

Participation and Resistance: Tribal Involvement in Bering Sea Fisheries Management and Policy

Julie Raymond-Yakoubian

Kawerak, Inc., Nome, Alaska, USA

Abstract

Bering Strait region tribes and tribal organizations have recently become more involved in federal fisheries management and policy in the northern Bering Sea. This involvement has focused on the issues of salmon bycatch in the pollock fishery, the management of the Northern Bering Sea Research Area, and National Marine Fisheries Service research activities.

Tribes and tribal organizations have both participated in and resisted the current management regime through involvement in North Pacific Fishery Management Council meetings, planning workshops, informal meetings, tribal consultations, and other activities in attempts to effect management and policy that reflects tribal concerns. This paper outlines some of the successes and problems tribes have encountered while trying to work with National Marine Fisheries Service and the North Pacific Fishery Management Council on Bering Sea fisheries issues.

Introduction

Bering Strait region tribes have faced a number of important marine management issues over the past several years. The tribes and Kawerak, Incorporated (Kawerak), in conjunction with several other Alaska Native and other organizations, have been struggling to become involved in the policy and decision making processes for Bering Sea issues. This paper reviews some issues and ways in which Bering Strait tribes have participated, or attempted to participate, in northern Bering Sea federal marine management, and ways in which they have resisted the current

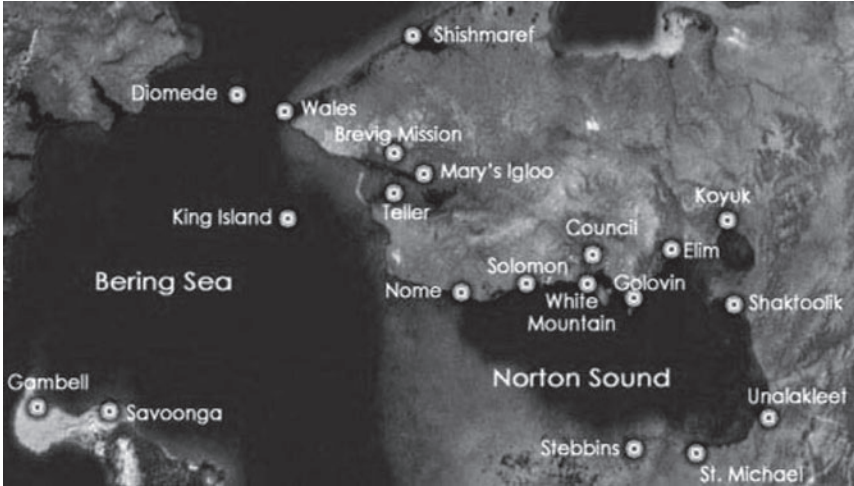


Figure 1. Bering Strait communities with federally recognized tribes.

regime (many tribes from other regions of Alaska have also participated in many of the issues described below). Following this, I outline some major problems that tribes and agencies/bodies involved have faced, and offer some solutions to how all parties can move forward in a positive manner. This discussion is limited to the National Marine Fisheries Service (NMFS) and the North Pacific Fishery Management Council (Council), as they are the two primary bodies involved in the major issues of concern to Bering Strait tribes.

The Bering Strait region of Alaska is the traditional territory of Iñupiaq, Yup'ik, and St. Lawrence Island Yupik peoples and is the contemporary home of 20 federally recognized tribes (see Fig. 1). The Alaska Native residents of the Bering Strait are highly reliant on the natural resources of the region for their cultural, spiritual, nutritional, and economic sustenance—particularly marine resources. Kawerak is the Alaska Native nonprofit for the Bering Strait region and collaborates with tribes in the region on many issues, including the marine policy and management issues discussed here.

Issues of concern to tribes

While Bering Strait region tribes have previously engaged with NMFS and the Council on other topics, over the past several years three major issues in the Bering Sea have caused great concern to Bering Strait tribes, issues in which they have attempted to become meaningfully

and consistently involved. These issues are Chinook salmon bycatch in the Bering Sea pollock fishery, chum salmon bycatch in the Bering Sea pollock fishery, and the Northern Bering Sea Research Area. Tribal involvement in these three issues has led to an additional, broader tribal concern about the process, content, and results of tribal consultations in general.

