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Comanagement: Merging the ESA with Political Pressure to Create a Viable Alternative to ESA Listing

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COMANAGEMENT: MERGING THE ESA WITH POLITICAL PRESSURE TO CREATE A VIABLE ALTERNATIVE TO ESA LISTING

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I. INTRODUCTION

Over seventy species of whale and dolphin exist.[1] Whale populations have faced many forms of exploitation over the centuries, including commercial whaling.[2] As humans progressed technologically, and adopted more efficient hunting techniques, the chances of a hunted whale escaping decreased and populations started rapidly diminishing.[3] Although the International Whaling Commission (IWC) was formed in 1949, its authority was largely ignored.[4] Whaling may have reached its peak in 1961, when over 66,000 whales were killed in that year alone.[5] The first decrease in whaling was due to the inability of hunters to locate any prey.[6] Eventually, regulations such as the Marine Mammal Protection Act (MMPA)[7] and the Endangered Species Act (ESA)[8] were implemented, providing a starting point for the conservation and recovery of many species of whales.[9]

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1. The World Wide Fund for Nature, *The Whale in History and Culture*, *at* http://www.panda.org/resources/publications/water/w_whales/page3.htm (last visited July 21, 2001).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421 (2000).

8. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000).

9. *Id.*

Beluga whales were traditionally harvested for their blubber, or *muktuk.*[10] *Muktuk* is a staple of the Alaskan native diet, and the hunting of beluga whales is a cultural tradition dating back hundreds of years.[11] Along with being the focus of much predation, beluga whales concurrently faced habitat destruction, pollution, and decreased food availability.[12] One particular population, the Cook Inlet stock of beluga whales, were over-hunted and headed toward extinction.[13] In the mid-1990s, it was discovered that natives in the Cook Inlet area were taking advantage of a certain provision of the MMPA.[14] The provision was created to allow exchange of beluga *muktuk* within a village, but created a loophole "allowing" the sale of *muktuk* commercially.[15] This resulted in a loss of 340 whales between 1994 and 1998.[16]

This article considers the plight of Cook Inlet beluga whales, and how development and use of comanagement techniques can operate to manage and preserve endangered species. Through the cooperation of managing administrative agencies, the listing process under the ESA is no longer necessary to preserve the beluga whale due to the viability of comanagement as an alternative.

Part II of this article covers the scientific background of the primary example used, beluga whales. It also provides some insight into the political controversy in the Cook Inlet area.[17] Part III focuses on the ESA listing process. Its operation is detailed, along with problems associated with listing. Next, the role of political pressure in the ultimate decision is considered, followed by a comparison with the

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10. Nancy Lord, *Two Worlds, One Whale: The Belugas of Alaska's Cook Inlet are the Victims of a Cultural Divide Between Science and Tradition*, SIERRA MAGAZINE (Sierra Club July/August 2000), *available at* http://www.sierraclub.org/sierra/200007/belugawhale.asp [hereinafter Lord, *Two Worlds*].
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Lord, *Two Worlds*, *supra* note 10.
17. *See* discussion *infra* Part II.A-B.

similar MMPA listing process.[18] Part IV discusses comanagement, and more specifically, its development, goals, and a specific example for application.[19]

II. BACKGROUND

A. Scientific Background

Cook Inlet is an area in Alaska that was faced with a dramatic decrease of one of their most important resources, the beluga whale.[19] The beluga whale, or Delphinapterus Leucas, is a small white whale found in the Arctic.[20] It is a member of the group Odonticeti, or toothed whale.[21] Male belugas range in length from twelve to fifteen feet, while females average ten to twelve feet.[22] The average weights of these whales are 1,300 to 2,300 pounds and 900 to 1,400 pounds, respectively.[23] The total world population of belugas is believed to be between 60,000 and 100,000.[24]

Instead of the common dorsal fin, belugas have a dorsal ridge that is used to break through thin sea ice in order for them to breathe.[25] Mating occurs in spring or early summer.[26] Calves are then born after a twelve to fourteen-month gestation period.[27] Calves are a dark gray-brown color when born, turning completely white only after adolescence.[28] The average lifespan of a beluga is twenty-five

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18. *See* discussion *infra* Part III.A-D.

