



April 26, 2012

U.S. Department of the Interior
ATTN: Alaska Consultation Policy
Office of the Secretary
1849 C Street NW
Washington, DC 20240

**Re: Comments of Arctic Slope Regional Corporation
Draft Policy on Consultation with Alaska Native Claims Settlement Act
(ANCSA) Corporations -- 77 Federal Register 13137 (March 5, 2012)**

Dear Docket Clerk:

Arctic Slope Regional Corporation (ASRC) appreciates this opportunity to submit these comments on the U.S. Department of the Interior's (DOI or the Department) Draft Policy on Consultation with Alaska Native Claims Settlement Act Corporations (Draft Policy) published at 77 Fed. Reg. 13137 (March 5, 2012).

ASRC is an Iñupiat-owned Alaska Native Regional Corporation, formed pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §1601, et seq. (ANCSA), that represents the interests of the Iñupiat Eskimos of the Arctic Slope. ASRC's congressionally-mandated mission is to invest in its land base and business interests to provide for the well-being of our Iñupiat Eskimo shareholders. ASRC owns approximately five million acres of land on the North Slope, including both surface and subsurface estate. Much of this land is increasingly subject to policies and decisions driven by the federal government that may impact the ability of ASRC to fulfill its mission.

It is critical that Alaska Native corporations have an opportunity to participate in the development and implementation of policies that impact our ability to fulfill our mission to our shareholders, especially those decisions and policies made by the Department. ASRC supports the Department's broad goal of ensuring that there is a process in place to ensure that tribal interests are able to provide meaningful and timely input in the development of regulatory policies that have tribal implications. ASRC also appreciates that the Department recognizes that Congress has specifically recognized the unique status of Alaska Native corporations (ANCSA Corporations) and the importance of including them in the consultative process. As the Department is well aware, Public Laws 108-199 and 108-447 (both enacted in 2004) specifically required that the Office

of Management and Budget (OMB) **and all federal agencies** consult with ANCSA Corporations on the same basis as Indian tribes under Executive Order No. 13175.¹

We also appreciate the efforts that DOI has undertaken to address consultation with ANCSA Corporations. The Department is one of the first federal agencies to recognize that the federal government's obligation to consult with Indian Tribes, pursuant to Executive Order 13175, extends to ANCSA Corporations. We support the Department's continued efforts to move forward with respect to the issue of consultation with ANCSA Corporations. We specifically would like to recognize Jodi Gillette and Sequoyah Simermeyer for their efforts in working with representatives from ANCSA Corporations and Alaska Native Tribes to get this Draft Policy out for comment.

Although we appreciate the efforts to date, and we want to continue to work with DOI on a wide range of issues, including consultation issues, we remain concerned that the Department decided to proceed with drafting a separate policy for ANCSA Corporations rather than amending the existing "Department of the Interior Policy on Consultation with Indian Tribes"² (Existing Tribal Consultation Policy).

For purposes of consultation regarding DOI actions, we continue to believe that it is appropriate for the Department to have one policy that covers consultation with both Tribes and ANCSA Corporations. Having one policy would fulfill the mandate issued by Congress when it stated specifically that all federal agencies, including DOI, "shall hereinafter consult with Alaska Native corporations **on the same basis as** Indian tribes under Executive Order No. 13175.

We recognize that the relationship between the federal government and ANCSA Corporations like ASRC is different from the government-to-government relationship between the federal government and Indian Tribes. We have supported, continue to support, and respect the need for DOI to work with federally recognized Indian Tribes on a government-to-government basis. We further recognize that this also means that there must be some differences in the manner in which the consultation process works in practice.

We do believe, however, that with respect to development of a policy on consultation that addresses issues impacting ANCSA Corporations and their shareholders – who are members of federally-recognized Alaska Native Tribes – the difference in the relationship is not so significant as to require an entirely separate policy.

There are several reasons why the scope of the consultation policy should be commensurate with the scope of the policy for Indian Tribes. ASRC, like other ANCSA Corporations, is charged by Congress with providing and protecting the health, education and welfare of our shareholders, who are Iñupiat Eskimos. ANCSA

¹ Pub. L. 108-199, div. H, Sec. 161, Jan. 23, 2004, 118 Stat. 452, as amended by Pub. L. 108-447, div. H, title V, Sec. 518, Dec. 8, 2004, 118 Stat. 3267.

² Policy found at <http://www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>.



Corporations, collectively, are the largest private landowners in Alaska, and ASRC is the largest single landowner on the North Slope.³ Much of the land owned by ANCSA Corporations is increasingly subject to DOI-driven policies and decisions that impact the ability of ANCSA Corporations to meet their congressionally-mandated mission of providing for the well-being of their shareholders. We are also obligated to act to preserve our cultural practices, our lands and resources, and access to traditional areas of cultural or religious importance.

