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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA OIL AND GAS ASSOCIATION, et al., Plaintiffs, v. KENNETH L. SALAZAR, et al., Defendants.	Case No. 3:11-cv-00025-RRB
STATE OF ALASKA, Plaintiff, v. KENNETH L. SALAZAR, et al., Defendants.	Case No. 3:11-cv-00036-RRB
ARCTIC SLOPE REGIONAL CORPORATION, et al., Plaintiffs, v. KENNETH L. SALAZAR, et al., Defendants.	Case No. 3:11-cv-00106-RRB

MEMORANDUM IN SUPPORT OF ALASKA NATIVE PLAINTIFFS' AND NORTH SLOPE BOROUGH'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

A broad coalition of representatives of the Alaska Native community from northern and northwest Alaska – including a federally recognized Alaska Native regional tribal government and ten Alaska Native-owned regional and village corporations from the area (collectively, the "Alaska Native Plaintiffs") – as well as the local civil government for the northern portion of the State of Alaska have come together to challenge the United States Fish & Wildlife Service's ("FWS") final rule designating critical habitat for the polar bear (the "Final Rule") under the Endangered Species Act ("ESA"). Although the FWS anticipates that designating critical habitat will result in no additional conservation requirements for the polar bear, it has designated a remarkable 187,000 square miles of land and sea as "critical" to the polar bear's survival. This overbroad designation will do little or nothing to help polar bears and will instead leave the species worse off because it is impairing the cooperative relationship that the FWS has sought to build with the Alaska Natives who have been the polar bear's primary conservation stewards for thousands of years.

The Alaska Native Plaintiffs and North Slope Borough requested that the FWS exclude from this vast designation Alaska Native-owned lands and rural communities, which constitute less than one percent of the total area. They offered evidence that the failure to exclude these areas would disproportionately harm Alaska Natives and other North Slope Borough residents, the people who share habitat with polar bears and whose livelihood depends on those lands. The Alaska Native Plaintiffs explained how the designation would jeopardize the longstanding working relationship between the federal government and Alaska Natives.

The FWS essentially ignored the comments and recommendations of the Alaska Native Plaintiffs and North Slope Borough and designated Alaska Native-owned lands and rural

communities as critical habitat. This designation is contrary to the mandates of the ESA and puts the "essential" relationship between the federal government and the Alaska Natives at risk.[1] Accordingly, the FWS's Final Rule should be overturned as arbitrary and capricious for the following reasons:

First, the FWS improperly limited its exclusion of villages to Barrow and part of Kaktovik, when the remaining part of Kaktovik and more than a dozen other villages also fall within the polar bear critical habitat designation and should have been excluded.

Second, in deciding not to exclude Alaska Native-owned land from the polar bear critical habitat designation, the FWS ignored the only evidence in the record and erroneously concluded that the decision would have no impact on the working relationship between the federal government and Alaska Natives, an essential part of polar bear conservation efforts.

Third, the FWS failed, despite its statutory obligation, to engage in meaningful consultation with Alaska Native Plaintiffs early in the rulemaking process.

Fourth, by failing to respond to Alaska Natives' comments explaining why it would be imprudent to designate critical habitat, and by failing to consider in 2010 whether a designation was prudent, the FWS's establishment of critical habitat was contrary to law and arbitrary and capricious.

Fifth, by including a one-mile no disturbance zone as part of the barrier island habitat unit of the designation, the FWS exceeded its authority under the ESA and its own implementing regulations, improperly imposed a protective measure in a critical habitat designation, and failed to address various comments and expert opinions stating that such a measure was either unnecessary or too broad.

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[1] PBCH0045523 ("The continued cooperation with the Native communities in northern and western Alaska is essential for the conservation of polar bears in Alaska.").

The Alaska Native Plaintiffs and North Slope Borough request that the court vacate the critical habitat designation, or, in the alternative, vacate the FWS's designation of Alaska Native-owned lands, rural communities, and the no disturbance zone as critical habitat, and remand to the FWS to decide whether to exclude these areas after taking into consideration the impact that decision will have on the relationship between the federal government and Alaska Natives – and the corresponding impact to polar bear conservation efforts – and after meaningful consultation with Alaska Native Plaintiffs and the North Slope Borough.

BACKGROUND

The Alaska Native Plaintiffs and North Slope Borough incorporate by reference the Statutory Background and Factual Background sections from the summary judgment motion filed by AOGA and API [Doc. 51, Sec. 3, 4] and additionally present the following undisputed facts:

I. PLAINTIFFS

A. Alaska Native Plaintiffs and the Alaska Native Claims Settlement Act.

The Alaska Native Plaintiffs include all four of the Alaska Native-owned regional corporations in the affected area – Arctic Slope Regional Corporation, Bering Straits Native Corporation, Calista Corporation, and NANA Regional Corporation, Inc. – and six Alaska Native-owned village corporations – Cully Corporation (Point Lay), Kaktovik Inupiat Corporation (Kaktovik), Kuukpik Corporation (Nuiqsut), Olgoonik Corporation, Inc. (Wainwright), Tikigaq Corporation (Point Hope), and Ukpeaġvik Iñupiat Corporation (Barrow) –

created at the direction of Congress under the terms of the Alaska Native Claims Settlement Act of 1971 ("ANCSA").[2]

