

Analysis of the Inuvialuit Final Agreement and Marine Protected Areas under the *Oceans Act*

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Introduction

This is an analysis of the Inuvialuit Final Agreement (referred to as the IFA or the Agreement) and marine protected areas under the *Oceans Act*. Provisions in the IFA affecting beluga whale management, and provisions in the *Oceans Act* establishing marine protected areas are examined. This analysis is not, and is not intended to be, a legal opinion on either the IFA or the *Oceans Act*, or any specific provision under the Agreement or Act. Other legislation, which has a role with respect to beluga management, such as the *Fisheries Act*, is commented on briefly.

Inuvialuit rights, and IFA processes and administrative structures are first examined. This portion of the analysis focuses on Inuvialuit harvesting rights for beluga whales under the IFA, and how the Fisheries Joint Management Committee, the Inuvialuit Game Council and the Hunters and Trappers Committees regulate beluga harvesting. The Beaufort Sea Beluga Management Plan (the Plan), in conjunction with by-laws and guidelines, is the current management regime for regulating the beluga whale harvest in the Inuvialuit Settlement Region. This Plan evolved under the IFA and with the participation of IFA institutions. The Plan's history, status and provisions are examined in detail. Another international initiative, the Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement, is also discussed.

The marine protected areas regime under the *Oceans Act* is then examined, in conjunction with a recent discussion paper from the Department of Fisheries and Oceans. This portion of the analysis focuses

on the preamble and the ocean management strategy in the *Oceans Act*. These are the provisions that could be used to establish a marine protected area. A discussion paper by the Department of Fisheries and Oceans, entitled *An Approach to the Establishment and Management of Marine Protected Areas under the Oceans Act: A Discussion Paper*, will also be examined to shed light on how the department is likely to implement a protected area regime. The *Oceans Act* marine protected area regime is contrasted with the Beaufort Sea Beluga Management Plan, with some reference to IFA requirements.

The analysis contains conclusions and recommendations. It concludes that the establishment of a marine protected area under the *Oceans Act* is consistent with the IFA. However, any marine protected area for beluga whales in the Inuvialuit Settlement Region must be consistent with the terms of the IFA and the rights, processes and boards established under that Agreement. If a marine protected area under the *Oceans Act* or other legislation is desirable, then the Beaufort Sea Beluga Management Plan would be the logical first step for any initiative to establish a protected area for beluga whales in offshore waters of the Inuvialuit Settlement Region. As a result of the IFA, the Fisheries Joint Management Committee, the Inuvialuit Game Council, and the Hunters and Trappers Committees will have a role in the establishment and maintenance of any marine protected area for the Inuvialuit Settlement Region.

This document is divided into three parts. The first part of the analysis contains

those conclusions and recommendations arising as a result of the analysis. The second part of the analysis is an overview of those provisions in the IFA that affect beluga management. This is the most detailed and extensive portion of the analysis as any other legislation and processes in place or established in the future must conform to the IFA. The third part of the analysis focuses on the *Oceans Act*, the proposed marine protected areas regime under that Act, and the related discussion paper.

This document has been formatted in order to make the analysis approachable to the reader. Larger complete quotations are placed within a box. Smaller or incomplete quotations are placed in the text within quotation marks. Where possible, specific references to the IFA and legislation have been placed in the footnotes. Figures and maps have been inserted to organize and summarize information, and assist in understanding the processes. Finally, the Appendix to the document contains a glossary, a bibliography and a copy of the proposal that initiated this analysis.

Conclusions

The *Oceans Act* is consistent with the IFA. The IFA does not prevent the federal government from enacting legislation that affects resource management in the Inuvialuit Settlement Region. Instead the IFA requires consultation when this legislation is proposed and implemented. As an example, the IFA contemplates special protective measures for lands that are important from the standpoint of wildlife and wildlife harvesting. Therefore, the *Oceans Act* is valid except to the extent it conflicts with the IFA. Currently, the *Oceans Act* does not conflict with the IFA.

Any marine protected areas regime under the *Oceans Act* for the Inuvialuit Settlement Region must conform to the IFA. The IFA recognizes Inuvialuit harvesting rights for beluga whales and recognizes the Inuvialuit Game Council, assisted by the Hunters and Trappers Committees, as the Inuvialuit voice on wildlife issues. The IFA establishes the Fisheries Joint Management Committee as an Inuvialuit-government joint management board with responsibilities for fisheries issues in the

Inuvialuit Settlement Region. Any marine protected areas regime under the *Oceans Act* will be valid to the extent it conforms with Inuvialuit harvesting rights and the responsibilities of the Inuvialuit Game Council and Fisheries Joint Management Committee under the Agreement.

The Beaufort Sea Beluga Management Plan has evolved as a result of the IFA, and institutions and rights under the IFA. A marine protected areas regime under the *Oceans Act* does not necessarily have to conform to the Beaufort Sea Beluga Management Plan. The IFA does not protect the entire Plan. It protects certain aspects of the Plan, and the Inuvialuit rights and the IFA processes that led to the development of the Plan. However, the Department of Fisheries and Oceans is likely to adhere to the Plan as the Department participated actively in its development and implementation, and is a signatory to the Plan.

In practice, any protected areas regime established for the Inuvialuit

Settlement Region is likely to reflect and include significant elements of the Beaufort Sea Beluga Management Plan. The Plan incorporates extensive community consultation and includes the major stakeholders. The Plan, in conjunction with the Hunters and Trappers Committees Beluga By-laws and Tourism Guidelines, is the central management tool in the Inuvialuit Settlement Region for regulating the beluga whale harvest and protecting beluga whales.

The Fisheries Joint Management Committee, the Inuvialuit Game Council and the Hunters and Trappers Committees will be involved in any marine protected

area established for beluga whales in the Inuvialuit Settlement Region. The committees and the council have distinct roles under the IFA, which include the right to advise and participate in any beluga management regime for the Inuvialuit Settlement Region. The Department of Fisheries and Oceans also has a history of working collaboratively with the parties. In addition, the marine protected areas regime under the *Oceans Act* envisions the Department working collaboratively with the local communities and developing effective partnering relationships.

Recommendations

These recommendations are derived from the analysis of the overview of the relationship between the IFA and marine protected areas under the *Oceans Act*. They discuss possible changes to the Beaufort Sea Beluga Management Plan, and courses of action for both the Fisheries Joint Management Committee and Inuvialuit Game Council.

Evaluate Beaufort Sea Beluga Management Plan.

Parties should now evaluate their satisfaction with the Beaufort Sea Beluga Management Plan to determine whether additional protections are necessary. It is appropriate to perform this evaluation now for several reasons. First, establishing a new legislative regime for beluga management may be difficult when development activity exists and interests conflict. Little development activity is occurring at the present time in the Inuvialuit Settlement Region. However, tourism is increasing, and

energy and mining production, and related transportation activities, are likely to increase in the near future. Second, the existing stakeholders to the Plan are currently engaged in a review of the Beaufort Sea Beluga Management Plan. Thus, they can decide to augment the Plan with another protective regime under the *Oceans Act* or other legislation. Lastly, the Department of Fisheries and Oceans is interested in considering the different alternatives to enhance or augment the Beaufort Sea Beluga Management Plan, including the establishment of a marine protected area under the *Oceans Act*.

Plans should be considered in any new regime for Inuvialuit Settlement Region.

The Beaufort Sea Beluga Management Plans should be the first and essential step in any additional legislative regime for beluga whales in the Inuvialuit Settlement Region. It is derived from

constitutionally protected rights and processes in the IFA, and is consistent with the IFA. The Plan is in place and works reasonably well. Lastly, the Plan is the outcome of significant efforts by the key stakeholders in the Inuvialuit Settlement Region who have an interest in beluga management. Those stakeholders are the Department of Fisheries and Oceans, the Fisheries Joint Management Committee, the Inuvialuit Game Council and the Hunters and Trappers Committees. The Plan also reflects the historic interests and participation of industry stakeholders.

At minimum, ensure non-signatories to the Plan are required to conform.

Different courses of conduct can be utilized to enhance the effectiveness of the Beaufort Sea Beluga Management Plan. As a minimum, signatories to the Plan can use existing means at their disposal to ensure that other departments and governments, IFA bodies and processes, and third parties conform to the Plan. Means include commitments from the federal Department of Indian Affairs and Northern Development, and the government of the Northwest Territories to adhere to the Plan when creating rights and issuing authorizations now and into the future. Similarly, efforts can be made to ensure that the IFA bodies and processes such as the Inuvialuit Land Administration and the environmental impacts screening and review process are subject to the Plan. Formal adherence by these parties will ensure that third parties requiring their authorizations are also subject to the Plan. Parties could adhere to the Plan by either becoming signatories, or formally agreeing to be bound by its provisions.

Consider establishment of protected regime to augment or enhance Plan.

Key stakeholders should also consider the establishment of a protected regime to enhance or augment the Beaufort Sea Beluga Management Plan. This can be accomplished under either the *Oceans Act*, or some other legislative process.

The proposed marine protected area regime under *Oceans Act* has the merit of being very flexible. The Act permits the establishment of a marine protected area in accordance with both the Plan and the terms and conditions of the IFA. The actual implementation of a marine protected area regime under the *Oceans Act* may be more problematic. Difficulties will arise if this regime requires modification of the Plan, or compromises Inuvialuit rights under the IFA. The *Oceans Act* may require the inclusion of further stakeholders, whose interests could conflict with Inuvialuit interests. All these matters should be considered if parties decide to establish a marine protected area for beluga whales under the *Oceans Act*.

However, other legislative means could also be explored to legislatively enhance the Beaufort Sea Beluga Management Plan. For example, the Plan could be legislatively endorsed through the enactment of regulations under *Fisheries Act* so as to bind all federal and territorial government departments and third parties.

Inuvialuit bodies and processes should be involved in any changes.

Inuvialuit bodies and processes will have a role in the establishment and operation of any marine protected area or affecting the Inuvialuit Settlement Region. Therefore, Inuvialuit bodies such as the

Fisheries Joint Management Committee, the Inuvialuit Game Council and the Hunters and Trappers Committees should be

proactive in designating and implementing their role under any protective regime.

Inuvialuit Final Agreement

Constitutional Status of the Agreement

The Inuvialuit Final Agreement is a land claims agreement within the meaning of section 35(3) of the *Constitution Act, 1982*.¹ By reason of section 35(3), aboriginal and treaty rights are constitutionally protected and cannot be altered or derogated except by constitutional amendment, or with the consent of the aboriginal peoples who hold these rights.² As such, the IFA supercedes federal legislation or regulations to the extent of any inconsistency or conflict. Section 3(3) of the IFA reiterates this principle of constitutional protection.

3.(3) The Settlement Legislation approving, giving effect to and declaring valid this Agreement shall provide that, where there is inconsistency or conflict between either the Settlement Legislation or this Agreement and the provisions of any other federal, territorial, provincial or municipal law, or any by-law or regulation, the Settlement Legislation or this Agreement shall prevail to the extent of the inconsistency or conflict.

Land claim agreements are modern treaties between the federal government and aboriginal peoples, which are legislatively implemented and constitutionally protected. Thus, the manner of legal interpretation is

important. Canadian courts have generally endorsed the principle of liberal interpretation of laws so that ambiguous laws are interpreted in a manner favourable to aboriginal peoples. It is not clear though whether the principle of liberal construction will be adhered to with land claims agreements as this principle was developed because of the unique historic vulnerability of native peoples. The courts have already found in the instance of one land claim agreement that where no such vulnerability exists, there is no rule that doubtful expressions should be interpreted in favour of aboriginal peoples.³

Unlike other land claims agreements for the Northwest Territories, the resource management regime in the IFA is superimposed on the existing federal and territorial legislative regime. Therefore, the Agreement does not necessarily substitute or replace existing resource management regimes. Subject to explicit provisions in the IFA, the Agreement does not prevent the enactment of further legislation.

The Agreement establishes a number of Inuvialuit-government joint management boards, but does not explicitly describe them as “institutions of public government.” This phrase is used to describe joint management boards established under other land claims

¹ IFA s. 3(2).

² Woodward, *Native Law*, p. 71.

³ Woodward, *Native Law*, p. 69. *Eastmain Band v. Robinson*, Sept 20, 1995, Montreal A107-91.

agreements for Northwest Territories.⁴ Despite the absence of that phrase in the IFA, a joint resource management board like the Fisheries Joint Management Committee is likely to be viewed as an institution of public government in the same manner as boards under other agreements. The Committee's roles and responsibilities under the Agreement are not restricted to the implementation of Inuvialuit rights. The Committee is also required to assist the Minister of Fisheries and Oceans in managing the fisheries in the Inuvialuit Settlement Region. Roles and responsibilities of committees and boards under land claims agreements can also evolve over time. Therefore, IFA boards and processes could evolve to become "institutions of public government." Section 4(3) of the IFA supports this evolutionary approach.

4.(3) Canada agrees that where restructuring of the public institutions of government is considered for the Western Arctic Region, the Inuvialuit shall not be treated less favourably than any other native group or native people with respect to the governmental powers and authority conferred on them.

Given the focus and thrust of the IFA, wildlife harvesting and wildlife co-management regimes are key rights and processes under the IFA, and will be constitutionally protected from abrogation by inconsistent laws. One of the basic goals of the IFA is "to protect and preserve the Arctic wildlife, environment and biological

productivity."⁵ The Transitional and Consequential Provisions in IFAs.20 recognize the centrality of the provisions that establish wildlife harvesting and co-management regimes. Section 20(3) provided that government would not act in a "manner inconsistent with the Agreement and, in particular, with sections 11, 12 and 14" in the interim period before the Agreement was in place.

Introduction and General Principles of IFA Section 14

One of the basic goals of the IFA is "to protect and preserve the Arctic wildlife, environment and biological productivity."⁶ Protection of wildlife, environment and biological productivity is addressed under Section 11-Environmental Impact Screening and Review Process; Section 12-Yukon North Slope; Section 13-Wildlife Compensation, and Section 14-Wildlife Harvesting and Management.

While other IFA provisions affect wildlife, section 14 is the key section for beluga regulation and the establishment of a marine protected area under the *Oceans Act*. Section 14 contains provisions for Inuvialuit harvesting rights,⁷ the Wildlife Management Advisory Council (NWT),⁸ the Fisheries Joint Management Committee,⁹ the Inuvialuit Game Council¹⁰ and the Hunters

⁵IFAs.1(c).

⁶IFAs.1(c).

⁷IFA ss.14(24-35).

⁸IFA ss.14(45-60).

⁹IFA ss.14(61-72).

¹⁰IFA ss.14(73-74).