Chinook and chum salmon are caught in high numbers by the pollock fishery in the Bering Sea (NMFS 2009a, 2011a). These salmon are considered “bycatch” because they are a prohibited species within the pollock fishery and so cannot be retained. These salmon are typically thrown back into the ocean already dead, or close to it. Tribes are unhappy and dismayed about this massive waste of salmon, many of which would have returned to rivers in the Bering Strait region, and tribes have been working to get the bycatch of salmon reduced. Genetic research has shown that as much as 87% of Chinook salmon bycatch and 21% of chum salmon bycatch originate from western Alaska stocks (e.g., Guthrie et al. 2012, Kondzela et al. 2012). Tribes consider both of these estimates to be significant, in terms of Chinook and chum salmon fish that would have returned to western Alaska river systems to assist in meeting escapement goals, for spawning, and to be caught by tribal members for subsistence.

The Northern Bering Sea Research Area (NBSRA) is an area from approximately St. Matthew Island north to the Bering Strait, which has been temporarily closed to bottom trawl fisheries since 2008 (NMFS 2011b). The NMFS Alaska Fisheries Science Center (AFSC) was tasked by the Council to draft a research plan for the NBSRA before it is reopened to bottom trawl fisheries, or some other action is taken. This work has been on hold since June 2011 when the Council directed the AFSC to compile background information on the northern Bering Sea, including previous and ongoing research, the effects of bottom trawl studies, the results of community and science workshops held in 2010 and 2011, and other information that was lacking in the outline of the draft plan (NMFS 2011c). The issue of bottom trawl fisheries potentially moving north into the northern Bering Sea is of great concern to Bering Strait tribes, as are the NMFS-directed bottom trawl research activities that took place inside the boundaries of the NBSRA in 2010 and additional research that may take place within the area in the future (NMFS 2010b, Bullard 2010a).

An overarching concern that has developed through tribal involvement in the three issues (Chinook and chum bycatch and the NBSRA) is tribal consultation. Tribal attempts at, and participation in, consultation have led to deep dissatisfaction with how NMFS and the Council approach the process, about the role that tribes play in Bering Sea

resource management, and how tribal concerns are incorporated into decision making processes.

The requirement for consultation with federally recognized tribes is primarily outlined by Executive Order 13175 and applies to the development or promulgation of “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes” (Federal Register 2000). This requirement was recently reiterated by President Obama in a Presidential Memorandum issued in 2009 (Federal Register 2009). An existing Department of Commerce policy, “American Indian and Alaska Native Consultation and Coordination Policy,” issued in 1995, also applies to the agencies within the department (DOC 1995). When it comes to issues that may affect tribal resources, tribes are not simply another “stakeholder”; they have special status as sovereign governments, which is why special provisions like Executive Order 13175 and others exist.

Bering Strait region tribes have engaged in tribal consultation with multiple agencies in a variety of formats for many years. From the perspective of Bering Strait region tribes and Kawerak, tribal consultation is, at its root and most simply, about forming and maintaining relationships between sovereign governments (that will hopefully also become partners and collaborators). This view, which I elaborate on below, was formally outlined during a “NMFS and Tribal Representatives Workgroup” meeting in November 2009 (NMFS 2009b), as well as through discussions with NMFS staff during formal and informal consultations over the past several years (e.g., NMFS 2010a, 2011d). Additional descriptions of some of these meetings and elaboration on the points below can be found in the meeting minutes and the NMFS response to the meeting (e.g., NMFS 2009b,c). Tribal consultation, in the view of Bering Strait tribes, should consist of an ongoing and meaningful relationship between a tribe and a federal agency that has the mutual objective of collaboration, should not be “issue-based” and should be maintained even during periods when there are no major issues of contention. Consultation on particular issues must also be timely; if it is not timely, collaboration and consideration of ideas are not feasible for either party. Other components of consultation include two-way communication, accountability, consistency (in policies, procedures, staff, etc.) and must involve decision makers (tribal and federal government). Tribes have also suggested other specific and basic steps that agencies and tribes can take to ensure that a consultation relationship is successful (such as following up on letters, etc.).

Because tribal consultation is federally mandated, because tribes have familiarity with the process from working with other federal agen-

cies, and because consultation was only happening at the most basic level (i.e., a form letter on a specific issue would be mailed to 600-plus tribes, Alaska Native Claims Settlement Act corporations, and tribal organizations), when they began to seriously engage with NMFS and the Council in 2008, tribes have pursued this process more aggressively than most other possible routes of engagement. In taking this route, as noted, tribal consultation itself has emerged as a separate major issue of concern for Bering Strait tribes that want to work with NMFS and the Council on marine management issues.