19. *See* discussion *infra* Part IV.A-C.

20. Designation of the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA) and Response to Petitions, 64 Fed. Reg. 56298-01 (1999) (to be codified at 50 C.F.R. pt. 216) (proposed Oct. 19, 1999) [hereinafter Proposed Depleted Designation].

21. *Id.*

22. TONY MARTIN, BELUGA WHALES 12 (1996).

23. *Id.*

24. STEFANI PAINE, THE WORLD OF THE ARCTIC WHALES: BELUGS, BOWHEADS, AND NARWHALS 19 (Nancy Flight, ed., 1995).

25. MARTIN, *supra* note 22, at 15.

26. PAINE, *supra* note 24, at 23.

27. MARTIN, *supra* note 22, at 27.

28. *Id.* at 12.

years, with a few whales living to be forty.[29]

The total beluga whale population of around 100,000 animals is made up of twenty-nine separate stocks.[30] Alaska's coast holds five separate and distinct beluga whale stocks, the Cook Inlet population ranking as the smallest.[31] This stock is also the most genetically distinct of the five stocks, partially due to the barrier the Alaskan Peninsula imposes.[32] This effectively keeps the Cook Inlet stock from intermingling with any other population. [33]

The suspected decline in Cook Inlet beluga whales was confirmed when results from the National Marine Fisheries Service's (NMFS) annual survey were released.[34] The survey, comprised of aerial surveys, abundance estimates, and traditional observations, revealed significant results.[35] The 1998 stock (347 animals) was half of the 1994 total (653 animals).[36] Results from surveys taken prior to 1994 are not available, but local hunters set the estimate at over 1,000 animals in the 1980s.[37]

Numbers for those animals taken through subsistence hunting are, for the most part, unreported.[38] However, the NMFS, with help from several hunter groups and individual hunters, estimates a mean level of eighty-seven whales taken annually.[39]

B. Political Controversy in the Cook Inlet Area

Alaskan Natives naturally have a concern for their cultural traditions,[40] and the hunting of beluga whales plays a

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29. *Id.* at 30.
30. *See* Lord, *Two Worlds*, *supra* note 10, at 1.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* Proposed Depleted Designation, *supra* note 20, at 56303.
35. *Id.*
36. *Id.* at 56298.
37. *Id.*
38. *Id.*
39. *Id.*
40. *See* PAINE, *supra* note 24, at 101.

large part in that culture.[41] Hunting and use of the whale products are practices they feel are necessary to their cultural identity.[42] Restrictions must be put in place, however, to regulate both the number of whales taken and the purposes for which they are used.[43]

On the other hand, environmental groups are concerned with the impending extinction of some of the world's most beautiful animals.[44] Subsistence takes are the largest cause of low numbers and environmental groups feel that it is their responsibility to intercede.[45] They represent whale enthusiasts and those who want to watch, research, and enjoy these animals in their natural environment.[46]

III. ESA LISTING PROCESS

The ESA historically served as the main protection for declining species. With time, the level of protection offered proved to be less effective than that required by diminishing species.[47]

A. Operation

The ESA is an act designed to protect valuable species and conserve the habitat necessary for their survival.[48] The listing process is the first step in designating a species as "threatened" or "endangered."[49] Marine species are listed by the NMFS headed by the Secretary of Commerce (Secre-

41. *See id.*
42. *Id.*
43. *See id.* at 98.
44. *See id.* at 101.
45. *See id.*
46. *See id.*
47. Matthew J. Rizzo, *The Endangered Species Act and Federal Agency Inaction*, 13 ST. LOUIS U. PUB. L. REV. 855, 856 (1994). Other comprehensive discussions regarding the ESA are available. *See generally* Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 279 (1993); James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499 (1991).
48. *See* Rizzo, *supra* note 47, at 885.
49. 16 U.S.C. § 1533 (a)-(c) (2000).

tary).[50]