⁴Resource management boards in the adjacent Gwich'in Final Agreement (s.24.1.3) and the Tungavik Federation of Nunavut Final Agreement (s.10.1.1) are examples of boards that are described as "institutions of public government."

and Trappers Committees.¹¹ IFA section 14 begins enumerating the principles that guide the interpretation of Inuvialuit harvesting rights, and the institutions, which have a role in regulating beluga whales. Each principle will be examined.

IFA section 14(1) states that the basic goal of the IFA is to “protect and preserve the Arctic wildlife, environment and biological productivity through the application of conservation principles and practices.” The principles suggest that the IFA is the key instrument for conservation. The principle is consistent with the definition of conservation in the IFA, and the preeminent position of Inuvialuit harvesting rights in any wildlife management regime for the Inuvialuit Settlement Region.

14.(2) In order to achieve effective protection of the ecosystems in the Inuvialuit Settlement Region, there should be an integrated wildlife and land management regime, to be obtained through various means, including the coordination of legislative authorities.

This principle recognizes the need for an integrated regime and the possibility of many ways of achieving that goal through various means, including but not limited to legislation. Section 14(2) also recognizes the role of legislation and government.

Section 14(3) is the most specific principle for the purposes of this analysis, and addresses legislative initiatives similar to a marine protected area under the *Oceans Act*.

¹¹ IFA ss. 14(75-79). The IFA also proposed the establishment of a research council to coordinate research for the region (IFA ss. 14(80-86)). The Research Advisory Council was never established by joint agreement of government and the Inuvialuit

14.(3) It is recognized that in the future [i.e., post 1984] it may be desirable to apply special protective measures under laws, from time to time in force, to lands determined to be important from the standpoint of wildlife, research or harvesting. The appropriate ministers shall consult with the Inuvialuit Game Council from time to time on the application of such legislation.

Section 14(3) explicitly permits legislation to be enacted to special protective measures to lands deemed to be important from the standpoint of wildlife, research and harvesting. Though the provision refers to “lands” rather than “offshore” waters, this may not be a significant difference given the absence of definitions for “land” and “water” in the IFA, and those considerable portions of the year when offshore waters are covered with ice, and thus function as an extension of the land. Special protective measures are also analogous to the marine protected areas regime under the *Oceans Act*. Subject to other or more explicit requirements elsewhere in the Agreement, IFAs. 14(3) would seem to suggest that, in principle, marine protected areas under the *Oceans Act* are consistent with the IFA. As is discussed subsequently, the provisions under the *Oceans Act* are sufficiently broad to not conflict with the IFA. Conflict is more likely to arise if the Inuvialuit do not agree with government on the necessity for a marine protected area for beluga whales, or if specific aspects of the proposed area are not consistent with the IFA or the Inuvialuit’s desires.

Specific aspects of IFAs. 14(3) are also of interest. The phrase “desirable” implies a lesser standard than “necessary” and some degree of subjectivity on the part of government as to whether protective measures are required. These sections also

gives rise to question of whether the new legislation must be desirable from all viewpoints, or merely from governmental standpoint. The requirement of consultation with the Inuvialuit Game Council suggests that the federal government may proceed unilaterally. There is some indication that not all Inuvialuit individuals and institutions may support the imposition of another legislative regime in the Inuvialuit Settlement Region that could further restrict Inuvialuit harvesting activities, the use of Inuvialuit lands or Inuvialuit business opportunities in the absence of an appreciable benefit.

Section 14(3) does contemplate protective measures being put in place and a minimal obligation of consultation with Inuvialuit Game Council as the representative voice of Inuvialuit on wildlife issues. Consultation is restricted to the “application” of legislation under this provision, and does not extend to consultation on either the requirement for or drafting of the legislation. However, any “special protective measures” will still need to conform to the Agreement and all the requirements in section 14. Hence, the requirement for consultation in IFAs. 14(3) may be refined or augmented by specific requirements elsewhere in section 14 for the participation of and consultation with the Fisheries Joint Management Committee and the Inuvialuit Game Council. Unilateral action by the Department of Fisheries and Oceans seems unlikely at this time in light of its current practices and in the absence of significant development pressures for the Inuvialuit Settlement Region.

IFA section 14(4) comments on the Inuvialuit role with respect to wildlife.

14.(4) It is recognized that one of the means of protecting and preserving the Arctic wildlife, environment and biological productivity is to ensure the effective integration of the Inuvialuit into all bodies, functions and decisions pertaining to wildlife management and land management in the Inuvialuit Settlement Region.

The use of word “integration” in IFA s. 14(4) echoes back to the earlier principle in IFAs. 14(2) which talks about an “integrated wildlife and land management regime.” Thus, a similar word is used twice in differing contexts. As a result of the two provisions, there is a requirement for an integrated management regime, and recognition that the Inuvialuit are an essential element of that regime.

Section 14(4) recognizes Inuvialuit participation in decision and functions, as well as boards. This participation is viewed as key to protecting and preserving wildlife under the Agreement. Therefore despite the more limiting provision in IFAs. 14(3) and without considering other provisions in IFA s. 14, Inuvialuit participation could include the “decision” to establish a marine protected area, and how that protected area is “functionally” operated.

Section 14(4) also refers to the Inuvialuit, rather than the Inuvialuit Game Council. The IFA defines the Inuvialuit as a relatively broadly as a people, and as represented by their corporate entities. In the context of this provision, Inuvialuit can be understood to incorporate both individuals and corporate structures. Inuvialuit individuals are members of the different joint management structures. IFA institutions also have the ability to participate in different functions and decisions. Considering the *Oceans Act*, one could argue that the Agreement recognizes

an ongoing role for the Inuvialuit, however defined, in any new regime establishing a marine protected area.

Subject to more specific provisions in section 14, IFAs. 14(4) itself does not define or recognize a role for the Fisheries Joint Management Committee, a joint management board with equal Inuvialuit and government membership. The Inuvialuit would probably not want to limit Inuvialuit participation to that Committee, or to a process involving that Committee and another government body. Instead, consistent with other provisions in IFAs. 14, there is a role for the Fisheries Joint Management Committee, the Inuvialuit Game Council, and the Hunters and Trappers Committees in any process establishing a marine protected area for the Inuvialuit Settlement Region.

Lastly, IFAs. 14(5) states that the “relevant knowledge and experience” of the Inuvialuit and scientific communities should be “employed in order to achieve conservation.” This section recognizes the importance of Inuvialuit knowledge and experience in determining whether a marine protected area is necessary to conserve beluga whales, and to establishing the terms and conditions of that protected area, if a protected area is required. This Inuvialuit knowledge and experience is particularly pertinent given the IFA definition of “conservation.”

Applicable Definitions in IFA Section 14

The following definitions from section 2 of the Inuvialuit Final Agreement are interlocking and key to understanding the general principles in section 14, Inuvialuit harvesting rights, and the joint

management regime applicable to beluga whales.

Wildlife is defined as all fauna in a wild state other than reindeer. Therefore, wildlife includes fish and game by necessary implication and by virtue of the definition of “game.” Game is defined as wildlife other than fish and certain birds. Fish is defined to include marine animals and the juvenile stages of marine animals, though this analysis is restricted to beluga whales.

Land and water are not defined in section 2 of the IFA. It only contains references to Inuvialuit lands, those lands transferred to the Inuvialuit under the Agreement. However, there are some references elsewhere in the Agreement. Section 7(2) refers to Inuvialuit ownership to the beds of all lakes, rivers and other water bodies contained within Inuvialuit lands. Apparently, this occurred because of the difficulty of distinguishing between land and water in the Mackenzie Delta. Land is also defined to not include buildings for tax purposes in IFAs. 7(48). In a similar vein, the Agreement does not define onshore lands and offshore waters. This can be viewed as an unfortunate omission in a marine-oriented agreement like the IFA where sea ice in place is in place for most of the year and functions as an extension of the land.

Conservation is a key term throughout the Agreement and is defined as “the management of the wildlife populations and habitat to ensure the maintenance of the quality, including the long term optimum productivity, of these resources and to ensure the efficient utilization of the available harvest.” Thus, conservation is defined in terms of harvesting and the maintenance of a harvestable population. The definition of conservation is central to

the Agreement as the term is used consistently when describing Inuvialuit harvesting rights and wildlife management.

The subsequent analysis of the *Oceans Act* suggests the IFA definition of conservation is not necessarily inconsistent with the understanding of conservation under that Act. Depending on the intent of legislation, it could be inconsistent with federal and international legislation dealing with protected areas. For example, Inuvialuit harvesting rights could be inconsistent with a legislative regime designed to conserve and protect restricted or endangered species. It is consistent with the formation of national and territorial parks in the Inuvialuit Settlement Region as these parks are subject to Inuvialuit harvesting rights.

The Inuvialuit “preferential right to harvest” includes the right to harvest wildlife for subsistence use and to be allocated, subject to conservation, quantities of wildlife sufficient to fulfill Inuvialuit requirements for subsistence use before there is allocation for other purposes. Conservation can limit the right to harvest, but Inuvialuit subsistence use has priority if there is a shortage. However, the preferential right to harvest beluga whales is not important at the present time as there has been a considered decision by signatories to the Beaufort Sea Beluga Management Plan to not impose a harvestable quota.

Lastly, “subsistence use” is defined as “the taking of wildlife by the Inuvialuit for their personal use for food and clothing and includes the taking of wildlife for the purposes of trade and barter and, subject to section 12, sale among the Inuvialuit.” The IFA does not define “commercial use” but does provide for commercial use of wildlife, including beluga whales. However, no parties in the Inuvialuit

Settlement Region commercially hunt beluga whales for sale on non-Inuvialuit, and there does not seem to be any intent to do so.

Inuvialuit Wildlife Harvesting Rights

IFA section 12 addresses Inuvialuit harvesting rights in the Yukon North Slope. Inuvialuit harvesting rights in the Yukon North Slope will not be discussed here except where referentially incorporated in IFAs. 14, or for the purposes of discussing role and responsibilities of the Fisheries Joint Management Committee. Section 14(6) describes Inuvialuit harvesting rights in the Western Arctic Region.

14.(6) The Agreement provides the Inuvialuit with certain harvesting rights to wildlife in the Western Arctic Region. The exercise of the Inuvialuit right to harvest is subject to laws of general application regarding public safety and conservation. Nothing in this section gives the Inuvialuit a proprietary interest in any wildlife. Subject to the qualifications set out in subsections (15) to (18), these harvesting rights include;

(a) the preferential right to harvest all species of wildlife except migratory non-game birds and migratory insectivorous birds, for subsistence use throughout the Western Arctic Region.

The following phrases in IFAs. 14(6) are significant: the “Western Arctic Region” which is defined to be all areas in Inuvialuit Settlement Region other than the Yukon North Slope; “laws of general application,” “public safety” and “conservation.”

“Laws of general application” is a phrase in *Indian Act* s.88. This section referentially incorporates provincial laws

except, and to the extent these laws are inconsistent with the *Oceans Act*. The phrase has been litigated and judicially interpreted to include all laws other than laws designed to affect an aboriginal group. The *Yukon Act* and the *Northwest Territories Act* authorize their respective governments to make game laws that apply to the Inuit, provided they make exceptions for native food hunting. These acts also provide that the Inuit are subject to laws “of general application in force” in the territory.¹² Therefore, the IFA reiterates the status quo when it states the Inuvialuit are subject to laws of general application, though the Agreement will be preeminent if a federal or territorial law conflicts.

For example, due to the IFA definition of conservation, a law of general application regarding conservation is likely to be narrower than otherwise supposed. One could not limit wildlife harvesting on the grounds that hunting is inconsistent with the goals of conservation as the IFA defines conservation in terms of sustainable harvesting. Laws of general application regarding public safety can be more limited than one would otherwise suppose. Parks Canada at one time indicated some concerns about Inuvialuit harvesting within national parks on grounds of public safety if tourists could be within that park. However, the IFA explicitly provides for Inuvialuit harvesting throughout the Inuvialuit Settlement Region including within parks.

Section 14(19) delineates the role of Wildlife Management Advisory Council (NWT) and Fisheries Joint Management Committee in allocating wildlife harvests.

14.(19) It is agreed that the Wildlife Management Advisory Council (NWT) established by subsection (45) and the Fisheries Joint Management Committee established by subsection (61) shall, within their respective jurisdictions, serve as the mechanisms to facilitate the distribution of the harvest limits or the harvest for subsistence purposes among all the native peoples living in the vicinity of the Inuvialuit Settlement Region who traditionally depend on a common wildlife resource for food and clothing.

There is a specific reference to the role of the Fisheries Joint Management Committee, in conjunction with the Wildlife Management Advisory Council, as the mechanism to facilitate the distribution of harvest limits, or harvest for subsistence purposes among aboriginal peoples in the Inuvialuit Settlement region. Section 14(19) also contains an ambiguous reference to the respective jurisdiction of each committee or council. The distribution of harvest limits for beluga whales is not essential, as neither the Fisheries Joint Management Committee or the Beaufort Sea Beluga Management Plan currently propose quotas for beluga harvesting. The “distribution of... the harvest for subsistence purposes” is more central as the Fisheries Joint Management Committee, the Inuvialuit Game Council and the Hunters and Trappers Committees all have roles with respect to the distribution and allocation of that harvest which are discussed elsewhere in the context of the “Fisheries Joint Management Committee.”

IFAs. 14(23) states “The provisions of subsections 12(36) and (37) and 12(39) and (40) apply, with such modifications as the circumstances require, to harvesting of wildlife under this section.” Therefore, IFA

¹² Woodward, *Native Law*, p. 111.

s. 14(23) referentially incorporates the following Inuvialuit harvest rights from the Yukon North Slope. Some of these rights are also explicitly provided for in specific provisions of IFAs. 14. Where there are differences, the provisions in section 14 will prevail over the provisions in section 12. This is due to the general principle of statutory interpretation where a more explicit provision will modify or, if necessary, override a more general provision, and due to the inclusion of the phrase “with such modifications as the circumstances require.”

As a result of this referential incorporation of these section 12 provisions, the Inuvialuit have the right to use present and traditional methods of harvesting, and the right to possess the necessary equipment, subject to international agreements to which Canada is a party and laws of general application about public safety and conservation. Transport of game is also authorized between the Yukon and Northwest Territories. ¹³The Inuvialuit can travel and establish camps as necessary to exercise their harvest right. ¹⁴They do not need permits or licenses to harvest wildlife. However, if authorizations are required for the purposes of “conservation” by the appropriate minister or on the recommendation of the Fisheries Joint Management Committee, the Inuvialuit will receive that authorization from the local authority at no cost. ¹⁵The IFA preserves persons’ ability to take “game” for survival

¹³IFAs. 12(36).

¹⁴IFAs. 12(37).

¹⁵IFAs. 12(39).

in an emergency. ¹⁶Game is broadened to wildlife, and thus includes fish.