The relationship between NMFS and the Council also has been a matter of contestation during tribal involvement with NMFS issues. The North Pacific Fishery Management Council (along with the other seven regional councils) was created by the Magnuson-Stevens Fishery Conservation and Management Act. The councils develop management plans and regulations for fisheries within their jurisdictions, which are then forwarded to and enacted and enforced by NMFS. The Council is, therefore, developing policy and regulation that directly impacts tribes and tribal resources and has “jurisdiction” and “primary responsibility for groundfish management” (NPFMC n.d.). While Bering Strait tribes believe that the Council should be required to formally participate in consultations, the Council and NMFS have operated under the belief that the Council is not an “agency” as defined in Executive Order 13175 and associated regulations (see Federal Register 2000 p. 67249, Oliver 2011a). Kawerak and tribes have requested, multiple times, that NMFS provide a written legal opinion on this matter, and even the Council itself has asked NMFS to clarify the situation (Oliver 2011b).

As a federal agency, it is clear that NMFS is required to carry out tribal consultation. While the determination of the Council’s status relative to consultation is debatable (e.g., see Balsiger 2011a), the fact is that they refuse to formally engage in the process (e.g., Oliver 2011b). The reason this is important, and is such a large concern to Bering Strait tribes, is that the Council is intimately involved in the policy and decision making process (which NMFS eventually implements and enforces) (e.g., Eagle et al. 2003, NPFMC 2008). Though technically Council decisions about fisheries management and policy must be approved by the Secretary of Commerce, Council recommendations are almost never abrogated by the Secretary, making the Council the *de facto* decision maker. Despite the power that the Council has over decisions that may significantly impact tribes and tribal resources, the Council is not held to the tribal consultation mandate. Partly as a result of significant pressure from Bering Strait region tribes and other tribes and organizations, the Council created a Rural Outreach Committee in late 2009. While not tribal consultation, and though the committee has no specific focus on tribes, the creation of this committee (and the setting aside of funds for its work) has been a small improvement in the process of communica-

tion between entities. Because of a Council motion in 2010, NMFS also has begun to give the Council formal updates about tribal consultation (see NPFMC 2010, Balsiger 2012), though the Council is not required to consider or respond to the information in these reports.

Tribal consultations to date

Since 2008, when Kawerak and Bering Strait tribes began to seriously engage with NMFS and the Council on issues of concern, there have been three formal tribal consultation meetings, as well as other requests for consultation that are described briefly below. The first formal tribal consultation in January 2009, in Nome, Alaska, focused on Chinook bycatch. Five tribes, Kawerak, and NMFS staff participated in this consultation and Council staff attended as observers (this is the only formal consultation meeting that Council staff attended). Tribes were generally satisfied with that first attempt at consultation; tribes expressed their concerns about Chinook bycatch, about being left out of the process of developing alternatives, and about NMFS's lack of understanding of tribal consultation. Following the meeting, however, tribes were not contacted by the agency for any kind of follow-up or response to concerns.

In October 2009 the Native Village of Unalakleet requested an additional consultation meeting to continue to develop the relationship between tribes and the agency and to discuss salmon bycatch, the status of the Northern Bering Sea Research Area, and the principles of ecosystem management. Nine tribes, Kawerak, and NMFS AFSC staff participated in this consultation in February 2010 in Unalakleet, Alaska. Follow-up from this meeting was also lacking and over the long term tribes have been disappointed in the lack of a continuing relationship. Additionally, the week after the Unalakleet consultation, tribes participated in a workshop focused on the NBSRA where they learned information about upcoming research they had not been consulted on and which they had not been notified of during the formal consultation meeting. Following this, in March 2010, 15 Bering Strait tribes requested consultation with NMFS regarding research activities planned in the northern Bering Sea. NMFS did not respond to these requests for consultation and informally denied that they were required to carry out tribal consultation on research activities (Raymond-Yakoubian 2010).