The three listing categories designated by NMFS are "threatened," "endangered," or "similar to a listed species without actually being listed."[51] The Secretary determines that a species is endangered when it is "in danger of extinction throughout all or a significant part of its range."[52] A threatened species is one likely to become endangered in the foreseeable future.[53] A species with sufficient similarity to an endangered or threatened species may be treated as such, although it is not officially listed.[54] The protection of these animals, however, is not as complete as that in the prior categories.[55]

Either the agency or a private party may initiate the listing of a species.[56] Private party petitions call for a ninety-day period in which the agency determines the presence or absence of "substantial information" to support the listing.[57] With a favorable determination, the agency then has one year to determine a finding of one of the following: (1) the petition is not warranted, (2) the petition is warranted, or (3) the petition is warranted, but presently precluded by higher-priority listing proposals.[58] The decision is then published in the Federal Register.[59] An emergency listing procedure is also available, allowing the Secretary to immediately list a species when a significant risk to its well-being exists.[60]

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50. *Id.* § 1533(a).

51. *Id.* § 1533 (a)-(c).

52. *See id.* §§ 1532(6), 1533(a).

53. *See id.* §§ 1532(20), 1533(a).

54. *See id.*

55. *Id.* § 1533(e). Takes of these similar species are allowed through proper permitting. 50 C.F.R. § 17.52 (2000).

56. 16 U.S.C. § 1533(a)-(b) (2000).

57. *See id.* § 1533(b)(3).

58. *Id.* § 1533(b)(3)(B). In the case of a determination of "not warranted," the process will end. *Id.* at §1533 (b)(3)(B)(i). In the case of a "warranted" finding, the proposed rule is promptly published. *Id.* § 1533 (b)(3)(B)(ii). After the proposed rule is published and public comments considered, the agency is required to promulgate a rule, request a one-time six month extension, or publish a notice of withdrawal within one year. *Id.* § 1533(b)(6).

59. *Id.* § 1533(b)(6)(A).

60. *Id.* § 1533 (b)(7). A thorough explanation of the emergency action is

Once the agency finds an action is warranted, the agency must only consider five statutory criteria in making its status decision: (1) the present or threatened destruction, modification, or curtailment of its range or habitat; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or man-made factors affecting its continued existence.[61] The Secretary is forbidden from considering economic impacts while making this decision.[62]

After a species is designated as "threatened" or "endangered," enforcement is implemented to ensure the species recovery. Enforcement mechanisms include designating critical habitat, developing and instituting recovery plans, prohibiting takes, and ensuring the compliance of federal agencies.[63]

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required in the Federal Register. 50 C.F.R. § 424.20 (2000). In the case of domestic animals, the Secretary must put the state authorities affected by the action on notice. *Id.*

61. 16 U.S.C. § 1533(a)(1) (2000).

62. *Id.* § 1533(b).

63. *Id.* § 1533. These areas are dealt with much more thoroughly in section 4 and section 9 of the ESA. *Id.* § 1532(5)(A)(i). Critical habitat must encompass food, shelter and breeding, or those things necessary to the species' survival. In designating critical habitat, the Secretary must weigh the "best scientific data available" against factors such as economic impacts. *Id.* §1533(b)(1)(A). The final designation of critical habitat accompanies the final rule listing the species. *Id.* § 1533(b)(2)-(8). Recovery plans are instituted by the Secretary to promote conservation and survival of listed species. *Id.* § 1533(f)(1). Recovery plans have a priority system, in which those species that are likely to benefit the most are implemented first. *Id.* § 1533(f)(1)(A), (h)(4). Endangered species are covered by the takings prohibition. Threatened species are included if the Secretary finds it necessary to that species' conservation. *Id.* § 1533(d). "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." *Id.* § 1532(19). Compliance is required by federal agencies to ensure that their actions will not harm listed species. *Id.* § 1536 (a)(2). This process begins by asking the Secretary as to the presence or absence of any listed species in the area. *Id.* § 1536(a)(3). If there are listed species present, a biological assessment must be prepared, outlining the impact the agency action would have. *Id.* § 1536(c)(1). If the species is likely to be affected, a formal consultation with the Secretary is required. *Id.* §1536(a)(3). A biological opinion is then issued by the Secretary, including alternatives if the project would have an unacceptable impact. *Id.* §1536(b)(3)(A). It is important to note that the agency has ultimate responsibility regarding these matters. *Id.* § 1536.