Inuvialuit Fish Harvesting Rights

Inuvialuit harvesting rights are described in ss. 14(29-31) of the IFA, and apply to the entire Inuvialuit Settlement Region as a result of IFAs. 14(35).

14.(29) The Inuvialuit shall have the first priority for the harvest of marine mammals, including first priority of access to all harvestable quotas for marine mammals, including first priority of access to all harvestable quotas for marine mammals within the Inuvialuit Settlement Region and the right to harvest a subsistence quota to be set jointly by the Inuvialuit and the Government. They shall also have the right to harvest any portion of the commercial or other quota that they can reasonably be expected to harvest within the quota year. The harvestable quotas for marine mammals shall be set jointly by the Inuvialuit and the Government according to the principles of conservation.

Section 14(29) refers to a joint subsistence quota. If subsistence quotas are required to ensure conservation of the resource, these quotas will be set jointly by the Inuvialuit and the federal government pursuant to IFAs. 14(61-72). The role of the Fisheries Joint Management Committee, the Inuvialuit Game Council and the Hunters and Trappers Committees with respect to the establishment and allocation of this quota is addressed below in the context of more specific provisions in the IFA. Section 14(30) reiterates that harvesting is subject to conservation, and harvestable quotas set in accordance with principles of conservation.

¹⁶IFAs. 12(40).

Lastly, section 14(31) states that the Inuvialuit have the preferential right within the Inuvialuit Settlement Region to harvest fish for subsistence usage including trade, barter and sale to other Inuvialuit.

The IFA contains other provisions that provide parameters as to how the Inuvialuit may use harvested marine mammals. The Inuvialuit may sell, trade or barter fish or marine mammal products acquired in subsistence fisheries to other Inuvialuits subject only to regulations to protect public health, to prevent sale, trade or barter to persons who do not qualify and to permit the acquisition of information necessary for the management of the fisheries.¹⁷ Another provision provides for the right to sell non-edible products of the harvested fish subject to the *Fisheries Act* and regulations.¹⁸ Interestingly, this is one of the few instances where the right is explicitly subject to a specific act and with where no restrictions are placed on the *Fisheries Act*. The right to harvest fish and marine mammals also includes the right to transport fish across territorial boundaries.¹⁹ Lastly, the IFA provides for Inuvialuit commercial fisheries for fish, including beluga whales.²⁰ These commercial fishing provisions will not be discussed further as there currently no intent to create a commercial fishery for beluga whales.

The above provisions describe Inuvialuit harvesting rights for beluga whales. While the Fisheries Joint Management Committee is key body under IFA for managing and regulating that

harvest, the IFA also discusses the Wildlife Management Advisory Council (NWT), the Inuvialuit Game Council, and the Hunter and Trapper Committees. The interrelationship between these boards is described in Figure 1: Wildlife and Environmental Structures: Appointing Agencies and Linkages .

Wildlife Management Advisory Council (Northwest Territories)

The IFA discusses the establishment of the Wildlife Management Advisory Council (NWT).²¹ This council is established as a joint management body with jurisdiction over that portion of the Inuvialuit Settlement Region that falls within the Northwest Territories “including the adjacent near shore and offshore waters.”²² The council is required to “provide advice to appropriate ministers on all matters relating to wildlife policy and the management, regulation and administration of wildlife, habitat and harvesting for the Western Arctic Region.”²³ The breadth of language establishing the council²⁴ suggests it may have some jurisdiction over wildlife in offshore waters, including beluga whales. Apparently, this ambiguity developed out of the need for polar bear regulation as the bear travel on the offshore ice and waters. Similar observations about jurisdiction ambiguity may be made with respect to Wildlife Management Advisory Council (North Slope). As a result, there is a measure of overlap under the IFA between the

¹⁷IFAs. 14(24).

¹⁸IFAs. 14(24).

¹⁹IFAs. 14(28).

²⁰IFA ss. 14(32-35).

²¹IFA ss. 14(36-50).

²²IFAs. 14(47).

²³IFAs. 14(60).

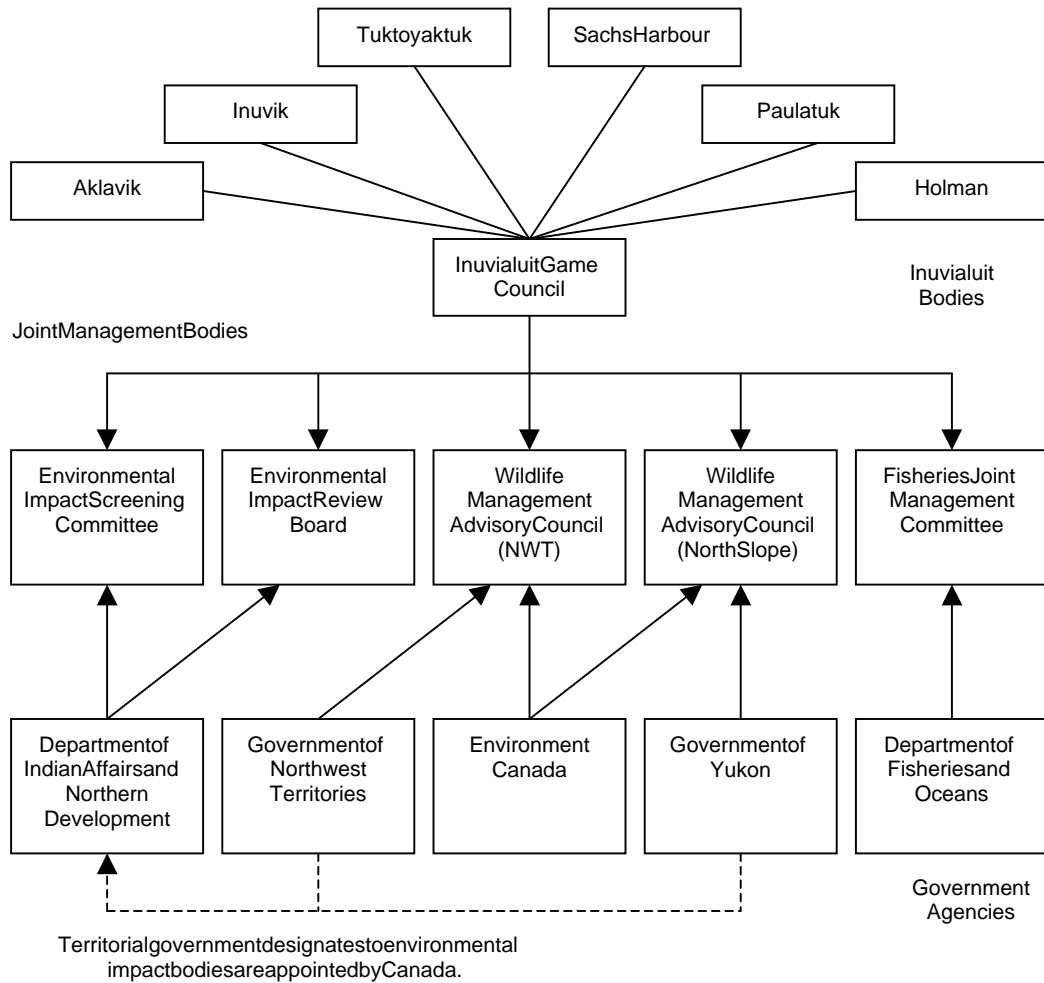
²⁴This results from the definition of “wildlife” and the “Western Arctic Region” in section 2 of the IFA.

various wildlife co-management boards such as the Wildlife Management Advisory Council (NWT), the Wildlife Management Advisory Council (North Slope),²⁵ and the Fisheries Joint Management Committee. All the boards have some jurisdiction over wildlife in the offshore region of the Inuvialuit Settlement Region.

More explicit provisions elsewhere in the IFA make the Fisheries Joint Management Committee the responsible party for fisheries issues in the offshore. In practice, the Fisheries Joint Management Committee regulates and manages beluga whales in the offshore, and no difficulties have arisen over jurisdiction between the boards. The Beaufort Sea Beluga Management Plan in particular has been perceived as the sole responsibility of the Fisheries Joint Management Committee. As such, other wildlife co-management boards will only be reviewed to understand the role of the Fisheries Joint Management Committee or for the purposes of making comparisons.

²⁵IFAs.12(1).

Figure 1: Wildlife and Environmental Structures: Appointing Agencies and Linkages (from IFA Annual Review 1994-1995, Appendix 3, page 27)



Inuvialuit Game Council

The Inuvialuit Game Council is an Inuvialuit body formed of a Chair and at least one representative from each Hunters and Trappers Committee.²⁶ Each Inuvialuit community has a Hunters and Trappers Committee.²⁷ Figure 1: Wildlife and

Environmental Structures: Appointing Agencies and Linkages pictorially describes this relationship. Section 14(74) provides a non-exhaustive list of the role and responsibilities of the Inuvialuit Game Council. It is reproduced in its entirety below, with selected parts being discussed further.

²⁶ IFA s. 14(73).

²⁷ IFA s. 14(75).

14.(74) For the purposes of this Agreement, the Inuvialuit Game Council shall represent the collective Inuvialuit interest in wildlife. Without limiting the generality of the foregoing, the Inuvialuit Game Council shall, among its other activities:

(a) appoint Inuvialuit members for all joint government/Inuvialuit bodies having an interest in wildlife including those referred to in sections 11, 12 and 14;

(b) advise the appropriate governments through the Wildlife Management Advisory Councils (NWT and North Slope) or otherwise as appropriate, on policy, legislation, regulation, and administration respecting wildlife, conservation, research, management and enforcement;

(c) assign community hunting and trapping areas within the Inuvialuit Settlement Region for the purposes of Inuvialuit wildlife harvesting where appropriate;

(d) review and advise through the Wildlife Management Advisory Councils (NWT or North Slope) or otherwise as appropriate, the appropriate governments on existing or proposed wildlife legislation;

(e) review and advise the government on any proposed Canadian position for international purposes that affects wildlife in the Inuvialuit Settlement region;

(f) where appropriate, allocate Inuvialuit quotas among the communities;

(g) appoint members whenever possible or appropriate for any Canadian delegation that deals with international matters affecting wildlife harvesting by the Inuvialuit;

(h) appoint members for any committee or group whose purpose is to investigate any aspect of wildlife usage in the Inuvialuit Settlement Region; and

(i) on request, assist the Wildlife Management Advisory Councils (NWT and North Slope) in carrying out their functions.

Section 14(74) states that the Inuvialuit Game Council represents the collective Inuvialuit interest in wildlife. The Inuvialuit Game Council appoints Inuvialuit members to all joint Inuvialuit-government bodies having an interest in wildlife including: the Fisheries Joint Management Committee, the Environmental Impact Screening Committee, the Environmental Impact Review Board and the Wildlife Management Advisory Councils, for the Northwest Territories and the North Slope. Each of the IFA bodies has a role or may impact upon beluga management. Specific responsibilities described in that section then illustrate how the council may represent the Inuvialuit interest in wildlife. For example, it appoints members to IFA joint management bodies and other committees, groups and delegations, has extensive advisory duties and assigns and allocates harvesting areas and rights among the Inuvialuit. Each of these matters is examined below.

The Inuvialuit Game Council has the ability to appoint members to Canadian delegations dealing with international aspects of wildlife harvesting, and to committees or groups investigating any aspect of wildlife management for the region. Both these appointment and participatory rights are significant for beluga management. Whale hunting is a very

²⁸IFAs. 14(74)(a).

political at the international level. The Inuvialuit Game Council, in conjunction with the Fisheries Joint Management Committee, has been actively participating at the international level to preserve beluga harvesting rights. The right to appoint a member to a committee investigating wildlife usage could be expansively interpreted to include the right to appoint a member to a committee formed for a protected area where wildlife is affected.

The Inuvialuit Game Council also has extensive advisory duties for policy legislation, regulation and the administration of wildlife. It is not clear whether this advisory role occurs independently, or only through nomination of members to joint management boards. The phrase “or otherwise as appropriate,” in conjunction with the non-exhaustive description of the council’s responsibilities suggest the council could perform that advisory role independently of the boards. This interpretational also suggests the council will have an independent role in the establishment and maintenance of any new beluga whale regime in or affecting the Inuvialuit Settlement Region.

The Inuvialuit Game Council also has distinct responsibilities for assigning community hunting and trapping areas for the purposes of wildlife harvesting, and in allocating Inuvialuit quotas among the communities. The council shares the first responsibility with the Hunters and Trappers Committee thus illustrating the overlap between the Inuvialuit organizations. The council shares the second responsibility with both the Hunters and Trappers Committees, and the Fisheries Joint Management Committee. This allocation of the quota will be discussed in the context of the Fisheries Joint Management Committee.

IFAs. 14(74) describes the Inuvialuit Game Council’s role in wildlife management in Canada and internationally, and its interaction with the Wildlife Management Advisory Councils. It does not explicitly describe or refer to the Inuvialuit Game Council’s interaction with the Fisheries Joint Management Committee. Instead, this role must be inferred and has evolved through the practices and conduct of the Committee. The Fisheries Joint Management Committee currently refers all matters, including advice and recommendations, equally to the Inuvialuit Game Council and the Department of Fisheries and Oceans. This occurs because the council, in conjunction with the Inuvialuit Hunters and Trappers Committees, represents the collective Inuvialuit interest in wildlife issues and has a central and coordinating role for the Inuvialuit for wildlife management under the IFA.

In summary, the combination of these roles, and the explicit statement that the Inuvialuit Game Council represents the “collective Inuvialuit interest in wildlife,” suggests that the Inuvialuit Game Council will be one of the Inuvialuit bodies to be consulted with or to participate in any additional legislative regime for beluga whales for the Inuvialuit Settlement Region.

Hunters and Trappers Committees

The Hunters and Trappers Committees act as members of the Inuvialuit Game Council. Each Inuvialuit Community Corporation is required under the IFA to establish a community Hunters and Trappers Committee. This committee then represents the local community on the Inuvialuit Game Council, and fulfills its responsibilities

under IFAs. 14(76).²⁹ Section 14(76) non-exhaustively describes the role and responsibility of the Hunters and Trappers Committees when it states:

14.(76) A Hunters and Trappers Committee shall, among its other activities:

(a) advise the Inuvialuit Game Council on all local matters within the Committee's area of responsibility;

(b) advise the Inuvialuit Game Council on the division of the Inuvialuit Settlement Region into community hunting and trapping areas;

(c) advise the Inuvialuit Game Council on the requirements of subsistence users in regard to the fish and animals referred to in paragraph 6(a), (b) and (c);

(d) sub-allocate the subsistence quota allocated for animals referred to in paragraph 6(a) within its area of responsibility;

(e) sub-allocate any Inuvialuit quota set for fish and animals referred to in paragraphs (6)(a), (b), and (c);

(f) make by-laws, subject to laws of general application, governing the exercise of the Inuvialuit rights to harvest referred to in paragraphs 6(a), (b), (c) and (d);

(g) encourage and promote Inuvialuit involvement in conservation, research, management, enforcement and utilization in relation to the wildlife resources in the Inuvialuit Settlement Region;

(h) assist in providing harvest data on request by the Wildlife Advisory Councils (NWT and North Slope) or by the Fisheries Joint Management Committee; and

(i) on request, assist the Wildlife Advisory Management Councils (NWT and Yukon North Slope) in carrying out their functions.