Most recently in June 2011, a third tribal consultation meeting took place via teleconference, on chum salmon bycatch, in response to consultation requests by six Bering Strait tribes. This consultation meeting was followed up by a teleconference in October 2011 when NMFS provided additional information to tribes and others on issues discussed at the June meeting. During consultation tribes specifically requested a hard cap on chum salmon bycatch in the pollock fishery, which has not been fully addressed by NMFS. Consultation on chum

salmon bycatch also has highlighted confusion surrounding the relationship between NMFS and the Council. After NMFS participation in the June consultation the NMFS Alaska Region administrator wrote a letter to the chair of the Council asking the Council to address tribes' recommendation for a chum salmon hard cap (Balsiger 2011b). Several tribes had also requested consultation with the Council on this issue and the Council's response to tribes was that they needed to carry out consultation with NMFS (Oliver 2011b). Tribal members are frustrated, to say the least, when they are told that they can formally consult only with NMFS, but then NMFS asks the Council to address the issue tribes are concerned about, and the Council, in turn, treats tribes like they are any other stakeholder. Unfortunately, tribes are being compelled to consult with a body (NMFS) that cannot take action on or resolve many of their major concerns, such as Chinook and chum salmon hard caps. As a result, some tribes and tribal members feel that consultation with NMFS is not true tribal consultation because it does not include decision makers from the federal government side.

Forms of participation and resistance

Tribes have approached these topics of concern in a variety of ways. Below I elaborate on different ways that tribes have engaged in the issues, as well the problems that have arisen. I discuss Chinook and chum salmon bycatch together. In attempts to engage NMFS and the Council on bycatch issues Bering Strait region tribes and Kawerak have formally requested tribal consultations and have fully participated in the Council process. Collectively we have spent large amounts of money to travel to multiple meetings to provide testimony to the Council and its Advisory Panel and Scientific and Statistical Committee. Tribal representatives who travel to these meetings and provide testimony are often not engaged by Council members (i.e., through questions following their testimony) and often describe leaving meetings feeling as though they have wasted their time and resources (Raymond-Yakoubian 2008-2012). These feelings are amplified for tribal representatives when they see that fishing industry representatives are given literally hours in front of the Council to discuss their views, solutions, and opinions on the bycatch issue (tribes requested additional time in front of the Council for the June 2011 meeting in Nome where chum bycatch was discussed, but were denied it). Tribal expert testimony is also often viewed as anecdotal by the Council, despite the fact that many such representatives are there speaking on behalf of their entire tribe and their views and observations are endorsed by them. Feelings of disappointment and frustration with the process are further affirmed when Council decisions greatly differ from tribal recommendations. For example, tribes virtually unanimously recommended a 30,000 hard cap on Chinook salmon

bycatch in the pollock fishery, but the Council set the cap at 60,000 in conjunction with an industry incentive program. While the consultation process does not ensure that agency decisions will reflect tribal desires, in this case the consultation process did not even address tribal concerns. As a result of these and other problems many tribal representatives are no longer willing to spend their time and effort attending Council meetings to participate in that particular process.

There are also some positives, in terms of the tribal consultations that have taken place on salmon bycatch. The first is that a few meetings have actually taken place, and the second is that two of these meetings have been face-to-face consultations. Kawerak and tribes strongly believe that formal consultation meetings must take place in person, particularly at this early stage in the development of relationships between Bering Strait tribes and NMFS. Also, there are some NMFS staff who, though extremely limited in their influence and power, do not take tribal concerns lightly. On the other hand, the agency as a whole has not taken its consultation mandate very seriously. Until Bering Strait region tribes and organizations began forcing the issue, tribal consultation on the part of NMFS primarily consisted of sending a form letter out to tribes (as noted above). The agency has frequently been slow to respond to requests for consultation and has not responded to all requests. Additionally, the staff that have been assigned to deal with consultation (for example, a fisheries economist) have no formal training or experience with consultation (as of March 2012) and are allotted only a certain amount of their work time to spend on it (Raymond-Yakoubian 2008-2012).

True tribal consultations are government-to-government and include individuals with decision-making authority. As noted above, many tribes believe that consultations with NMFS do not meet this standard because of the NMFS-Council relationship. However, even for those who do accept such consultations as being government-to-government, the NMFS staff present at consultations do not always meet this criteria of "decision makers." The participating agency staff also frequently rotate between meetings and teleconferences, and tribes have to repeat their concerns and background on the issues to inform the inexperienced staff present that have been tasked to work with tribal concerns (see participant lists for consultations, in NMFS 2010a, 2011d,e; Raymond-Yakoubian 2008-2012). Overall, the formal tribal consultations have not been timely or meaningful on salmon bycatch. These are just some of the problems with the way the consultation process has been proceeding to date.