B. Problems with the ESA Listing Process

One of the major problems with the implementation of the ESA is the delay associated with listing.[64] It seems that procedural delays are built into the act.[65] The "warranted but precluded" by other pending listing actions provision creates an effective purgatory for those species that do not meet the threshold danger level.[66] Because of limited resources, a disservice is being done to those animals that fall behind in the waiting line.[67] This is evidenced by the average of a two to three year period between filing the petition and listing.[68] The Fish and Wildlife Service (FWS) estimate that three-dozen species succumbed to extinction while waiting to be listed.[69]

Although many problems surround the ESA listing process, one of the most important is the lack of funding.[70] Lack of sufficient funding not only causes a lack of enforcement, but a lack of sufficient implementation as well.[71] Therefore, when the average cost to list a species is $60,000, a congressional allotment of thirty to forty million dollars is simply insufficient.[72]

The ESA is triggered only when a species is on the brink of extinction.[73] Only then, when the species is dangerously close, does the ESA intervene.[74] Instead of acting as a preventative tool and implementing species' growth and conservation, it is an effective last resort, used to keep a remaining few alive.[75]

The structure of the ESA encourages landowners who

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64. John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 532 (1994).

65. *Id.* at 533.

66. *Id.*

67. 16 U.S.C. § 1533(b)(3)(C)(i).

68. Kunich, *supra* note 64, at 534.

69. *Id.*

70. Rudy Abramson, *Wildlife Act: Shield or Sword*, L.A. TIMES, Dec. 14, 1990, at A1.

71. *Id.*

72. *Id.*

73. Kunich, *supra* note 64, at 550.

74. *Id.*

75. *Id.* at 551-52.

find a threatened or endangered species on their land to get rid of it.[76] Instead of creating an incentive to protect these species through monetary or other means, the ESA makes it more amenable to destroy or suppress the species' presence.[77] Through completely restricting landowners' property with no compensation in return, the ESA is reinforcing the problem it was created to resolve.[78]

Limited time, money, and manpower are all factors in the problem of delay.[79] The ESA's purpose suffers at the hands of bureaucracy, and the delays could "mean extinction for species awaiting protection."[80]

The ESA has an uncanny ability to polarize involved parties.[81] Activists, as well as the media, incorrectly and much too simplistically describe listing issues as "jobs versus owls."[82] This quickly divides parties and causes a "breakdown of cooperation and communication."[83] With no positive incentives offered to those negatively affected by the listing process, the ESA suffers from a lack of respect and confidence.[84]

C. *Political Pressure and the Ultimate Decision*

Interest groups make their opinions known in the listing process through participating in a system set up by Congress for the Administrative Procedures Act (APA) and the ESA.[85] Through this process, individuals make their concerns known by submitting listing petitions to the FWS.[86]

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76. Mike Vivoli, *Shoot, Shovel & Shut Up*, WASH. TIMES, Nov. 27, 1992, at F1.

77. *Id.*

78. Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 419 (1994).

79. Kunich, *supra* note 64, at 566.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Amy Whritenour Ando, *Waiting to be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J. L. & ECON. 29, 37 (1999).

86. *Id.* at 38.

These petitions must "provid[e] substantive information supporting the case for listing a species and carrying the implicit threat of a lawsuit should the Service [FWS] act too slowly on the case."[87] Interest groups or interested individuals are encouraged to participate in the public comment period, the effect of which strengthens or weakens the agency's decision to list.[88] Another available mechanism is the request for hearings during the proposal period,[89] which have the effect of creating uncertainty in the listing decision by bringing different facts and viewpoints directly to the attention of the agency.[90]

Theoretically, United States residents can ask their legislator to intervene with an agency on their behalf. Legislators do have an incentive to be responsive to their constituents, however, constituents are typically split equally between pro-environment and anti-restriction concerns.[91] Thus, the decision to intervene is completely at the legislator's discretion.[92] Even when a legislator does intervene, the level of influence that the legislator is able to exert requires consideration by the constituent. If the legislator is a member of a highly influential subcommittee, a constituent's request may be much better served.[93]

Thus, mechanisms designed to create a forum for individuals' voices can be ineffective. In fact, it is possible that an individual's concern will not be truly noted or considered at all. [94] It can be argued, however, that this was the intention of the ESA when it was enacted.[95] The ESA was specifically designed to effectively eliminate political pressure from the process, leaving only the non-partisan

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87. *Id.*

88. *Id. See also* Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 374 (1983).