In this way, while the relationship between ANCSA Corporations and the federal government is not equal to the government-to-government relationship between federally-recognized Indian Tribes and the federal government, the federal government does have an obligation to ANCSA Corporations because of its distinct relationship within federal Indian policy.

In the event that the Department decides to retain a separate policy for ANCSA Corporation consultation, we offer the following specific comments on the Draft Policy (references are to the specific paragraphs in the Draft Policy).

Comment 1: Second Paragraph of Section I. In order to give full credence to the fact that the Department will be consulting with ANCSA Corporations “on the same basis” as it consults with Tribes (to fulfill Congressional intent), we suggest amending the paragraph by removing the word “distinguishes” (as it refers to the Federal- ANCSA Corporation relationship and the Federal government-to-government-Tribal relationship) and otherwise amending the paragraph to read:

The Department of the Interior (Department) recognizes that there are differences between the Federal relationship to ANCSA Corporations and the Federal government-to-government relationship between the Federal government and each federally recognized Indian Tribe, and this Policy will not diminish in any way that relationship and the consultation obligations towards federally recognized Indian Tribes. Recognizing these differences, the Department is committed to fulfilling its ANCSA Corporation consultation obligations by adhering to the framework described in this Policy.

Comment 2: Second Paragraph of Section I. ASRC submits that the language in the last sentence of the second paragraph of Section I is inconsistent with the language in Secretarial Order No. 3317, issued by Secretary Salazar on December 1, 2011, which was issued to “update, expand and clarify the Department’s policy on consultation with American Indian and Alaska Native tribes.” Section 4(c) of the Secretarial Order describes the appropriate scope of the Department’s consultation policy: the policy is to be applied when “...a Department action with Tribal implications arises.”⁴ The last

³ ASRC owns approximately 5,000,000 acres of land stemming from an aboriginal land claim that covered the entire North Slope. In addition, the eight village corporations in ASRC’s region own an additional 963,000 surface acres of land on the North Slope; pursuant to ANCSA, ASRC owns the subsurface estate to most of the surface acres owned by the village corporations.

⁴ Department of the Interior, *Secretarial Order No. 3317*, issued by Secretary Salazar (December 1, 2011), page 1.



sentence of the second paragraph of Section I of the Draft Policy, however, provides that the Department will initiate consultation with ANCSA Corporations “when taking Department action that has a **substantial direct affect** on ANCSA Corporations” (emphasis added).

This sentence appears to limit the scope of the Draft Policy by adding a “materiality” qualifier, while the Department’s own order suggests that consultation should be triggered whenever there is a Departmental action that has “Tribal implications.” This is a critical issue, because the degree to which ANCSA Corporations are able to fulfill the congressionally-mandated obligations to their shareholders rests, in large degree, on the ability of these ANCSA Corporations to participate in the decisions that are made respecting their shareholders, lands and resources.

To avoid confusion, we suggest that the last sentence of this paragraph be revised to read “When taking departmental action that has ANCSA Corporation Implications, the Department will initiate consultation with ANCSA Corporations” (see Comment 4 below regarding the definition of the term “Departmental Action with ANCSA Corporation Implications”).

Comment 3: First Paragraph of Section II. ASRC questions the need for specific language that is included in this paragraph. The first sentence reads: “This Policy broadly defines provisions for improving the Department’s consultation processes with ANCSA Corporations **to the extent that a conflict does not exist with applicable law or regulations**” (emphasis added).

ASRC does not understand the need for this clause, and we respectfully suggest that this clause either be deleted or be amended to parallel the similar concept that is set forth in the Existing Tribal Consultation Policy: “This Policy shall complement, not supersede, any existing laws, rules, statutes, or regulations that guide consultation processes with ANCSA Corporations.”

Comment 4: Definition of “Departmental Action with ANCSA Corporation Implications” in Section III. As indicated in Comment 2 above, the degree to which ANCSA Corporations are able to fulfill their congressionally-mandated obligations to their shareholders rests, in large part, on their ability to fully participate in the decisions that are made respecting their shareholders, lands and resources. This requires full implementation of the consultation policy, and it is the definition of “*Departmental Action with ANCSA Corporation Implications*” that sets the scope of the Draft Policy.

We believe that the definition in the Draft Policy – only applying if a Departmental activity may have a “substantial direct effect” on ANCSA Corporation land, water areas and resources, and ability to participate in a program for which it qualifies – is far too limited.

Consistent with Comment 2 above, we first suggest that the definition of “Departmental Action with ANCSA Corporation Implications” more faithfully track the concept of



“implications” from the Secretarial Order. We also believe that the language needs to be amended to reflect the reality that ANCSA Corporations need to be consulted on activities that affect the corporation, its shareholders (and their way of life), its lands and the region. In that regard, we suggest that the Department track more closely the general language in the parallel section of the Existing Tribal Consultation Policy.