In terms of the Northern Bering Sea Research Area, Bering Strait tribes and Kawerak have participated in several meetings and workshops about the issue, have written formal correspondence to the agency and Council, and provided oral testimony to the Council.

Tribes and tribal organizations also participated in a Community and Subsistence Workshop organized by NMFS Alaska Fisheries Science Center (the entity creating the NBSRA Research Plan) in which tribes shared local and traditional knowledge about the NBSRA with the agency (NMFS 2010b). This knowledge was shared despite the fact that the agency's goals and purpose for establishing the NBSRA and a research plan for it have been at times ambiguous.

Tribes have requested, and when no response was forthcoming, demanded that NMFS conduct formal tribal consultation on the issue of "research activities" carried out or sponsored by the agency. This was a direct result of the NMFS lack of compromise about the 2010 bottom trawl research survey in the northern Bering Sea, within the boundaries of the NBSRA. Rather than making a good faith effort and carrying out consultation, NMFS indicated their belief that they are not required to carry out tribal consultation on research activities—or at the very most that such a responsibility is debatable—and in actual practice have not conducted this consultation (despite formal requests from tribes). Communications from NMFS have included the explicit belief (Raymond-Yakoubian 2010, Bullard 2010b) that they are not required to, as well as implicit indications (Karp 2010) that the issue might be debatable; in practice, they have not carried out consultations on this issue. It is the tribes' view that NMFS is required to (Bullard 2010b). In the face of what is at most a debate, NMFS' decision not to proceed with a good faith effort in carrying out consultation regarding research activities has been detrimental to the incipient and already shaky relationship between Bering Strait tribes and NMFS. Tribes plan to make additional requests for tribal consultation on this issue directly to the Secretary of Commerce and to publicly protest any additional similar research in the northern Bering Sea that is not preceded by timely and meaningful tribal consultation activities. This is not because, as some within the agency believe, that tribes are opposed to research or that tribes do not understand the research that the agency does. Neither is true, but tribes do want to be fully informed about research activities, have the opportunity to collaborate with the agency on some research, and help determine whether the research is appropriate in their traditional territory.

Bering Strait tribes are extremely concerned about the implications and repercussions of the research the agency conducts, particularly in the northern Bering Sea. Related to this, it is important to tribes that agency scientists are aware of and acknowledge the implications of their research, rather than saying that it is simply research and science, and that researchers have no control over how the results of their work will be used by the agency, the fishing industry, or others (Raymond-Yakoubian 2010). In 2010 Bering Strait tribes passed formal resolutions requesting the agency to postpone the bottom trawl survey

until consultation was carried out. Tribes subsequently passed resolutions stating that they were opposed to the expansion of bottom trawl fisheries into the northern Bering Sea, in their traditional marine hunting territory and the critical habitat for many of the species they depend on for subsistence. Many tribes are very disappointed and dissatisfied with how things have proceeded regarding the NBSRA, and some have declared that they will no longer meet with the agency or share information with them.

Tribes have also pursued other methods for engaging issues. For example, tribal organizations like Kawerak, as well as tribes, have sought and obtained funding for their own research projects, outreach, and other activities. These funds support several ongoing social science projects, the majority of which are directly related to marine resources. Bering Strait tribes and Kawerak have also formed new coalitions with groups that have similar interests, and strengthened existing relationships. Some tribes and organizations have decided to bypass NMFS and the Council to try to work directly with industry. Tribes and tribal organizations also work directly with academic or independent scientists on research projects and in developing policy and management recommendations. Additionally, tribes are attempting to get seats on governing bodies, including the Council, to ensure a more balanced membership and that tribal concerns are fully heard and considered.

Suggestions for building agency-tribal relationships

Kawerak and Bering Strait region tribes have offered numerous suggestions to NMFS and the Council to improve and expand the existing relationship and to address tribal concerns. Below are examples of recommendations from Kawerak and Bering Strait tribes.