89. *Id.*

90. *Id.*

91. *Id.*

92. John Jackson & John Kingdon, *Ideology, Interest Group Scores, and Legislative Votes*, 36 AM. J. POL. SCI. 805, 811 (1992).

93. *Id.*

94. Ivan J. Lieben, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 ENVTL. L. 1323, 1327-29 (1997).

95. *Id.*

mechanisms listed above as recourse.[96] Feeling frustrated that their voices are not heard, however, interest groups and individuals have begun to turn to mechanisms not prescribed by Congress, such as political pressure.[97]

A species is required to be listed based on an analysis of the best available scientific data, with the assurance that political pressure and economics are not considered in the listing decision.[98] In reality, however, politics do play a part in the listing process.[99] For example, in the recent cases concerning the bull trout[100] and the Canadian lynx,[101] judges ruled that failure to list these species was contrary to federal law.[102] The reason the FWS did not list the bull trout, rested on political controversy.[103] The timber industry complained that, if listed, the bull trout would bring 100 million additional acres of federal and private land under federal control.[104] This governmental face-off against the industries that rely on timber, grazing, and power generation by dams makes the FWS decision not to list seem less based on the FWS's needs and more on political pressure.[105] The Canadian lynx faces a similar situation in that its existence depends on old-growth forest habitat, which rapidly raises an adversary in the timber industry that works against the lynx's ultimate survival.[106] Tools used by these anti-listing factions to pressure the FWS not to list included political lobbying, lawsuits, and hiring their own biologists to contradict the findings of FWS biologists.[107]

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96. *Id.*

97. *Id.* at 1327.

98. 16 U.S.C. § 1533(b)(1)(A) (2000).

99. Lieben, *supra* note 94, at 1327.

100. *See* Friends of the Wild Swan, Inc. v. United States Fish and Wildlife Serv., 945 F. Supp. 1388 (D. Or. 1996).

101. *See* Defenders of Wildlife v. Babbitt, 958 F. Supp. 670 (D.D.C. 1997).

102. *See id. See also, Friends of the Wild Swan*, 945 F. Supp. at 1388.

103. *See Friends of the Wild Swan*, 945 F. Supp. at 1388.

104. Jonathon Brinckman, *Federal Judge Orders New Look at Bull Trout*, OREGONIAN, Nov. 14, 1996, at D1.

105. *Id.*

106. *See Defenders of Wildlife*, 958 F. Supp. at 675.

107. *See* Lieben, *supra* note 94, at 1345.

Before a species can be listed, it must receive a "favorable determination" from the FWS.[108] The FWS is given a high level of discretion for this decision under the 1983 Endangered and Threatened Species Listing and Recovery Priority Guidelines, due to the lack of well-defined criteria needed to establish an easily recognized "magnitude and immediacy of the threat of extinction" to that species.[109] Because of the broad discretion granted to the FWS, there is room for the political process to affect these decision makers, as evidenced by[110] the effects of political pressure in the case of the bull trout, discussed above.[111] After consideration, the bull trout was given a priority ranking of nine.[112] That ranking precluded it from being listed, as other, higher priority rankings, were being given attention at that time.[113] Friends of the Wild Swan, Inc. and the Alliance for the Wild Rockies, Inc. then sued FWS, challenging its decision not to list as arbitrary and capricious.[114] The district court judge ruled that the FWS decision was indeed arbitrary and capricious when examined using the APA's[115] standard of review.[116] The Service, according to the court:

> . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for [the Service's] decision that runs counter to the evidence before the agency, or is so implausible that it could

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108. 16 U.S.C. § 1533 (a)(2)(C) (2000).

