg. 71941 (Dec. 30, 1998) (listing federally recognized tribes including Alaska Natives tribes); *John v. Baker*, 982 P.2d 738, 749-50 (Alaska 1999) (deferring to the U.S. Department of the Interior's determination that Alaskan Native tribes recognized by the federal government are sovereign entities who "possess governmental authority and autonomy"); *Native Village of Noatak v. Hoffman* (finding that Alaska Native villages organized under the Indian Reorganization Act or listed in ANCSA have tribal status as a matter of law) *rev'd on other grounds sub. nom. Blatchford v. Native Village of Noatak*, 501 U.S. 776 (1991).

[77] *Stevens Village*, 757 P.2d at 40 (citing legislative history of the Indian Reorganization Act at H.R. Rep. No. 2244, 74th Cong., 2nd Sess. 1-2 (1936).

[78] *Id.* at 35.

[79] Smith, et. al, *supra* note 76 at 483.

[80] *Id.* at 483, citing *Montoya v. United States*, 180 U.S. 261 (1901) ("By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."). Smith, et. al, contrast this concept of a historic tribes with the related label of legal tribe. The former refers to the ethnologic, historical, or ordinary use of the word, while the later refers to the status of the tribe under federal law.

Smith, et. al, warn of making too much of this distinction, however, noting that while "there have been historical tribes that have lost their legal status through termination, and there are tribes with legal status what were never historical tribes . . . [the distinction] can also be misleading, for it can obscure the fact that a historical tribe is a legal tribe unless its legal status is terminated by Congress or it voluntarily relinquishes its tribal status." Smith, et. al, *supra* note 74 at 473.

[81] Smith, et. al, *supra* note 76 at 484.

[82] *Id.* at 490.

[83] *Id.* at 491, *quoting Shinkwin*, *supra* 73 at 333.

[84] *Id.* at 495-96.

[85] *Id.*, *citing* Federal Field Committee for Development Planning in Alaska, Alaska Natives and the Land 138 (G.P.O. 1968).

[86] Smith, et. al, *supra* note 74 at 496.

[87] *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

[88] *See* Treaty of Cession of Alaska, March 30, 1867, United States--U.S.S.R., 15 Stat. 539, 11 T.S. No. 1216. Article III provides:

> [T]he inhabitants of the ceded territory . . . may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

15 Stat. 539, 11 T.S. 1218.

[89] 1993 List, *supra* note 75 at 54,366. The Federally Recognized Tribe List Act requires the Department of the Interior to publish such a list annually. 25 U.S.C. § 479a-1 (1994). The findings section of this Act explained the import of inclusion on the list of federally recognized tribes:

> . . . the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs; ancillary to that authority, the United States has a trust responsibility to

> recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes.

Section 103(1)-(2), Pub. L. 103-454, Nov. 2, 1994. Inclusion on the BIA list means that the tribe has been recognized by congressional, federal administrative, or federal judicial action. *Id.* at section (3); *see* Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 25 C.F.R. Part 83 (1999); for a relevant example of congressional recognition see Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994) (recognizing the Central Council of Tlingit and Haida Indian Tribes of Alaska as federally recognized tribes).

[90] 58 Fed. Reg. 54,365.

[91] *Id.* at 54,366.

[92] *Montana v. United States*, 450