To implement these concepts, we suggest the following amended definition:

Departmental Action with ANCSA Corporation Implications -- Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a direct or indirect effect on an ANCSA Corporation or its shareholders, included but not limited to:

1. An ANCSA Corporation’s land and resources;
2. Shareholders in the ANCSA Corporation, including their cultural practices, subsistence way of life, and access to traditional areas of cultural or religious importance on federally managed lands;
3. The ability of an ANCSA Corporation to provide services to its shareholders, and to provide for the health, education and welfare of those shareholders; and
4. An ANCSA Corporation’s relationship with the Department, including the ability of an ANCSA Corporation to participate in Departmental programs for which it qualifies.

Comment 5: Caveats in Sections IV, V, VI, and VII. Sections IV, V, VI and VII, which are the essence of the consultation process, do not actually appear in the Draft Policy itself, but rather are incorporated by reference to the Existing Tribal Consultation Policy. However, the incorporation language – “The provisions of Section ‘xx’ of the Department of the Interior Policy on Consultation with Indian Tribes, shall apply to this Policy” – is subject to the following caveat: “with adjustments as necessary to account for the unique status, structure, and interests of ANCSA Corporations as appropriate and allowable.”

ASRC questions the need for this standard, broad caveat applicable to each of these sections. It is important that the final Policy for consultation with ANCSA Corporations not include the type of vague, broad caveats that may lead to one or more elements of the consultation policy being disregarded on the basis that they do not apply to ANCSA Corporations because of their “unique status, structure, and interests.” We suggest eliminating this caveat in its entirety.

Comment 6: Section IV. The language in the Existing Tribal Consultation Policy suggests that the Secretary’s annual report that discusses implementation of the



consultation policy will be provided to Indian Tribes; we suggest additional language be added to the Draft Policy making it explicit that this annual report will also be provided to ANCSA Corporations and including implementation of both the Existing Tribal Consultation Policy and the final ANCSA Corporation Consultation Policy.

Comment 7: Section VI. Both the Secretarial Order No. 3317 (Section 9) and the Existing Tribal Consultation Policy (Section VI) contain references to and procedures for creating the “Joint Federal-Tribe Team.” Section 9 of the Secretarial Order provides that the Team will should include members that represent diversity for the Department and the tribes. ASRC suggests that, in order to ensure true diversity and representation, the Department amend the Draft Policy to expressly ensure that ANCSA Corporations are represented on the Joint Federal-Tribe Team.

Comment 8: Section VII. ASRC suggests that the Department amend the Draft Policy to include language that ensures that an “ANCSA Corporation Official or Designee” (as defined in the Draft Policy) is included in the implementation of the Existing Tribal Consultation Policy to the same degree and in the same manner as “Tribal Officials” (as that term is defined in the Existing Tribal Consultation Policy).

In addition, we also request that the Department add language that ensures that ANCSA Corporations are included when a Tribal Leader Task Force is created or used to address regional or issue-specific matters (see page 12 of the Existing Tribal Consultation Policy). This is necessary and appropriate to ensure that ANCSA Corporations are included, on the same basis and to the same extent as Indian Tribes, in the process that the Department describes as “...open to all Indian Tribes” and that must “...to the extent possible, represent a cross-section of Tribal interests with respect to the matter at issue.”⁵

Conclusion. ASRC reiterates its appreciation for the Department’s express recognition of the need for a consultation policy for ANCSA Corporations as mandated by Congress, and for the good work on the Draft Policy to date. We would like to continue to work closely with the Department to develop a policy that appropriately expands the scope of consultation with ANCSA Corporations like ASRC, so that we can continue working towards fulfilling our mission to provide for the best interests of our Iñupiat shareholders.

In carrying out this consultation duty, ASRC requests that the policy confirm that all federal legal authorities and policies requiring consultation with tribes will be extended to ANCSA Corporations. For example, ASRC is deeply involved in federal actions under the Endangered Species Act (ESA) that could affect its lands. Secretarial Order 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997), facilitates such involvement by requiring consultation with tribes to the maximum extent practicable whenever proposed actions “may impact tribal trust resources.” The Order further requires the agencies to provide

⁵ Existing Tribal Consultation Policy, Section VII.E.2, page 12.



affected tribes with opportunities to participate in the ESA process, and must solicit comments from affected tribes. ASRC considers it very important to be included in such consultations that apply to our lands and interests, and affirmative application of authorities such as Secretarial Order 3206 would promote such cooperation.

We believe that the Department's policy should and can be the gold standard that other federal agencies look to as the benchmark for ANCSA Corporation policy consultation, and we offer these comments to continue and further efforts towards that goal.

Sincerely,
ARCTIC SLOPE REGIONAL CORPORATION

A handwritten signature in black ink that reads "T. Sweeney". The signature is written in a cursive, flowing style.

Tara M. Sweeney
Senior Vice President
External Affairs