109. *Endangered and Threatened Species Listing and Recovery Priority Guidelines*, 48 Fed. Reg. 43,098 (Sept. 21, 1983).

110. Lieben, *supra* note 94, at 1347.

111. Memorandum from the Regional Director, USFWS Region 1, to Director, USFWS, *Warranted But Precluded Administrative 12-Month Finding on a Petition to List the Bull Trout Under the Endangered Species Act* (June 8, 1994) (on file with the Lewis & Clark College Law Library) [hereinafter *1994 Bull Trout Finding*].

112. *Id.*

113. *Id.* at 25. The priority rankings listed were between one and six.

114. *Friends of the Wild Swan*, 945 F. Supp. at 1392-93.

115. 5 U.S.C. § 706(2)(A) (2000).

116. *Id.*

> not be ascribed to a difference in view or the product of agency expertise.[117]

The court's holding was based on the Agency's record, which showed a high degree of threat to the bull trout that belied the low-priority ranking it was given.[118] This decision should persuade the FWS to consider more carefully its future determinations of priority rank.

D. The Parallel MMPA "Depleted" Listing Process

An alternative to an ESA listing is a "depleted" listing under the MMPA,[119] which constitutes a lower standard of classification, but a similar lower level of protection.[120] An animal qualifies for a "depleted" classification under section 3 of the MMPA if:

> (a) [T]he Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals, determines that a species or population stock is below its optimum sustainable population [hereinafter (OSP)]; or
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> (b) [A] State, to which authority for the conservation and management of a species or population stock is transferred . . . , determines that such species or stock is below its [OSP]; or
>
> (c) [A] species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973.[121]

In the MMPA, OSP is defined: "[W]ith respect to any population stock, as the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of

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117. Lieben, *supra* note 94, at 1348 (citing O'Keefe's Inc. v. United States Consumer Prot. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996).

118. *Id.*

119. Proposed Depleted Designation, *supra* note 20, at 56299.

120. *Id.*

121. 16 U.S.C. § 1362(1)(a)-(c) (2000).

the habitat and the health of the ecosystem of which they form a constituent element."[122]

Through the use of such tools as aerial surveys and abundance estimates, it was determined that the Cook Inlet stock of beluga whales was well below their OSP.[123] Therefore, the NMFS was required to list the stock as "depleted."[124]

The purpose of a "depleted" listing is to reverse the decline, and promote recovery of the stock of beluga whales.[125] The most important function of a "depleted" listing is the restriction of subsistence harvests of depleted populations.[126] This becomes important to comanagement agreements in that enforcement is necessary to create a proper balance for the agreement.[127]

IV. COMANAGEMENT

A. Problems with the ESA and Political Pressure Combine to Create a Viable Alternative to Listing

Section 119 of the MMPA provides for the option of comanagement agreements.[128] The purpose of these agreements is to bring native knowledge, practices, and management systems into fish and wildlife management,

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122. *Id.* § 1362(9) (2000). NMFS defines OSP as: a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem (K) to the population level that results in maximum net productivity (MNPL). Maximum net productivity is the greatest net annual increment in the population numbers or biomass resulting from additions to the population due to reproduction and/or losses due to natural mortality. 50 C.F.R. § 216.3 (2000).

123. Designation of the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA), 65 Fed. Reg. 34590-97, 345961 (2000) (to be codified at 50 C.F.R. pt. 216)[hereinafter Depleted Designation]. 50 C.F.R. § 216.3 (2000).

124. *Id.*

125. 16 U.S.C. § 1361 (2000).