IFAs. 14(76) lists a number of responsibilities that the Hunters and Trappers Committees have for beluga whales. These responsibilities include advising the Inuvialuit Game Council on local matters, community hunting and trapping areas, and the requirements of subsistence users; making by-laws, subject to laws of general application, governing the exercise of the Inuvialuit harvest; allocating the quota for belugas; and assisting in providing harvest data to the Fisheries Joint Management Committee.

IFAs. 14(76) sheds some light on the relationships between the Hunters and Trappers Committees and the Inuvialuit Game Council. Under the IFA, the former committees have distinct responsibilities, but seem to participate through the council. In practice, however, the Hunters and Trappers Committees seem to function independently, as well as in cooperation with the council. For example, the Hunters and Trappers Committee enact Beluga Hunting By-laws and adhere to the Beaufort Sea Beluga Management Plan.

IFAs. 14(77) provides that the Hunters and Trappers Committee by-laws referred to in IFAs. 14(76) are enforceable under the *Wildlife Ordinance* of the Northwest Territories. This is a piece of legislation that addressed game management on lands within the Northwest Territories, and traditionally has not been applied to wildlife in offshore waters. Despite IFAs. 14(77), the territorial government has not asserted authority or jurisdiction over offshore waters. Instead, Hunters and Trappers Committee by-laws with respect to fish and marine mammals have been

²⁹IFAs. 14(75).

supported by the enforcement of similar measures under the *Fisheries Act* and regulations. In practice, officers of either territorial government or Department of Fisheries and Oceans have the ability to enforce both pieces of legislation. For these reasons, it is not an issue at the present time even though IFAs. 14(77) may inadvertently create some ambiguity over federal and territorial jurisdiction for offshore waters.

Fisheries Joint Management Committee (FJMC)

IFAs. 14(61) establishes the general principles and parameters of the Fisheries Joint Management Committee, which are augmented and interpreted by other more specific provisions below.

14.(61) To assist Canada and the Inuvialuit in administering the rights and obligations relating to fisheries under this Agreement, and to assist the Minister of Fisheries and Oceans of Canada in carrying out his responsibilities for the management of fisheries, the Minister of Fisheries and Oceans shall establish a Fisheries Joint Management Committee to advise him on matters relating to Inuvialuit and Inuvialuit Settlement Region fisheries.

The Committee is both an advisory body and a joint management body by virtue of title, and duties and processes elaborated in other provisions in section 14. It has a role in administering the rights and obligations relating to fisheries under the Agreement, which include the interpretation and implementation of IFA with respect to fish. The Committee also assists the Minister of Department Fisheries Oceans in carrying out responsibilities for the management of fisheries, which implies overall management

of resource in the geographical area of Inuvialuit Settlement Region. The final phase in IFAs. 14(61) of “matters relating to Inuvialuit and Inuvialuit Settlement Region fisheries” emphasizes that it is not limited to Inuvialuit harvesting rights, but that it also advises the Minister on fisheries for Inuvialuit Settlement Region. As a result, the Fisheries Joint Management Committee has broader obligation than the IFA and may have ongoing objective role in any regime established for the Inuvialuit Settlement Region. This implies a partnering relationship under the *Oceans Act* could be required between the department and the Committee if a marine protected area is established.

Membership of the Fisheries Joint Management Committee is illustrative of its joint management role. The Committee is formed of a chair, and equal membership from the Inuvialuit Game Council and the government of Canada. Under the IFA, the Inuvialuit Game Council and the government of Canada each appoint two members to the Committee. Though the agreement does not describe who in government appoints members to the Fisheries Joint Management Committee. In practice, the Department of Fisheries and Oceans appoints the government members, with subsequent ratification by a Cabinet decision. The members then appoint the chair.³⁰

The IFA specifies that the members of the committee each have one vote, with the chair only voting in the event of a deadlock.³¹ In practice, decisions of the Fisheries Joint Management Committee are

³⁰IFAs. 14(62).

³¹IFAs. 14(63).

consensual, with unanimous consent of all the members. Formal votes only tend to be recorded for matters such as financial allocations, or with respect to certain recommendations, such as the one subsequently accepted by government for an Inuvialuit subsistence bowhead whale harvest.³²

Section 14(64) then provides an non-exhaustive description of the roles and responsibilities of the Fisheries Joint Management Committee. The following provisions describe the Committee and its role for beluga whale regulation.

14.(64) The Committee shall, among its other activities:

(a) review information on the state of fishing in water on 7(1)(a) and 7(1)(b) lands and Crown lands in any areas where the Inuvialuit have an interest and fishery related activities on 7(1)(a) and 7(1)(b) lands;

(b) identify areas in water on 7(1)(a) and 7(1)(b) lands where fishing has taken place and predict where fishing may in the future take place;

(c) determine current harvest levels

(d) develop, maintain and control a public registration system for fishing in water on 7(1)(a) and 7(1)(b) lands and for entry on 7(1)(b) lands for the purpose of fishing;

(e) restrict and regulate the public right to enter on 7(1)(b) lands for the purpose of fishing where such restriction and regulation is required for the purpose of fishing where such restriction and regulation is required for the conservation of a stock, to prevent serious conflict with Inuvialuit activities, to prevent interference with other Inuvialuit use of the land to which they have title or to prevent unreasonable interference with Inuvialuit use and enjoyment of the land;

(f) deny entry to persons who abuse their right;

(g) allocates subsistence quotas among communities;

(h) determine the reporting requirements and review the role of the Hunters and Trappers Committee in regulating the subsistence harvest and collection of harvest statistics;

(i) make recommendations to the Minister of Fisheries and Oceans on subsistence quotas for fish, harvestable quotas for marine mammals, Inuvialuit commercial fishing, allocation of preferential fishing licences to be granted under subsections (29) to (32), regulations regarding sport and commercial fishing in water on 7(1)(a) and (b) lands and the identification of waters where such fishing may be prohibited; and

(j) advise the Ministers of Fisheries and Oceans on regulations, research policies and administration of fisheries generally affecting the Inuvialuit Settlement Region, and on new international agreements being developed that might apply to Inuvialuit fisheries.

Section 14(64) is described as “non-exhaustive” because the Committee has evolved into roles and responsibilities not explicitly described by the IFA. An example

³² Inuvialuit Communications Society, *The Inuvialuit Bowhead Harvest of 1991*. This publication provides a pictorial history and analysis of the events preceding the actual hunt.

would be the substantive and coordinating role of the Committee in the establishment of a Beaufort Sea Beluga Management Plan. Some of the matters addressed in the Plan are explicitly described in the IFA; while other matters are not. Therefore, it is a matter of interpretation as to which aspects of the Plan are likely to be constitutionally protected under the IFA, and which matters are only binding due to the agreement of the parties.

The responsibilities described in IFA s. 14(64) potentially impact upon beluga whales. The Fisheries Joint Management Committee has the ability to determine the current harvest levels for beluga whales, and to allocate subsistence levels of beluga whales among communities. As mentioned earlier, the IFA shares this responsibility for allocation of the subsistence levels with the Inuvialuit Game Council and the Hunters and Trappers Committees, both wholly Inuvialuit bodies. The latter Inuvialuit bodies will have the best knowledge of how to allocate quota among communities in times of scarcity. In contrast, the Fisheries Joint Management Committee is more akin to an “institution of public government” with a duty to act fairly and impartially. While this has not been a contentious issue, the Committee could in practice defer to the judgement of the Inuvialuit bodies unless that allocation seems unreasonable or unfair.

Neither harvest levels nor subsistence quotas are currently in place for beluga whales. The Committee has made few formal recommendations for subsistence quotas or harvestable quotas for beluga whales or for the allocation of preferential fishing licences for beluga whales. However, the Committee does determine reporting requirements and review aspects of the Hunters and Trappers Committee’s role in

regulating the beluga whale harvest and collecting statistics of that harvest.³³

The Fisheries Joint Management Committee also advises the Minister of Fisheries and Oceans on regulations, research policies and administration of beluga whales in the Inuvialuit Settlement Region; and, in conjunction with the Inuvialuit Game Council, on new international agreements being developed that might apply to beluga whales. It is not clear how “advice” is treated as the IFA only provides a specific process for how the Minister must consider the “recommendations” of the Committee.³⁴

The IFA provides for a very formal process as to how the Committee’s recommendations under IFAs. 14(64)(i) must be treated. This is somewhat similar to but more detailed than the treatment of recommendations of the Environmental Impact Review Board for environmental assessment of developments,³⁵ or recommendations of the Arbitration Board for compensation for future wildlife harvest loss.³⁶ There is no parallel process for treatment of the recommendations of the Wildlife Management Advisory Council for either the Yukon North Slope or the Northwest Territories.

The IFA requires the Minister to provide written reasons within 30 days for varying or rejecting a recommendation of the Fisheries Joint Management Committee. It then requires the Committee to consider

³³For example, Hunters and Trappers Committee Beluga Hunting By-laws, and the training of Inuvialuit monitors.

³⁴IFAs. 14(65)(i) and ss. 14(65-72).

³⁵IFA ss. 11(29-31).

³⁶IFAs. 13(24).

that written decision of the Minister and submit a further recommendation within thirty days. The Minister is then required to provide another written decision within 30 days if the further recommendation is not accepted.³⁷ The Minister can also request the Committee to provide a recommendation on a matter referred to in IFAs. 14(64)(i), and the Committee must provide that recommendation within 30 days of receiving that request.³⁸ Lastly, the Minister may make an interim decision “where the good management of the resources requires” which shall only be effective until the formal process described in ss. 14(65-70) is completed. However, no interim decision may be made or implemented unless the Minister has given the Committee a reasonable opportunity to provide a recommendation.³⁹

This formal process for considering a recommendation will be constitutionally protected, and must be adhered to by the Minister of Fisheries and Oceans. The degree of formality of the treatment of the recommendations of the Fisheries Joint Management Committee also suggests that, in this instance, it is behaving in a very formal role like a decision-making body. The Department of Fisheries and Oceans also perceives “recommendations” as significantly different from “advice,” and may treat advice in a more discretionary manner.

An interesting question then arises though of the necessary treatment of the “advice” of the Committee pursuant to IFA s. 14(64)(j), as the IFA is silent. Arguably,

³⁷ IFA ss. 14(65-69).

³⁸ IFAs. 14(70).

³⁹ IFA ss. 14(71-72).

their treatment depends on the importance of the advice and the centrality of that advice to the IFA’s goals. The status and necessary treatment of the advice will vary with the matter being advised on, and the overall provisions of the IFA. The Agreement creates complex rights that circumscribe the activities of the federal and territorial governments.

The Fisheries Joint Management Committee also has a number of other roles that fall neither within “advice” or “recommendations.” The Fisheries Joint Management Committee has coordinated the development of a Beaufort Sea Beluga Management Plan and associated regulations with the Inuvialuit Game Council and the Hunters and Trappers Committees. The Plan has been executed by the Committee, the Inuvialuit Game Council and the Department of Fisheries and Oceans and adhered to by these and other parties. Specifics of this plan, its status and enforceability are examined below .

Beaufort Sea Beluga Management Plan

Introduction

The Beaufort Sea Beluga Management Plan (the Plan), in conjunction with the Hunters and Trappers Committees Beluga By-laws and Tourism Guidelines, is the central management tool for regulating the beluga whale harvest and protecting belugas. The analysis will review the evolution of the Plan, and the Hunters and Trappers Committees Hunting By-laws and Tourism Guidelines. There will also be a discussion, where relevant, of the status and enforceability of the Plan, and the by-laws and the guidelines referred to in the Plan,

against third parties who operate within or affect the Inuvialuit Settlement Region.

The Beaufort Sea Beluga Management Plan has its antecedents in IFA s. 14(61) and the responsibilities of the Fisheries Joint Management Committee. Under IFAs. 14(61), the Committee is required to assist the Minister of Fisheries and Oceans in carrying out the responsibilities for the management of fisheries, and to advise the Minister on all matters relating to fisheries affecting the Inuvialuit and the Inuvialuit Settlement Region.

In 1988, the Wildlife Management Advisory Council (NWT) and the Fisheries Joint Management Committee prepared and executed the Inuvialuit Renewable Resource Conservation and Management Plan. This plan establishes a long-term strategy for conservation and management of wildlife in the Inuvialuit Settlement Region, and provides a rationale for community users and resource managers.⁴⁰ The Department of Fisheries and Oceans initiated negotiations for the Beaufort Sea Beluga Management Plan prior to the establishment of the Fisheries Joint Management Committee. The first version of the Plan was developed by the Fisheries Joint Management Committee in 1991, in cooperation with the Hunters and Trappers Committees of Aklavik, Inuvik, Paulatuk and Tuktoyaktuk, and the Department of Fisheries and Oceans, after several years of discussion and extensive community consultation. The oil and gas

⁴⁰ Inuvialuit Renewable Resource Conservation and Management Plan, pages 10-14. This plan discusses community conservation plans, the active involvement of the Inuvialuit in resource management and the determination of harvest and quotas, and the development of appropriate legislation and conservation agreements.

industry also participated in the evolution of the first version of the Plan and, in particular, focused on the identification of zone boundaries.

A second printing of the plan occurred in March 1993 with a third printing scheduled for late 1997. Technically, the second version of the Plan is in force. The third printing of the Plan has not yet been executed by the signatories to the earlier versions of the plans, though it has not been significantly altered from those earlier plans. The draft third printing of the Plan will be referred to when quoting from the Plan as it contains the most up to date background information and some revised language. Research, monitoring and regulations necessary for the implementation of the Plan are provided by the Hunters and Trappers Committees, the Inuvialuit Game Council, the Department of Fisheries and Oceans and the Committee.

The Beaufort Sea Beluga Management Plan evolved in response to rights and responsibilities under the IFA. The Plan can in part be viewed as a practical evolution of these roles and responsibilities under the IFA as it involves both matters referred to under the IFA, and matters distinct from the IFA. A senior representative of the Department of Fisheries and Oceans, all members of the Fisheries Joint Management Committee and the Chair of the Inuvialuit Game Council execute the Plan. Thus, the Plan binds the signatories that respectively represent the key federal regulator with responsibilities over beluga whales, the Inuvialuit-government joint management regime involved in beluga whale management, and the party who represents the Inuvialuit interest in wildlife.