Consultation in general

NMFS and the Council must embrace the consultation process and the government-to-government relationship. This entails not just a change in attitude and approach, but also taking concrete steps toward improvement, some of which are described below. Major relationship building needs to occur and many tribes have already attempted, or shown their interest in developing, ongoing engagement with NMFS and the Council.

Staffing

For several years Kawerak and tribes have requested that NMFS Alaska Region hire a tribal liaison. This position is common in most federal agencies; the Department of Commerce, within which NMFS is housed,

has a tribal liaison position. NMFS, however, has consistently refused to create such a position within their agency, citing lack of funding. This reason does not satisfy tribes, however. The Alaska Fisheries Science Center and NMFS Alaska Region together have well over 300 staff. Tribes believe that it is more than reasonable to request that one of these staff positions be dedicated to a liaison position. This would greatly improve the good will between tribes and the agency, and assist in many other ways such as streamlining communication between parties. Other staffing concerns expressed by tribes in the context of the issues discussed above include the lack of sufficient anthropologically trained staff within both NMFS Alaska Region and the Council. Such staff are needed for assisting the agency and Council in assessing and understanding the importance of and impacts to subsistence foods and subsistence culture from salmon bycatch, research activities, etc. Neither the AFSC nor the Council has anthropologists on staff. The responsibility for writing documents, such as the environmental justice, cumulative effects, and subsistence-related sections of policy and management documents has fallen to staff with training in fisheries economics or other fields.

Funding

NMFS needs to set aside funds for the specific purpose of carrying out their tribal consultation mandate. Ironically, the Council has actually set aside funds for similar work—for outreach to communities. Bering Strait region tribes are certainly pleased that the Council has set some funding aside, but remain extremely concerned that the Council and NMFS do not take formal consultation as part of their mandate. Tribes have also requested that NFMS collaborate with them in the conduct of research—social science and biological research—and that more funds be set aside for such community based work.

Research

This suggestion has several components. The first is to allow the existing NMFS Alaska Region noneconomic social science staff (currently one person) to participate in the consultation process and in the writing of environmental and other documents that are used in agency and Council decision making processes (i.e., social impact, subsistence, environmental justice, and other components of analyses). This will help ensure that tribal concerns are more fully understood and addressed. Additionally, the noneconomic social science and other research staff should be encouraged to develop and conduct research that is responsive to tribal concerns. The agency should also sponsor research that would be conducted directly by tribes or tribal organizations or in collaboration with the agency, as noted above. Such projects would be an excellent opportunity to help build capacity within tribes,

tribal organizations, and communities and would provide an important conduit for the two-way sharing of knowledge that tribes desire.

Consultation process

Bering Strait region tribes have repeatedly requested that NMFS formalize their consultation process and protocols and the Council's role in that process. Tribes have made direct comments to the agency on what they believe consultation should consist of and what an appropriate process would be, but the agency has followed through on very few of the recommendations (e.g., NMFS 2009b,c; 2010a). Also, though tribes do not agree with the Council's assessment that they are not required to carry out consultation, tribes have still offered some interim suggestions such as formalizing a process whereby NMFS communicates tribal concerns to the Council much earlier in the process (as noted above, the Council has adopted a reporting protocol) and some kind of accountability for addressing those concerns (this has not yet been dealt with). The Department of Commerce recently issued its draft American Indian and Alaska Native Consultation and Coordination Policy (Federal Register 2012). Though it includes no specific guidance as to how Department of Commerce agencies should carry out consultation, there is nothing that would prevent NMFS and the Council from developing (in collaboration with tribes) a more detailed set of guidelines, expectations, and policies for carrying out consultation.

Conclusion

The current situation is that in order to, possibly, have their concerns taken into consideration, tribes must participate in two separate processes, neither of which function according to their needs or acknowledge their unique relationship to the federal government (these being some kind of engagement with NMFS and the Council process). The bottom line is that by not embracing consultation, NMFS and the Council have forced all parties into a reactionary stance from which little that is positive or lasting can come. Bering Strait tribes will continue to pursue policies, research, and management goals that acknowledge and protect subsistence resources and traditional cultural practices. Despite the problems and difficulties discussed here, Kawerak and Bering Strait region tribes remain very interested in working with NMFS and the Council to develop the trust and relationships necessary to move forward on these and many other issues that are just coming to light in the northern Bering Sea and that have the potential to have substantial direct effects on tribes in the region.

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