126. *Id.*

127. Depleted Designation, *supra* note 123, at 34590.

128. 16 U.S.C. § 1388 (2000).

resulting in the sharing of responsibility by indigenous peoples and the federal government regarding management functions.[129] These management functions usually include research, regulation, allocation, and enforcement.[130]

The MMPA states that the federal government may not regulate the taking of marine mammals unless there is a finding that the stock is depleted.[131] Therefore, the "depleted" finding is necessary to a comanagement agreement, as it allows the federal government to work with indigenous peoples in restricting and enforcing native takes.[132]

Particularly in the harvest of marine mammals, Alaskan Natives have played an active part in comanagement duties.[133] This can be done through action by tribes or through commissions particular to species.[134] An example of such a commission is the Alaska Eskimo Whaling Commission (AEWC),[135] which entered into an agreement with the National Oceanic and Atmospheric Administration (NOAA) to regulate and enforce whaling by their people, with NOAA serving a mere backup function.[136]

B. Goals of Comanagement

Both commissions and individual tribes can approach the federal government about their involvement in comanagement.[137] Some of the commissions include the AEWC, the Cook Inlet Marine Mammal Council, the Eskimo Walrus Commission, and the Alaska Beluga Whale Committee.[138] Because multiple parties approach the federal government, particular attention is necessary to ensure that

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129. Eric Smith, *Some Thoughts on Comanagement*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (1997).
130. *Id.* at 2.
131. 16 U.S.C. § 1371(b) (2000).
132. *Id.*
133. Smith, *supra* note 129, at 1.
134. *Id.* at 2.
135. *Id.*
136. *Id.*
137. *Id.* at 6.
138. *Id.*

those interested in comanagement do not overlap.[139] A limited amount of funding in section 119 of the MMPA requires the utmost level of cooperation and coordination between the commissions and tribes.[140]

The main structure of a comanagement agreement usually addresses management functions, dispute resolution, and funding.[141] Management functions include research, regulation, allocation, and enforcement.[142] A balance must be struck by the native organizations and the government as to who and to what extent each body is responsible for each function.[143] Dispute resolution is needed when the native organizations and the government disagree on components of the agreement, such as the meaning of "health of a wildlife population."[144]

Funding played a large role in the success of comanagement agreements.[145] Funding comes in a variety of forms. It may be built into the comanagement agreement, as prescribed in section 119 of the MMPA.[146] Funding may also be obtained through contracting with a federal agency, or receiving independent funding.[147] The latter worked especially well, playing a part in AEWC's success.[148] Limited funding requires a native community to work together to eliminate competition between the native tribes and organizations and to allocate funding.[149]

The AEWC is responsible for all four forms of management, which include conducting research, developing regulations and whale quotas for each community, allocation of funds and responsibilities, and enforcing those regula-

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139. *Id.*
140. 16 U.S.C. § 1388 (2000).
141. Smith, *supra* note 129, at 5.
142. *Id.* at 1.
143. *Id.*
144. *Id.* at 9.
145. *Id.* at 6.
146. *Id.*
147. *Id.*
148. David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice?,"* 60 U. COLO. L. REV. 1009, 1030-31 (1989).
149. Smith, *supra* note 129, at 9.

tions.[150] Although the AEWC has responsibility for all of these functions, they collaborate with other whale biologists doing research, and participate in the process rather than unilaterally deciding the quotas to be set.[151]

The roles that indigenous people and government play can differ tremendously. Alaskan Natives can have complete enforcement control, by prefacing their management with a requirement that the government stay only minimally involved.[152] On the other hand, the government can take a strong role in enforcement, giving tribal authorities and commissions very little control, ultimately combining to achieve a suitable balance.[153]

C. *Success Through Comanagement: the Cook Inlet Beluga Whales*

The development of comanagement is exemplified well by the preservation of the Cook Inlet beluga whales. NMFS received two petitions to list the Cook Inlet stock of beluga whales as endangered under the ESA in March of 1999.[154] The NMFS declined to list the species as threatened or endangered based on the following findings: (1) Congress passed legislation that stopped the harvest of Cook Inlet beluga whales until October 1, 2000.[155] Subsistence was seen as the major factor in the species' decline, and was therefore halted, allowing no takes in 1999.[156] (2) The Cook Inlet beluga whales were listed as depleted under the MMPA, which imposed harvest restrictions on the stock.[157] (3) Preliminary data suggested that controlling the harvest

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150. *Id.* at 3.