Certain issues then arise such as whether and under what circumstances any of the signatories could withdraw their consent to the Plan. The Plan itself is silent with respect to these circumstances. However, consent is unlikely to be absolute, and circumstances can be contemplated where parties withdraw their consent on the provision of some reasonable notice. Additionally, there is the issue of the enforceability of the Plan against other government agencies, IFA bodies and third parties. To my knowledge, no legislation, regulations or policy guidelines are formally in place to require these parties to comply with the Plan. Both these issues will be explored in the context of specific elements of the Plan.

The Beaufort Sea Beluga Management Plan was developed to be consistent with the Inuvialuit Renewable Resource Conservation Management Plan, and has two goals:

- to maintain a thriving population of beluga whales in the Beaufort Sea; and
- to provide for optimum sustainable harvest of beluga by Inuvialuit. (p. 3)

The Plan is divided into the following elements: Sustainable Harvests, Conservation and Protection and Supporting Programs. Each of these elements will be reviewed in turn.

Sustainable Harvests

The objectives of the “Sustainable Harvests” portion of the Plan are:

- to provide for a level of harvest that generates the greatest net benefit to the Inuvialuit while ensuring the long-term sustainability of beluga in the Canadian Beaufort Sea; and
- to ensure an efficient harvest. (p. 5)

This portion of the Plan provides information about the Inuvialuit communities who participate in beluga harvesting, the average harvests for the years 1984-1996, the stuck and loss rates, the size and migration patterns of the beluga stock, and the total allowable catch.

In particular, the Plan discusses why the Fisheries Joint Management Committee, and other signatories to the Plan, chose not to establish a total allowable catch. A total allowable catch was included in the first printing of the Plan, but not subsequent printings. IFAs 14(64)(i) also refer to the role of the Committee to make recommendations on “harvestable quotas for marine mammals.” The Plan states that it no longer includes the total allowable catch because of the accurate and reliable information provided in the beluga monitoring program, and the results of a 1992 aerial survey which have established the presence of far more whales (20,000 or more), than the original estimates of 7,500.

The absence of a total allowable catch in the second and third printing of the Plan should not be taken to suggest that the beluga whales are not managed. There is an intensive and expensive beluga harvest management program carried out annually by the Fisheries Joint Management Committee and the Hunters and Trappers Committee that determine the level of the

harvest and the biological parameters of the harvest. It also ensures that the annual harvest is consistent with the IFA's definition of conservation. Additionally, there is little year to year variation in the size of the Inuvialuit harvests suggesting the harvest may be characterized as self regulated, with a collective self-imposed quota based on need and past experience. ⁴¹

In the absence of an estimate of the total allowable catch or harvestable quota, there is no Inuvialuit subsistence quota for beluga whales that would have priority over commercial quotas. However, this is not a key concern as only aboriginal peoples are authorized to hunt beluga whales under the *Marine Mammal Protection Regulations* for subsistence purposes, and, in Canada, only the Inuvialuit have consistently harvested the Beaufort Sea beluga whale stock. The Inupiat in Alaska also hunt this stock in US waters, and the Inuvialuit and the Inupiat are negotiating the Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement. This agreement is summarized below.

The Plan recognizes that the total allowable catch number could be a useful tool in the future, and defines this number as the total number of beluga that can be struck by hunters in a single hunting season without reducing the number of beluga in the overall population, or that ensures that the number of adult beluga taken from the population through hunting and other natural causes of death will not be greater than the number of beluga that reach breeding age each year. This definition of total allowable catch is similar to the definition of conservation under the IFA, which is defined in terms of managing wildlife and

their habitat in order to achieve a sustainable harvest.

The definitions of total allowable catch also incorporate the experience and knowledge of the Inuvialuit hunters who have the most ongoing familiarity with the stock. This is consistent with IFAs 14(5) that require that the knowledge and experience of both the Inuvialuit and the scientific community be used to achieve conservation. For example, the Inuvialuit have always believed that their harvest did not have an appreciable impact on the Beaufort Sea stock. More recent scientific evidence such as a 1992 aerial survey confirmed this belief. In the absence of this scientific confirmation, potential conflict could have arisen between Inuvialuit and scientists over the size of the stock. It is also not clear whether a quota could have been applied over the objections of the Inuvialuit, given the weight the IFA accord to traditional knowledge.

More pragmatically, the Plan states that the Department of Fisheries and Oceans are responsible for the necessary counts, and the Inuvialuit will continue to provide accurate harvest information and participate in the collection of biological data, in order to assemble this number.

Conservation and Protection

The "Conservation and Protection" portion of the Plan is divided in the following interrelated sections "Guidelines for Development Activities," "Tourism, Belugas and Beluga Hunting," and "By-laws and Regulations." The guidelines for development activities section is reviewed first, followed by the remaining two sections.

⁴¹Oral discussions with Bob Bell, Chair, Fisheries Joint Management Committee.

Guidelines for Development Activities

The Plan provides guidelines for developments that affect beluga whales. The severity, likelihood and biological implication of these effects are for the most part unknown. Development is defined to include oil and gas exploration, production and transportation, hydroelectric developments, mining, deep-water port development and shipping. It notes the absence of commercial fisheries at this time in the Canadian Beaufort Sea, but that commercial fishing may be pursued in the future. The Plan recognizes that any commercial fishery could reduce the food available to belugas, and that the food requirements of beluga should be taken in account in developing a commercial fishery. However, the Plan notes that current scientific information on species interaction and beluga feeding ecology is insufficient to allow an assessment of the impact of a medium commercial fishery.

The objectives of this section are then listed followed by a description of beluga management zones, which are the means of satisfying the objectives for development activities, and for conservation and protection in general. The objectives are as follows:

- To protect beluga, beluga habitat and beluga harvesting.
- To provide guidelines and information to assist Government, the Environmental Impact Screening and Review Process and the Inuvialuit Lands Administration in their evaluation of development proposals

which may affect beluga, beluga habitat or beluga harvesting.

- To provide information in a format that will assist the Mackenzie Delta–Beaufort Sea Regional Land Use Planning Commission in developing its comprehensive land use plan.
- To provide guidelines to assist industry in preparing development proposals.⁴²

The text then describes the four zones, and the applicable guidelines for each zone. The Plan states that the zones are intended to assist decision makers in their consideration of special regulations, codes of conduct, or international agreements needed to guarantee that beluga are conserved, the harvest assured and the habitat protected, and other compatible uses of the resource allowed. The guidelines are intended to provide specific guidance for IFA joint management bodies (the Environmental Impact Screening Committee and the Environmental Impact Review Board) and government agencies (i.e., the Department of Indian Affairs and Northern Development) in their evaluation of development for Crown lands in the Inuvialuit Settlement Region. The guidelines are also intended to assist the Inuvialuit Land Administration in administering Inuvialuit private lands.

As evident from Figure 2: Beluga Management Zones, there are four zones

⁴² Beaufort Sea Beluga Management Plan, pp. 8–9.

under the Plan, with Zone 1 being afforded the most protection. The guidelines preclude certain types of activities (e.g., hydrocarbon exploration, production and transportation), and temporarily restrict other forms of activity (e.g., mining from break-up to August 15). Zones 2 and 3 permit certain activities, subject to those activities not having any direct, indirect, cumulative or long-term adverse impacts on the beluga, beluga habitat or harvesting. The Zone 4 addresses international waters, and stresses the need for international agreement between governments, and parties such as the Inuvialuit and the Inupiat.

This description of development activities in the Beaufort Sea Beluga Management Plan also sheds some light on the relationship between the Plan and the environmental impacts screening and review process in the IFA. The terms, “developer” and “development,” are expansively defined in section 2 of the IFA and function as the trigger for the involvement of the Environmental Impact Screening Committee and the Environmental Impact Review Board. Section 2 defines developer and development in the following way.

“developer” means a person, the government or any other legal entity owning, operating or causing to be operated any development in whole or in part in the Inuvialuit Settlement Region, and includes any co-contractant of such owner or operator. For greater certainty, “developer” includes any Inuvialuit developer

“development” means:

any commercial or industrial undertaking or venture, including support and transportation facilities relating to the extraction of non-renewable resources from the Beaufort Sea, other than commercial wildlife harvesting; or

any government project, undertaking or construction whether federal, territorial, provincial, municipal, local or by any Crown agency or corporation, except government projects within the limits of communities not directly affecting wildlife resources outside these limits and except government wildlife enhancement projects;

The committee must screen any developments referred to it by the Inuvialuit to determine if those developments may result in a significant negative environmental impact, and thus require review by the board or some other government body.⁴³

The EISC reviews all development proposals for the Inuvialuit Settlement Region including tour operators and tourism applications. Certain aspects of the guidelines for beluga and beluga habitat protection are indirectly referred to in Appendix D: Determination of Potential for Significant Negative Environmental Impact of the Environmental Impact Screening Committee—Operating Guidelines and Procedures (September 1994). Appendix D states the following:

In determining the potential for significant negative environmental impact, the EISC includes, for example, the consideration of the following:

1. Conflict with Inuvialuit Community Conservation Plans where such conflict has not been waived by the affected HTC....

⁴³ IFAs, 11(1)(c).

5. Potential significant habitat loss, disturbance, or population decline for any species with special conservation status, keystone species or species harvested by the Inuvialuit, as determined by the WMAC (NWT and/or North Slope) and/or Fisheries Joint Management Committee (FJMC).

6. Encroachment on an area with particularly high biodiversity potential.

7. Conflict with traditional Inuvialuit harvesting where this has not been waived by the affected HTC.

Interestingly, tourism activities are not referred to as development activities but are treated separately under the Beaufort Sea Beluga Management Plan. An argument can be made that tourism activities are also development activities that may potentially adversely affect wildlife, wildlife habitat and wildlife harvesting, and thus should be subject to the screening and review process under the IFA. As such, it would be appropriate for the Plan to be amended to include tourism activity as a development activity, and to either prohibit or restrict these activities within certain zones. This amendment would result in tourism being treated consistently with other development, and focus on its adverse effects on beluga whales.

An issue to be considered is the enforceability of the guidelines for development activities. Until now, the IFA joint management bodies and governments who assess a development proposal have considered the guidelines. There does not seem to be any binding requirement that these parties consider or in any way adhere to these guidelines when making their recommendations and decisions. Only the Department of Fisheries and Oceans is likely

to be bound by the guidelines as a developer of and signatory to the Plan. This deficiency should be addressed. A requirement that development conform to the Plan could resolve future conflicts. Other organizations, such as the Department of Indian Affairs and Northern Development and the territorial governments, will not be bound.

As a matter of administrative law and their enabling statutes, these co-management boards and governments may not be able to agree in advance to adhere to the guidelines, unless the guidelines are entrenched in law and deemed to override any inconsistent legislation. Otherwise, these boards and agencies may be deemed to be improperly making an advance judgement before considering all relevant matters. However, as a preliminary matter, these guidelines could be submitted to these boards and governments for a confirmation that these guidelines will be explicitly considered whenever a decision or affecting these zones is made.

Figure 2: Beluga Management Zones

Zone	Description of Zone	Guidelines for Zone
Zone 1a Traditional Harvesting Concentration Areas	1800 square kilometres of shallow waters at the mouth of the Mackenzie R., including summer concentration area of Shallow Bay, east Mackenzie Bay and Kugmallit Bay. Beluga harvested by Inuvialuit from Inuvik, Tuktoyaktuk and Aklavik.	Zone 1 is a Protected Area according to guidelines in the Inuvialuit Renewable Resource Conservation and Management Plan. No oil and gas exploration, production or related construction in this area. No mining activities (e.g., gravel removal) from break-up until August 15. All shipping activities (including dredging) should be confined to designated routes. Passage outside these routes should be avoided from break-up to August 15. No port development within or on the shores of Zone 1.
Zone 1b Occasional or Potential Harvesting Areas	Areas where Beluga harvested by Inuvialuit of Paulatuk and occasionally by Holman, and where Sachs Harbour residents may harvest.	Development activities outside Zone 1 should be evaluated for potential deleterious effects on water quality, quantity or on stability and integrity of Zone 1 ice. Commercial fishing proposals in Zone 1 evaluated for impact on beluga food species. Developers, regulators and other interested parties should consult with Hunters and Trappers Committees.
Zone 2	Mackenzie shelf waters shallower than 20 metres that were not included in Zone 1. Extends from Cape Bathurstine east to Kay Point on the Yukon coast to the west. Major travel corridor used by beluga to move into, out and among various bays of Mackenzie estuary.	Development permitted if does not adversely affect the conservation of the beluga, protection of beluga habitat and hunting, and conducted in controlled and responsible manner. Assessment of development must consider direct effects on beluga (contamination, Inuvialuit Settlement Region disruption and displacement) as indirect effects (stability and integrity of ice, timing of breakup and food availability).
Zone 3	Remaining range of beluga in Beaufort Sea and Amundson Gulf (waters greater than 20 metres deep). Bounded by Victoria Island on east, permanent pack ice on north, and Alaska-Yukon border on west.	Assessments must consider potential for cumulative impact and long-term effects. Commercial fishing proposals are reevaluated with to beluga food species. Developers, regulators and other interested parties should consult with Hunters and Trappers Committees.
Zone 4 International Waters	Winter range of beluga population, and outside Canadian waters. Includes Alaskan Beaufort Sea, Chukchi Sea and Bering Sea.	An international agreement should be developed to beluga are managed and protected throughout the range. Exchange of information between Canada and Alaska on industrial activities that could affect well being of beluga.

Figure 3: Map of Beluga Management Zones
Detailed Inset of Beaufort Sea

Tourism, Belugas and Beluga Hunting

The Plan notes that interest in viewing both belugas and beluga harvesting is increasing, and that the opportunities to view both the animals and the harvesting are valid uses of the resource. However, if this situation is not controlled it could lead to both a negative impact on Inuvialuit harvesting activities and harassment of the beluga whales. This section of the Plan is governed by the following objective: to facilitate opportunities associated with belugas while minimizing the impacts of such activities on belugas and beluga harvesting.⁴⁴

As sustainable harvesting and tourism may not be compatible activities, the Hunters and Trappers Committees prepared Tourism Guidelines which were then approved by the Inuvialuit Game Council on June 22, 1994. These Tourism Guidelines are referred to in the Plan. The Tourism Guidelines are summarized below, and contain the following requirements and prohibitions:

- Subsistence hunting takes priority over tourism activities.
- In recognition of the priority of the subsistence beluga harvest, no water based tourism or related activities are permitted in Zone 1(a).
- Hendrickson Island is off limit to any tourism activities.
- Pursuant to the *Fisheries Act*, tour operators must

ensure their clients don't harass whale and marine mammals. There are aircraft restrictions and minimum flight altitudes.