151. Milton Freeman, *The Alaska Eskimo Whaling Commission: Successful Comanagement in Extreme Conditions*, *in* CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES (Evelyn Pinkerton ed., 1989).

152. Smith, *supra* note 129, at 3.

153. *Id.*

154. Regulations Governing the Taking and Importing Marine Mammals; Endangered and Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 65 Fed. Reg. 38778 (June 22, 2000) (to be codified at 50 C.F.R. pt. 216, 223, and 224).

155. *Id.* at 38779.

156. *Id.* at 38778-79.

157. *Id.* at 38779.

would result in an effective recovery.[158] (4) Any recovery plans must be preceded by an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA).[159]

Currently, NMFS is in the process of preparing an EIS.[160] NMFS, in apparent reliance on actions under the MMPA, mentions that the decision not to list the Cook Inlet beluga whales relies on one of the aforementioned mechanisms being in place by the expiration of the temporary legislation, or by October 1, 2000.[161]

Although listing was denied, comanagement was an alternative that NMFS was willing to explore.[162] The federal government had power to limit subsistence harvests because the belugas were "depleted."[163] Through a combination of this power and the interest expressed by Alaskan Natives, the Cook Inlet Marine Mammal Council (CIMMC) and NMFS created a comanagement agreement allowing for the take of one beluga whale in 2000.[164]

NMFS has proposed a long-term mechanism for promoting the recovery of this stock.[165] NMFS will regulate the harvest by imposing regulations such as: (1) Subsistence hunting may only occur pursuant to an agreement between NMFS and affected Alaska Native Organizations (ANOs).[166] (2) The harvest is limited to two strikes annually until the stock has recovered from its "depleted" status.[167] (3)The sale of beluga whale products is strictly prohibited.[168] (4)

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158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Taking of the Cook Inlet(CI), Alaska, Stock of Beluga Whales by Alaska Natives, 65 Fed. Reg. 59164 (to be codified at 50 CFR 216) (Oct. 4, 2000) [hereinafter Taking].

163. 16 U.S.C. § 1361 (2000).

164. Taking, *supra* note 162, at 59165.

165. *Id.*

166. *Id. See also* 16 U.S.C. § 1388 (2000) (stating that the Secretary may enter into cooperative agreements with Alaskan Native organizations to conserve marine mammals and provide comanagement of subsistence use by Alaskan Natives).

167. Taking, *supra* note 162, at 59165.

168. *Id.* at 59165-66.

Any hunting will take place after July 15 of each year, to minimize the harvest of a pregnant female.[169] (5) The taking of newborn calves or adult whales with maternally dependent calves is strictly prohibited.[170]

With these regulations regarding population effects in place, the comanagement agreement will clarify the details.[171] They proposed these regulations as a safety measure to ensure that there is no gap in protection of the stock, but a comanagement agreement is still preferred and pursued.[172] NMFS is combining the benefits of a comanagement agreement with the added enforcement of regulations in order to ensure the recovery of the Cook Inlet beluga whales.[173] As stated in the proposed regulations: "NMFS believes it should work with the Native Cook Inlet communities to develop a comanagement agreement that protects and conserves CI [Cook Inlet] beluga whales while preserving traditional beluga subsistence hunting activities."[174]

V. Conclusion

Taking into consideration the ESA listing process and the coordination of the MMPA listing process with the development of comanagement agreements, it is apparent that comanagement is a viable alternative to ESA listing. Not only is the controversial stigma attached to "endangered or threatened" listing avoided, but Alaskan Natives previously viewed as enemies to species conservation measures are included in the process. Alaskan Native views will finally be heard. Not only do these natives have an interest in preserving their culture, but they also have an interest in preserving the whales that have been part of their culture for so long. The ESA listing process has deteriorated through postponed reauthorization, lack of funding, and bureau-

169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 59167-68.
173. *See* Taking, *supra* note 162, at 59167-68.
174. *Id.* at 59168.

cratic red tape. Comanagement is a fresh new outlook to a species' survival. The coordination of Alaskan Natives and administrative agencies recognizes a wide range of viewpoints to utilize in the future. With ESA listings becoming less and less effective, the future of our endangered species lies in comanagement.