- The Inuvialuit have guiding and outfitting priority in the Western Arctic as a result of IFA s. 14(42).
- Hunters and Trappers Committees will designate areas to be used for whale watching and tourism within the Inuvialuit Settlement Region, and retain the right to limit the number of designated areas, the number of operators and the number of tourists. In the event of dispute over use, preference will be given to an Inuvialuit operator.
- Tourism operators must have written agreements with the local Hunter and Trapper Committee and the Camp Owner, and these agreements are to be attached to Operators Licence issued by Economic Development and Tourism of the government of the Northwest Territories. The duration of the tour group stay outside of a regular whaling camp will be at the discretion of the local Hunter and Trappers Committee, though it may

⁴⁴ Beaufort Sea Beluga Management Plan, p. 15.

- be extended in the event of an emergency.
- No one is permitted to take photographs, films of whale harvesting without the written consent of the Inuvialuit Game Council, the local Hunters and Trappers Committee, and the Camp Owner. Similar provisions are in place for media involvement in any activity relating to beluga whales.

These guidelines are referenced in the Plan. As the Department of Fisheries and Oceans is a signatory to that Plan, the department is committed to adhere to and enforce the guidelines. The question would then be whether a third party could challenge the guidelines on the basis that they are not consistent with the IFA, or the *Fisheries Act* and regulations. Some provisions in the Tourism Guidelines are more consistent with resource management and conservation than other provisions. The first four provisions listed above are similar to the guidelines for development activities, and are supportable as measures designed to protect beluga whales, habitat and harvest. They could be more appropriately included as development activities to be considered by government agencies and IFA joint management boards when reviewing proposed tourism activities.

The latter four provisions are not as focused on beluga management and conservation. Instead, they address the economic value derived from tourism and the desire of the Inuvialuit Game Council and local Hunters and Trappers Committees to control how tourism is implemented and any associated negative publicity. These

tourism activities may not necessarily interfere with belugas, their habitat or harvesting. Guidelines in these areas are supportable if they are justified under other provisions of the IFA, or regulate commercial activities on Inuvialuit private lands. For example, section 14(42) provides that the Inuvialuit have first priority in the Western Arctic Region for guiding, outfitting and activities related to wildlife. Tourism activities are arguably commercial activities in relation to wildlife. Similarly, IFAs 7(13) only provides a public right of access to Inuvialuit lands adjacent to water. It does not authorize commercial access to Inuvialuit lands for purposes of tourism activities. That activity is likely to be within the auspices of the Inuvialuit Land Administration.

Lastly, this portion of the Plan comments on disturbance of beluga whales and notes that many human activities can be controlled through application of the Hunters and Trappers Committee by-laws, the *Marine Mammal Protection Regulations* and the Tourism Guidelines. It also notes that a general prohibition against disturbance is contained in the *Fisheries Act*, and that general guidelines developed by that department for whale watching should be adopted by the Hunters and Trappers Committees and distributed to tourism operators.

Adequate enforcement of the Tourism Guidelines does not seem to be a problem, though there is some concern about its potential in the future. The Department of Fisheries and Oceans is responsible for the enforcement of the *Fisheries Act* and the *Marine Mammals Protection Regulations*. The *Fisheries Act* and regulations are duly enacted federal laws, and bind all parties. Currently, both federal fisheries officers and

territorial wildlife officers are authorized to enforce and lay charges under the *Fisheries Act* and regulations. An interesting question is whether one can require enforcement. Enforcement tends to be discretionary under most legislation. Further if there is a concern about a department's enforcement practices within one legislative regime, this concern tends to persist even if a new regime is enacted. Uncertainty over enforcement is best addressed by discussions with the relevant department, or the enactment of measures that permit private enforcement.

By-laws and Regulations

In many ways, this portion is the heart of the Plan. Introductory comments to this section of the Plan emphasize how and by what means the Plan will be enforced.

The ongoing implementation of this Plan requires a continuing firm commitment and coordinated effort by the Inuvialuit and the Government of Canada to be prepared to make changes to existing legislation or formulate new laws as may be required. Parties to this Plan must recognize and be prepared to deal directly with any real or potential threat which may adversely affect beluga habitat. (p17)

The objectives are listed immediately after this passage, and are as follows:

- to protect the Beaufort Sea beluga resource and the harvest of that resource; and
- to formulate, amend and implement guidelines, by-laws, and regulations necessary to protect the beluga, beluga habitat and the beluga harvest. (p. 17)

Beluga protection laws, Hunters and Trappers Committee hunting by-laws and enforcement realize these objectives. Each of these matters is reviewed in turn.

The *Marine Mammal Protection Regulations* (enacted under the *Fisheries Act*), and the *Oceans Act* are cited as examples of laws for beluga protection. The *Marine Mammal Protection Regulations* authorize the Inuvialuit and other aboriginal people to hunt marine mammals, including beluga whales. The *Oceans Act* is cited as it contains provisions to establish marine protected areas that would provide recognition and protection for the beluga management zones.

Hunters and Trappers Committees Beluga Hunting By-laws and Beluga Hunting Guidelines are community by-laws to ensure efficient and safe hunting of belugas. Though each local Hunters and Trappers Committee enacts their own by-laws and guidelines, they are quite similar, and include specific community standards and practices for harvesting belugas. As such, they regulate the exercise of Inuvialuit harvesting rights, and need only be consistent with laws of general application. 45

Enforcement is addressed last. The Plan states that the Department of Fisheries and Oceans is responsible for the enforcement of the *Fisheries Act* and the *Marine Mammal Protection Regulations*. Further, the Plan states that fisheries officers under this Act and regulations can enforce the Hunters and Trappers Committees by-laws and guidelines. If this is correct, fisheries officers have the ability to enforce Hunters and Trappers Committees' by-laws and guidelines if they fall within, and are consistent with the *Fisheries Act* and

⁴⁵ IFAs. 14(76)(f) and IFAs. 14(78).

regulations. Adequate enforcement of these by-laws and guidelines does not seem to be an issue at the present time. As they apply primarily to Inuvialuit, there are also many informal means to enforce these by-laws and guidelines.

Supporting Programs

The Supporting Programs for the Plan are composed of monitoring and research, and education and public awareness. The objective of monitoring and research is to provide necessary and new biological information for the conservation, management and optimal utilization of the beluga whales, and for the implementation of the Plan. This is accomplished by the incorporation of traditional ecological knowledge, the involvement of the Inuvialuit in the research project, and Inuvialuit implementation of research and monitoring. The objective of education and public awareness is to initiate school and hunter education programs. This is accomplished through programs of classroom instruction and, for the Inuvialuit, practical training and teaching aids.

The Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement

The IFABeaufort Sea Beluga Management Plan operates within an international framework. There will be a brief review of the role of the Inuvialuit Game Council in the context of the draft

Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement—an international beluga management initiative underway between the Inuvialuit and the Inupiat.

The Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement is a draft agreement between the Inuvialuit and the Inupiat of Northern Alaska to work together to cooperatively manage a shared resource. The agreement will be signed by the chair of the Inuvialuit Game Council, the chairs of the North Slope Fish and Game Management Committee and the chair of the Kivalina Whaling Captains Association. In the preamble to the agreement, the Inuvialuit and the Inupiat state they will manage their use of beluga whales in accordance with the Beaufort Sea Beluga Management Plan, and the Alaska Beluga Whale Committee Management Plan respectively. Within the agreement, the parties agree to establish an Inuvialuit and Inupiat Beluga Commission consisting of three appointees from each of the Inuvialuit Game Council and the North Slope Fish and Game Management Committee, and one appointee from the Kivalina Whaling Captains Association to oversee the terms of the agreement. The parties agree the Commission will meet at least once every two years, to share information on their respective beluga harvest data and planned research, and, where desirable, to conduct joint research. Parties to the agreement are hoping to sign a final version by the fall of 1997.

Oceans Act

Introduction

The *Oceans Act* was assented to and proclaimed law on December 18, 1996. This

analysis is limited to a review of provisions concerning marine protected areas. The preamble and ocean management strategy in the Act, and a discussion paper from the

Department of Fisheries on marine protection areas will be examined.

The Act's preamble summarizes its purposes: Canada's rights to a territorial sea of 12 miles and an exclusive economic zone of 200 miles, and the promotion of the integrated management of oceans and marine resources through integrated management plans, cooperation, agreements, and marine protected areas. While a preamble to legislation is not legally binding, it is often used for interpretive purposes to shed light on the meaning and intent of the Act. As such, a number of comments in the preamble are relevant for the discussion of marine protected areas.

WHEREAS Canada holds that conservation, based on an ecosystem approach, is of fundamental importance to maintaining biological diversity and productivity in the marine environment;

WHEREAS Canada promotes the wide application of the precautionary approach to the conservation, management and exploitation of marine resources in order to protect these resources and preserve the marine environment;

...

AND WHEREAS the Minister of Fisheries and Oceans, in collaboration with other ministries, boards and agencies of the Government of Canada, with provincial and territorial governments, and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, is encouraging the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems; [Oceans Act, *preamble*]

This portion of the preamble is significant as it introduces two of the recurring themes in the *Oceans Act*: the definition of conservation and the role of aboriginal organizations and bodies established under land claims agreements. Conservation is defined in the Act as an ecosystem approach, taking into account the precautionary approach, or as erring on the side of caution, when conserving, managing or exploiting a marine resource.⁴⁶ The Inuvialuit Final Agreement has a more specific definition of conservation in terms of managing wild life populations and habitat to maintain the quality and efficient use of the available harvest. The IFA definition of conservation can be viewed as consistent with the *Oceans Act*'s definition, and can if necessary modify the meaning of conservation for any marine protected area established under the Act.

The Act explicitly recognizes the rights of aboriginal organizations and the joint management boards created under land claims agreements. Similar provisions to the preamble are found throughout the Act. Additionally, section 2 of the Act contains a clause frequently found in recent federal legislation to ensure the legislation is not contrary to land claims agreements.

2.1 For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*. [Oceans Act]

The recognition in the preamble, the non-derogation clause in section 2, and provisions throughout the *Oceans Act* that refer to aboriginal organizations and land

⁴⁶ *Oceans Act*, preamble and s. 30(c).

claim bodies, demonstrate the intent of the Act to formally describe a role for the Inuvialuit and Inuvialuit bodies. This role could be the same or less than the IFA provides for the Inuvialuit, the Inuvialuit Game Council and the Fisheries Joint Management Committee. If the role under the Act is less than the role under the IFA, the Agreement's more expansive role will prevail. Specific instances are discussed below in the context of the ocean management strategy.

Oceans Management Strategy, Including Marine Protected Areas

Part II of the *Oceans Act* establishes an ocean management strategy. Sections 29 to 36 of the Act are very general provisions that provide for the development and implementation of a national strategy, integrated management plans, cooperation and agreements, consultation and marine protected areas. These sections can best be viewed as a progression from the general to the specific, with marine protected areas being the most specific and localized aspect of an overall ocean management strategy. The Act recognizes land claims agreements' rights boards and processes at every stage of this continuum.

Oceans Act sections 29 and 30 discuss the development and implementation of a national strategy and the principles of that strategy.

29. The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems in waters that form part of Canada and in which Canada has sovereign rights under international law.

30. The national strategy will be based on the principles of

(a) sustainable development, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs;

(b) the integrated management of activities in estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law;

(c) the precautionary approach, that is, erring on the side of caution.

Oceans Act s. 29 has limited relevance other than asserting a role for Inuvialuit organizations and joint management bodies, if they so desire, in the creation of a national strategy. A national strategy is likely to be sufficiently general to incorporate any specific marine protected area. Further, any national strategy will have to comply with the IFA, or at least be invalid to the extent that it is not consistent. The principles in *Oceans Act* s. 30 are slightly more relevant as they state the national strategy that will be based on the principles

of sustainable development and the precautionary approach. Neither of these principles is inconsistent with the Inuvialuit Final Agreement. Indeed, the Agreement could be said to exemplify this approach with its emphasis on the protection and preservation of Arctic wildlife, environment and biological productivity through the application of conservation principles and practices.⁴⁷

Section 31 discusses the lead and facilitative role of the Department of Fisheries and Oceans, in collaboration with aboriginal organizations and land claim bodies, in developing and implementing plans “for the integrated management of all activities or measures affecting Canada’s marine waters.”

32. For the purpose of the implementation of integrated management plans, the Minister

- a) shall develop and implement policies and programs with respect to matters assigned by law to the Minister;
- b) shall coordinate with other ministers, boards and agencies of the Government of Canada the implementation of policies and programs of the Government with respect to all activities or measures in or affecting coastal waters and marine waters;

- c) may, on his or her own or jointly with another person or body or with another minister, board or agency of the Government of Canada, and taking into consideration the views of other ministers, boards and agencies of the Government of Canada, provincial and territorial governments and affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements.
 - (i) establish advisory or management bodies and appoint or designate, as appropriate, members of those bodies, and
 - (ii) recognize established advisory or management bodies; and
- d) may, in consultation with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, establish marine environmental quality guidelines, objectives and criteria respecting estuaries, coastal waters and marine waters.

Section 32 is interesting as it creates mandatory obligations for the Minister of Fisheries and Oceans. It also provides a mechanism for the Minister to formally involve Inuvialuit bodies and joint management boards to the extent that they are not already participating in the

⁴⁷IFAs. 14(1).

implementation of policies and programs. Section 32(c) also provides a means where the Minister can recognize established advisory or management bodies such as the Fisheries Joint Management Committee. Lastly, section 32(d) states the Minister may consult with aboriginal organizations and land claims bodies on certain matters. Consultation is mandatory under the Inuvialuit Final Agreement.

Interestingly, section 32 seems to make a distinction between and afford a higher degree of participation to a “board or agency of the Government of Canada” than to “bodies established under land claims agreements.” While this is not a key issue, it is interesting to note the distinction the Act makes between “boards of the Government of Canada” and “bodies established under a land claims agreement.” Joint management regimes established under the Inuvialuit Final Agreement could be characterized as a board or agency of the federal government to the extent they have a duty to go beyond their rights transferred under the Agreement, and to consider broader management issues for the region. Arguably, this is the case for the Fisheries Joint Management Committee as it has a duty to advise the Minister on fisheries in the Inuvialuit Settlement Region.

33.(1) In exercising the powers and performing the duties and functions assigned to the Minister by this Act, the Minister

- (a) shall cooperate with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements;

- (b) may enter into agreements with any person or body or with another minister, board or agency of the Government of Canada;
- (c) shall gather, compile, analyze, coordinate and disseminate information;
- (d) may make grants and contributions on terms and conditions approved by the Treasury Board; and
- (e) may make recoverable expenditures on behalf of and at the request of any other minister, board or agency of the Government of Canada or of a province or any person or body.

Consultation

(2) In exercising the powers and performing the duties and functions mentioned in this Part, the Minister may consult with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies including those bodies established under land claims agreements.

Section 33 empowers the Minister to cooperate and enter into agreements with the Inuvialuit and joint management boards established under the IFA. Again, that consultation will be mandatory under the Agreement, not discretionary. Section 34 permits the Department of Fisheries and Oceans to coordinate logistical support for and provide assistance to advance scientific knowledge of marine ecosystems.

35.(1) A marine protected area is an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada and has been designated under this section for special protections for one or more of the following reasons:

- (a) the conservation and protection of commercial and non-commercial fishery resources including marine mammals, and their habitats;
- (b) the conservation and protection of endangered or threatened marine species, and their habitats;
- (c) the conservation and protection of unique habitats;
- (d) the conservation and protection of marine areas of high biodiversity or biological productivity; and
- (e) the conservation and protection of any other marine resource or habitat as is necessary to fulfil the mandate of the Minister.

Marine protected areas

(2) For the purposes of integrated management plans referred to in sections 31 and 32, the Minister will lead and coordinate the development and implementation of a national system of marine protected areas on behalf of the Government of Canada.

Regulations

(3) The Governor in Council, on the recommendation of the Minister, may make regulations

- (a) designating marine protected areas; and
- (b) prescribing measures that may include but not be limited to
 - (i) the zoning of marine protected areas,

- (ii) the prohibition of classes of activities within marine protected areas, and
 - (iii) any other matter consistent with the purpose of the designation.
- Interim marine protected areas in emergency situations

Section 35 is a very general provision that empowers but does not require the Minister to act. Section 35(1) lists four reasons why marine protected areas should be established. Three reasons support the establishment of a protected area in the Beaufort Sea to protect beluga whales. These are the conservation and protection of fishery resources and their habitat; the conservation and protection of unique habitats; and the conservation and protection of areas of high biological productivity. Section 35(3) authorizes, but does not require, the Minister to make regulations. The regulators may designate marine protected areas, and prescribe measures like zoning, the prohibition of classes of activities within the area, and any other matter consistent with the purpose of the designation.

36.(1) The Governor in Council, on the recommendation of the Minister, may make orders exercising any power under section 35 on an emergency basis, where the Minister is of the opinion that a marine resource or habitat is or is likely to be at risk to the agreement that has been given effect and has been ratified or approved by an Act of Parliament....

Section 36(1) then authorizes emergency orders, provided those are not inconsistent with a land claim agreement. IF Ass. 14(71-72) permits the Minister to make an interim decision where “the good management of resources requires,” subject to later consultation with the

Fisheries Joint Management Committee. However, it is difficult to see how this scenario is likely to arise given the current state of the beluga stock and habitat, and the Beaufort Sea Beluga Management Plan.

Lastly, *Oceans Act* ss. 37-39.12 contain extensive provisions dealing with enforcement of the Act, and the enforcement of regulations that establish a marine protected area. These provisions provide for offenses; the designation and powers of enforcement officers; inspections; liability for costs; the imposition of fines and sentences; forfeiture of property and a range of court orders. The language in the Act is permissive. Therefore, enforcement is at the discretion of the Minister of Fisheries and Oceans, and is not required under the Act. Private enforcement is currently not authorized, though it could be included in the regulations establishing a marine protected area. Enforcement under the *Oceans Act* is consistent with the IFA if the Minister has the authority to establish a marine protected area under the Act.

Discussion Paper on Marine Protected Areas

The Department of Fisheries and Oceans issued a discussion paper dated January 1997 entitled *An Approach to the Establishment and Management of Marine Protected Areas* (the Discussion Paper). The paper clarifies the broad provisions of the *Oceans Act* and how the department is likely to interpret and implement the Act. The paper is a non-binding policy document, and does not have the same status as the Act.

The paper elaborates on the broad purposes for a marine protection area in *Oceans Act* s. 35(1). Under the first purpose of conserving of commercial and non-commercial fisheries, the paper refers to the

historic fisheries' focus of the department, and role and interests of aboriginal communities as a result of strong cultural ties to marine resources, and commercial fisheries as a result of land claims agreement. The protected areas could function as a fisheries management tool as it is an effective way of incorporating precautionary and ecosystem approaches into fisheries management. They could be used to reduce fishing pressure or, more relevantly for beluga management, to protect habitat from disturbances that would otherwise affect fish production. It notes that protected areas for fisheries management could vary in many ways depending on the purpose and type of area. The size, locations and activities in a fisheries oriented protected area could be jointly determined, taking into account management objectives, current history activities, health of the stock and input from area stakeholders (Discussion Paper, pp. 11-12). All these aspects reflect how the Beaufort Sea Beluga Management Plan was drafted, and what would need to take place in the Inuvialuit Settlement Region prior to the establishment of a marine protected area for beluga whales.

While the beluga stock in the Beaufort Sea is not currently an endangered or threatened species, the paper does provide some specific comments on beluga mammals under a discussion of the conservation of endangered species. The paper notes that a wide variety of marine mammals are found in Canadian waters and that some beluga (the Hudson Bay stock) are threatened. As such, marine mammals and their habitats can benefit from a protected area in order to limit the impact of adverse activities. Geographical and temporal restrictions on development and tourism activities are already present in the Beaufort

Sea Beluga Management Plan. The paper also notes that migratory species such as whales require international networks of protected areas to protect them throughout their range (Discussion Paper, pp. 15-16). This again reflects the experience of the Beaufort Sea beluga stock, and efforts by the Inuvialuit to reach a cooperative arrangement with the Inupiat to jointly manage the stock.

The Department of Fisheries and Oceans considers the following matters when directing protected areas:

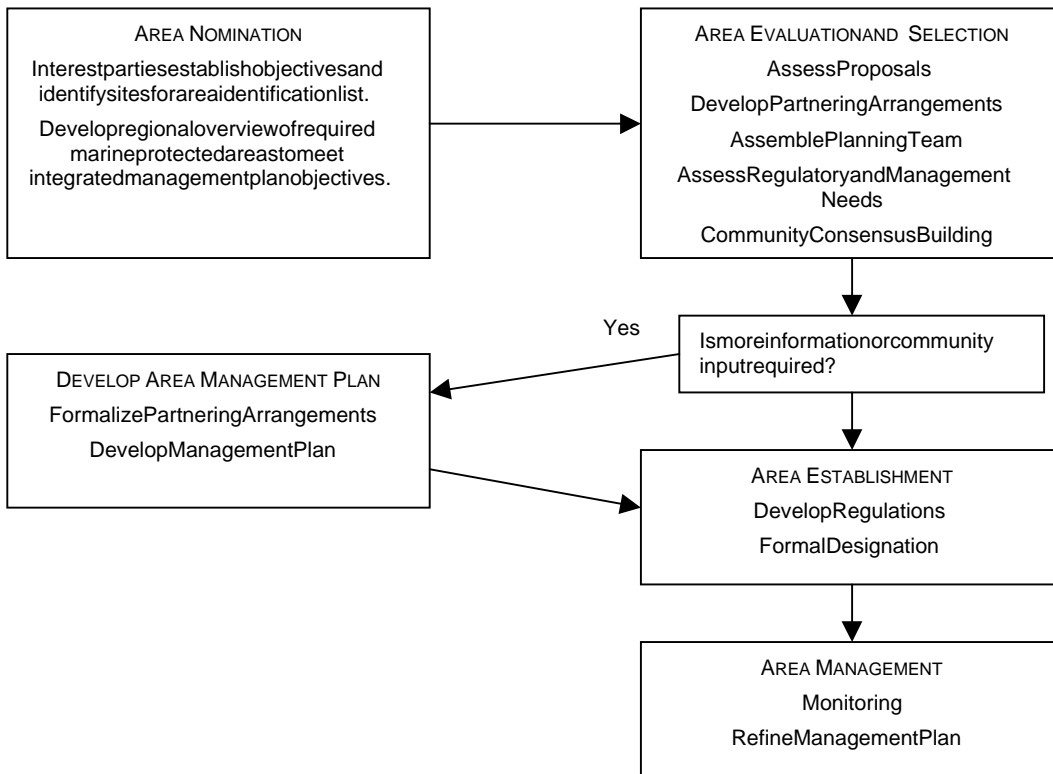
DFO's MPA Program will consider the following in its development:

- that MPAs must be seen as an important means of marine conservation – a means suitable to a national strategy for ocean management and fisheries management as well as provincial and community-based conservation strategies;
- that the MPA program must be adaptable to and determined by regional and local circumstances and issues;
- that the process of completing a system of MPAs, as well as establishing individual candidate sites, may require many years; and,

that monitoring will need to be established to determine if the program is meeting its goals, and to take advantage of the lessons learned. (*Discussion Paper, p. 18*)

The discussion paper reviews how marine protected areas will be identified, established, and subsequently managed. Some of the specific elements of the department's establishment process are reviewed. Under a nomination, there is the opportunity of interested groups such as the Inuvialuit to nominate a plan for the Beaufort Sea. The discussion paper also refers to areas currently under some form of special protection as having a "built-in" constituency, and that potential collaborators already exist. The paper notes that nomination of a protected area should include a stated purpose, objectives and proposed plan for the area that is prepared through a cooperative process involving coastal communities organizations and government agencies. The Beaufort Sea Beluga Management Plan meets these requirements, suggesting the Plan could form the basis of a nomination and the proposed plan for the Inuvialuit Settlement Region.

Figure 4: Proposed Marine Protection Area Establishment Process



Each proposal for a marine protected area is evaluated on the basis of the purposes in section 35 of the *Oceans Act*. Areas may rate highly under several criteria. Criteria relevant to the Beaufort Sea present in the paper, but not listed in the Act, are: social and economic values, immediacy of need, practicality, opportunities of partnering arrangements, community support, adequacy of existing regulatory regimens, ecological fragility, feasibility of enforcement and national/international significance.

Area management plans will be developed from information gathered at the early stages of the process, and expanded so all players, including partners, understand their roles and responsibilities. However the paper stresses that each plan will be unique and reflect the issues and concerns of the

stakeholders. One relevant issue is whether a marine protected area regime will expand stakeholder participation to the Beaufort Sea Beluga Management Plan and require changes and modifications to the Plan.

Existing and proposed activities may conflict with the conservation objectives of the protected area. *Oceans Act* s.35 already authorizes the establishment of zones and the prohibitions of classes of activities. The paper notes that levels of zoning can vary from severely limited access to areas with controlled use, resource harvesting and various economic activities. Buffer areas could also surround the more restrictive areas. Any area management plan must be consistent with the IFA. The IFA describes scenarios where Inuvialuit harvesting of marine mammals may be restricted. If these

scenarios are not present, a marine protected area cannot restrict Inuvialuit harvesting, without the consent of the Inuvialuit.

The paper contemplates that marine protected areas would be established by regulations under *Oceans Act* s.35(3), though the form of these regulations has not yet been identified. Each protected area could have its own set of regulations. Otherwise, a set of more general regulations could be enacted which would authorize protected areas at a regional level, and permit activities not in conflict with the plan. Regulations, or the plans enacted under regulations, would be enforceable under *Oceans Act* s.37 and enforced by persons appointed under s.39 of the Act.⁴⁸

Lastly, the paper comments on the management of a protected area. Typically, the areas will be managed on a site basis, and with a partner. The paper notes that effective partnering is key to both the creating and managing a protected area, and identifies the following parties as potential partners: the fishing interests, aboriginal organization and ocean industries, i.e. oil and gas, mining, tourism, and shipping.⁴⁹ The Fisheries Joint Management Committee, the Inuvialuit Game Council and the Hunters and Trappers Committees would all be suitable partners for a marine protected area in the Inuvialuit Settlement Region.

Internationally, the paper refers to cooperative agreements and joint planning exercises between Canada and the US in order to meet common conservation objectives. It also notes that highly migratory species, such as whales with habitats located

thousands of kilometres from Canadian waters, require a network of protected areas throughout the range (Discussion Paper, p. 26). Some of these initiatives are already underway for the Beaufort Sea beluga stock due to shared usage between Alaskan and Canadian aboriginal peoples, and the migration of the stock into US and international waters. For example, the Inuvialuit and the Inupiat are negotiating the Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement.

⁴⁸Discussion Paper, pp.23-26.

⁴⁹Discussion Paper, pp.23-26.

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Glossary

A

Act, the. Refer to Oceans Act.
Agreement, the. Refer to Inuvialuit Final Agreement.

B

Beaufort Sea Beluga Management Plan. Also the Plan.

C

Committee, the. Refer to the Fisheries Joint Management Committee.

D

Department of Indian Affairs and Northern Development. Also DIAND.
Department of Oceans and Fisheries. Also DFO.
Department, the. Refer to Department of Oceans and Fisheries.
discussion paper, the. Refer to the discussion paper *An Approach to the Establishment and Management of Marine Protected Areas*.

E

Environmental Impact Review Board. Also EIRB.
Environmental Impact Screening Committee. Also EISC.

F

federal legislation.
Fisheries Act.
Fisheries Joint Management Committee. Also FJMC.

H

Hunters and Trappers Committee. Also HTC.

I

Inuvialuit.
Inuvialuit Final Agreement.

Inuvialuit Game Council.

Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement

Draft.

Inuvialuit Inupiat Beaufort Sea Beluga Whale Agreement (Draft).

Inuvialuit Settlement Region.

L

land claims agreement.

M

Marine Mammals Protection Regulations.
marine protected areas.

Minister, the. Refer to the Minister of the Department of Oceans and Fisheries.

O

Oceans Act. Also the Act.

P

Plan, the. Refer to Beaufort Sea Beluga Management Plan

W

Western Arctic Region. Portion of the Inuvialuit Settlement Region other than the Yukon Territory.

Wildlife Management Advisory Council. Also WMAC.

WMAC (NS). WMAC for Yukon North Slope.

WMAC (NWT). WMAC for Northwest Territories.

Y

Yukon North Slope. Portion of the Inuvialuit Settlement Region in the Yukon Territory.

Proposal

Marine Protected Area Proposal: Legal Needs

Project Title

Legal analysis of relationship between the Inuvialuit Final Agreement (IFA) and the development of Marine Protected Areas (MPAs) under the Oceans Act for the Inuvialuit Settlement Region.

Responsible Party

Magdalena AK Muir
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 e-mail: makmuir@ieels.com

Project Objectives

The objectives of this analysis are:

To examine how MPAs under the Oceans Act [and in particular the draft process for the establishment of MPAs in “An Approach to the Establishment and Management of Marine Protected Areas under the Oceans Act”] integrate into the management regime, institutions and provisions of the IFA, and whether these MPAs are required or consistent with that Agreement.

If MPAs under the Oceans Act are consistent with the IFA, to consider what kind of MPAs could be established for the Inuvialuit Settlement Region and the role of the Fisheries Joint Management Committee (FJMC) with respect to the establishment and operation of those MPAs. In particular, this analysis will focus on the development

of MPAs for beluga whales and the role of the FJMC in that respect.

To highlight legal issues which may be of concern to the FJMC as the process for establishing MPAs for beluga whales evolves.

Discussion of Objectives

The first and second objectives address how MPAs under the Oceans Act would interact with the IFA and the FJMC. One would be required to legally examine the Oceans Act and the IFA together, as well as the regulations and historic practices of the FJMC with respect to beluga management. The third and last objective is to highlight legal issues which may be of concern to the FJMC. Some concerns already highlighted include Inuvialuit harvesting rights for beluga whales, privacy with respect to the exercise of those harvest rights, as well as the impacts of development and transportation on the MPAs. These issues and others could be identified and briefly discussed.

Research methodology

In order to implement this analysis, it would be useful to dialogue with members of the FJMC, other interested parties in the Inuvialuit Settlement Region, and representatives of the Department of Fisheries and Oceans (DFO). Therefore, meetings in Inuvik and elsewhere could be scheduled with members of the FJMC and other parties for late June and early July to coincide with meetings of the FJMC and related research on Marine Protected Areas

Proposal: Community Needs. Telephone calls and faxes will be used to supplement these meetings and to facilitate discussions with parties based elsewhere.

Milestones

A final report will be produced and delivered to both the Natural Resources Institute and the FJMC no later than August 31, 1997. A draft interim report will be provided to the same parties no later than July 31, 1997. The final report will also be used for the Marine Protected Areas Proposal: Community Needs.

Appendix A—Marine Conservation and beluga management in the Inuvialuit Settlement region Can Marine Protected Areas play a role?

Report Prepared for the Fisheries Joint Management Committee, Inuvialuit Settlement Region By Helen Fast, Jack Mathias & Fleur Storach with contributions from Magdalena AK Muir and Evelyne Meltzer—January 27, 1998

Helen Fast is assistant professor at the Natural Resources Institute, University of Manitoba, Winnipeg. Jack Mathias is research scientist at the Freshwater Fisheries Institute, Department of Fisheries and Oceans Canada, Winnipeg. Fleur Storach is a graduate student at the Natural Resources Institute, University of Manitoba, Winnipeg. Magdalena A. K. Muir is with International Energy, Environmental and Legal Services, Calgary. Evelyne Meltzer is with Meltzer Research and Consulting, Halifax.

Recommendation 3: An Institutional Framework

An institutional framework is suggested as a potential option for proceeding with a "Pilot Marine Protected Area". The framework is based partly on DFO's Process paper for Establishing MPAs (Draft).

Framework

Recommended organizational linkages associated with the identification and establishment of a pilot marine protected area in the Inuvialuit Settlement Region is shown in Figure 1. This text describes the proposed organizational

linkages in Figure 1, and the rationale behind the proposed linkages and participants.

DFO-National

The Minister of Fisheries and Oceans and the national office of the Department of Fisheries and Oceans (DFO or the Department) will have a supervisory and overseeing role for any marine protected area in Canada. This supervisory and overseeing role is required as the Minister and the national office are ultimately responsible for the activities of local and regional offices. A strong federal role is also required to present a management plan for a marine protected area to the federal cabinet, or to draft federal legislation or regulations, if required to implement the protected area. Figure 1 reflects these responsibilities by having DFO regional offices report to the Minister and the national office.

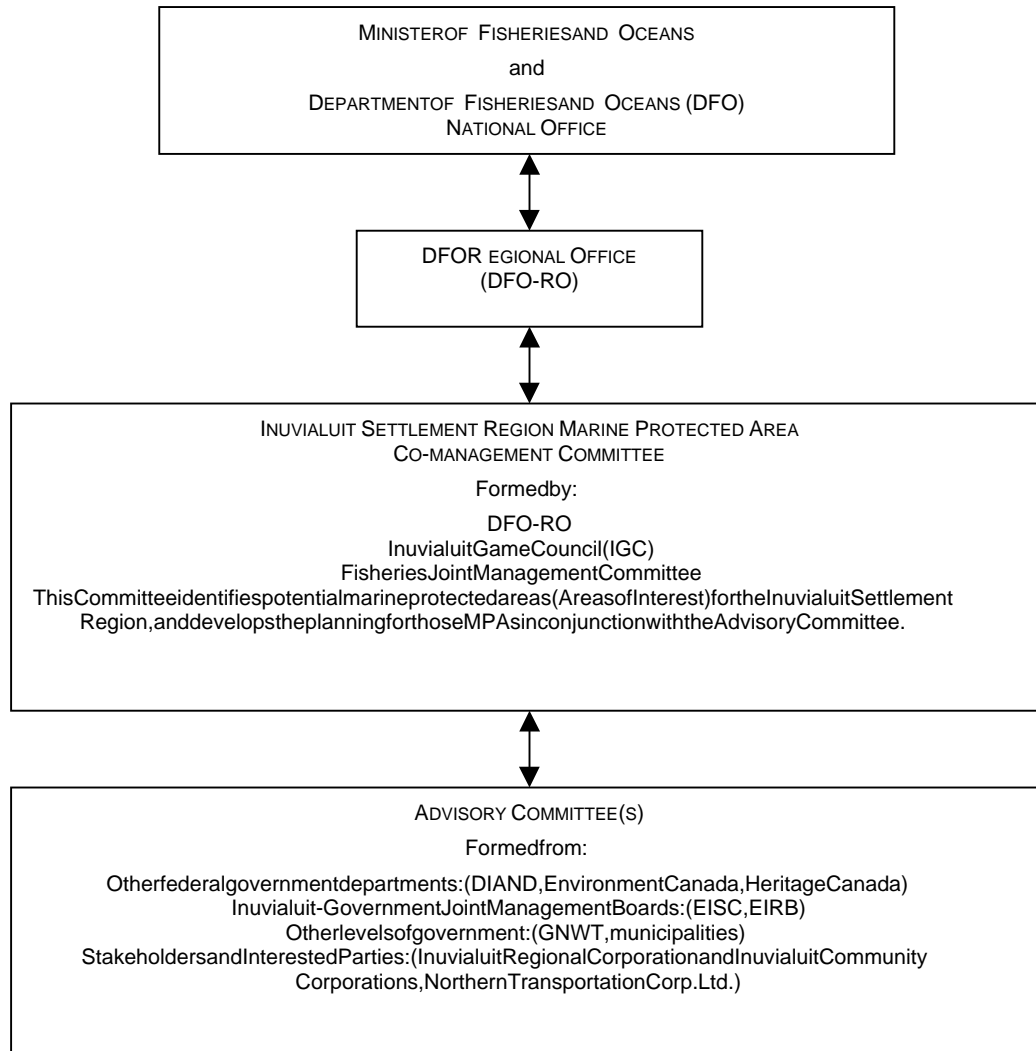
DFO-Regional

Given the local nature and concerns associated with a marine protected area, the DFO regional offices should have the primary responsibility within the Department for the identification and establishment of marine protected areas. The regional office will be the most appropriate party to direct the establishment of a marine protected area within a national framework and policy for marine protected areas. The

regional office will have access to and knowledge of local concerns and conditions. It will be able to take a lead role on behalf of the federal government in the establishment of a marine protected area. Lastly, it will be

able most efficiently to direct resources and staff to meet any responsibilities or duties arising from the establishment of a marine protected area.

Figure 5: Organizational Linkages Associated with the Identification and Establishment of Marine Protected Area in the Inuvialuit Settlement Region



The DFO Regional office in Winnipeg is particularly suited to the role of collaborating with co-management partners to identify and establish a marine protected area for beluga whales in the Inuvialuit

Settlement Region. The regional office nominates members to the Fisheries Joint Management Committee established under the Inuvialuit Final Agreement, has a primary role in the implementation of the

Department's responsibilities under that Agreement, and has actively participated in the development of the existing Beaufort Sea Beluga Management Plan.

Co-Management Committee

Figure 1 then refers to the Inuvialuit Settlement Region Protected Area Co-Management Committee (the Committee). This Committee will be formed by representatives of the Winnipeg regional office of the DFO, the Inuvialuit Game Council (IGC), and the Fisheries Joint Management Committee (FJMC). Given its structure, the IGC will also reflect the concerns and issues of the Hunters and Trappers Committees.

It is envisioned that the Committee will be a joint management committee which will of its own accord identify potential marine protected areas such as the proposed Zone 1 lands in the current Beaufort Sea Beluga Management Plan. The Committee will also work with the Advisory Committee or Committees to develop management plans for that area and any subsequent areas, and to establish any required regulations. The exact number of representatives on the Committee may be determined later but it is proposed that, in keeping with the spirit of co-management under the Inuvialuit Final Agreement and the structure of the FJMC, that there be an equal number of Inuvialuit and DFO representatives. Parties may also wish to consider having the FJMC assume the Committee's role for marine protected areas, given the structure and makeup of the FJMC and the historic and successful relationship between the Inuvialuit and the DFO with regard to the FJMC.

Advisory Committee

After the Inuvialuit Settlement Region Protected Area Co-Management Committee has identified a proposed marine protected area, that Committee will work with one or more Advisory Committees to develop the management plan and establish any regulations required. The Advisory Committee will be formed of other federal government departments, Inuvialuit-government joint boards established under the Inuvialuit Final Agreement, regional governments, and other key stakeholders and interested parties. It is important to involve these key stakeholders and interested parties in the development and establishment of a plan for a marine protected area at the earliest stage in order to achieve some level of "buy-in" by parties who will either implement, enforce or be affected by the marine protected area.

Other Federal Agencies

The federal government departments on the Advisory Committee are the Department of Indian Affairs and Northern Development (DIAND), Environment Canada and Heritage Canada. DIAND's participation is essential as they manage federal lands and issue leases for the Northwest Territories and the adjacent offshore. DIAND manages the majority of the surface land and subsurface rights in the Northwest Territories, and issues related oil and gas and mineral leases. DIAND also manages Canada's rights in offshore lands under the Beaufort Sea, issuing oil and gas and mineral leases. Therefore, DIAND represents the property interests of the federal government and the business interests of the oil and gas, and mining industries. Environment Canada and

Heritage Canada are included as they have the legislative authority to establish marine protected areas under their statutes, and as they regulate land activities that may affect marine protected areas in the offshore. Though the Coast Guard manages and regulates transportation in the offshore, they are part of DFO and the Department can represent their interests.

Other Government Agencies and Boards

The Government of the Northwest Territories, and the local governments of Aklavik, Holman, Inuvik, Paulatuk, Sachs Harbour and Tuktoyaktuk are regional governments that should be included on the Advisory Committee. They have jurisdiction over land activities in the Northwest Territories that could affect a marine protected area. They also represent economic and social interests that may be impacted by the formation of a marine protected area in the Beaufort Sea. The Environmental Impact Screening Committee and the Environmental Impact Review Board need to be included in the Advisory Committee as they are Inuvialuit-government joint management committees that review offshore developments, and land developments that may impact the offshore.

Industry

Lastly, the Advisory Committee should include parties such as the Inuvialuit Regional Corporation who will represent their subsidiaries including the Inuvialuit Petroleum Corporation, the Inuvialuit Community Corporations, and Inuvialuit-owned or influenced corporations such as Northern Transportation. In contrast to the IGC, which represents the Inuvialuit interests in wildlife, the Inuvialuit Regional

Corporation represents the Inuvialuit corporate and economic interests. The Inuvialuit Regional Corporation is the largest private owner of both surface lands and subsurface rights in the Inuvialuit Settlement Region. They are likely directly or indirectly to be a significant participant in any development proposed for the offshore.

Separate Advisory Committees

Given the diverse nature of the members of the Advisory Committee, it may be useful to establish separate Advisory Committees and to allow different representatives of the Beaufort Sea Protected Area Co-Management Committee to coordinate and represent the concerns of these Advisory Committees before the Committee. For instance, the DFO could take a lead role with federal government departments such as the DIAND, Environment Canada and Heritage Canada, and other levels of governments such as the Government of the Northwest Territories and municipal governments. Similarly, the FJMC could take a lead role with other joint management boards such as the Environmental Impact Screening Committee and the Environmental Impact Review Board and possibly with the local governments of Aklavik, Holman, Inuvik, Paulatuk, Sachs Harbour and Tuktoyaktuk. Lastly, the IGC may wish to take a lead role with Inuvialuit participation and act as a liaison with the Inuvialuit Regional Corporation, the Inuvialuit Community Corporations, and Northern Transportation.

The Inuvialuit Final Agreement

The rationale for the proposed organizational linkages and the role and responsibilities of the Committee and

Advisory Committee(s) is discussed below. Arguably, any marine protected area for beluga whales in the Inuvialuit Settlement Region must conform to the Inuvialuit Final Agreement. The Inuvialuit Final Agreement recognizes Inuvialuit harvesting rights for beluga whales and states the IGC, assisted by the Hunters and Trappers Committees, is the Inuvialuit voice on wildlife issues. The Agreement establishes the FJMC as the Inuvialuit-government joint management board with responsibilities for administering Inuvialuit rights to fish, including marine mammals, under the Agreement, and more generally for managing fisheries in the Inuvialuit Settlement Region. As such, the FJMC, the IGC and the Hunters and Trappers Committees will be involved in any marine protected area established for beluga whales in the Inuvialuit Settlement Region.

The committees and the council have distinct roles under the Inuvialuit Final Agreement which include the right to advise and participate in any beluga management regime for the Inuvialuit Settlement Region. Similarly, any marine protected area established under legislation, regulation or policy initiatives will be valid to the extent it conforms with Inuvialuit harvesting rights, and the responsibilities of the IGC and FJMC under the Agreement. The DFO has a history of working collaboratively with the parties. In addition, the marine protected areas regime under the Oceans Act envisions the Department working collaboratively with the local communities and developing effective partnering relationships.

Beaufort Sea Beluga Management Plan

In practice, any protected area established for beluga whales in the Inuvialuit Settlement Region is likely to

reflect and include significant elements of the Beaufort Sea Beluga Management Plan (the Plan). The Beaufort Sea Beluga Management Plan, in conjunction with the Hunters and Trappers Committees Beluga By-laws and Tourism Guidelines, is the central management tool for regulating the beluga whale harvest and protecting beluga whales in the Beaufort Sea. The Plan evolved as a result of the IFA, and institutions and rights under the Agreement. The Agreement protects certain aspects of the Plan, and the Inuvialuit rights contained in the Plan. The Plan also incorporates extensive community consultation and includes the views of stakeholders. As such, it would provide the appropriate framework for identifying Zone 1 as proposed marine protected area, and developing a specific management plan for that area.