ANCSA settled Alaska Natives' aboriginal claim to Alaskan land by transferring title to the surface and subsurface estate of millions of acres in Alaska to these regional corporations. These corporations are charged with managing and utilizing these lands and natural resources for the cultural and economic benefit of their shareholders.[3] Moreover, revenues generated by the corporations from their subsurface mineral rights are broadly shared among Alaska Natives statewide.[4]

While these subsurface mineral rights have helped serve as the economic engine for many Alaska Native communities, Alaska Natives continue to struggle to support themselves in the inhospitable environment of northern Alaska. The unemployment rate among the Alaska Native population of the four Alaska Native-owned regional corporations in the affected area is more than twice the state average, as is the percentage of the Alaska Native population living below the poverty line.[5] A further loss of jobs and other benefits of development activities could have a potentially devastating impact on these communities.[6]

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[2] *See* 43 U.S.C. §§ 1606, 1607. Under ANCSA, every Alaska Native, based on where they were living or the Alaska Native tribe with which they were associated, was enrolled as a shareholder in a regional corporation. *Id.* Together, the four regional corporations represented in this lawsuit have over 40,000 shareholders and span the entire region in which critical habitat has been designated.

[3] *See* 43 U.S.C. § 1606(r) (authorizing regional corporations "to provide benefits to its shareholders who are Natives or descendants of Natives . . . to promote the health, education or welfare of such shareholders or family members").

[4] *See* 43 U.S.C. § 1606(i) (providing that seventy percent of a regional corporation's revenues from subsurface mineral rights are divided among all twelve land-owning regional corporations).

[5] PBCH0041532.

[6] *See* PBCH0055129-30.

Alaska Native Plaintiffs also include the Iñupiat Community of the Arctic Slope, a federally recognized Alaska Native regional tribal government representing village tribal members from eight villages in the northern Alaska region.[7]

The Alaska Native Plaintiffs are directly impacted by the critical habitat designation for polar bears.

B. The North Slope Borough.

The Alaska Native Plaintiffs are joined by the North Slope Borough, an area-wide local government. The North Slope Borough encompasses roughly 90,000 square miles of arctic territory in the northern portion of the State of Alaska, including all of the critical habitat identified as terrestrial denning habitat. The Borough is analogous to a county government in other states. The Borough is responsible for, inter alia, planning, zoning, environmental protection, and wildlife management. The Borough's municipal activities, including transportation and public works projects, have required and will likely require in the future federal agency authorization, funding or involvement. Many of these activities may be located within or adjacent to designated polar bear critical habitat, and the Borough's ability to obtain agency authorization, funding, or involvement for these activities in the future will be impaired by the critical habitat designation.

The North Slope Borough has historically been involved in polar bear management and conservation efforts. Since the ESA listing, the North Slope Borough has been actively engaged in ESA conservation and recovery planning efforts and expects to continue to participate in these

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[7] *See* 25 U.S.C. § 461 *et seq.* (Indian Reorganization Act of 1934); Notice, 75 Fed. Reg. 60,810, 60,813 (Oct. 1, 2010). Iñupiat Community of the Arctic Slope represents village tribal members from eight villages in the region: the Village of Atqasuk, Native Village of Barrow, Naqsragmuit Tribal Council (Anaktuvuk Pass), Village of Kaktovik, Village of Nuiqsut, Native Village of Wainwright, Native Village of Point Hope, and Native Village of Point Lay.

efforts into the future. However, unfortunately, FWS has failed to meaningfully involve the North Slope Borough and its citizens, such as Alaska Native subsistence hunters who have unique expertise and regular interaction with polar bear, in key aspects of the listing process, such as the designation of critical habitat, and implementation of conservation and recovery efforts associated with the ESA listing.

The North Slope Borough is directly impacted by the critical habitat designation for polar bears.

II. ALASKA NATIVES ARE ESSENTIAL TO POLAR BEAR CONSERVATION EFFORTS

As the FWS has correctly and repeatedly acknowledged, Alaska Natives living on the North Slope are an "important" and, in fact, "essential" partner for any efforts to conserve polar bears.[8] Alaska Natives and their ancestors have been the Arctic's primary conservation stewards for thousands of years, carefully balancing subsistence needs and cultural traditions with a profound respect for polar bears and the other wildlife that share their habitat. There is nobody in this case – or anywhere – that cares more deeply about the preservation of the species or has more interaction with polar bears.

Alaska Natives have taken significant voluntary actions to assist in polar bear conservation efforts. They have contributed to the scientific understanding of polar bears by providing information on polar bear locations and behaviors in areas when researchers are not present, and by collecting and contributing biological specimens from subsistence-harvested

[8] *See, e.g.*, Answer ¶ 3 ("Defendants admit that the cooperation of Alaska Natives is an important element of conservation of the polar bear[.]"); PBCH0045523 ("The continued cooperation with the Native communities in northern and western Alaska is essential for the conservation of polar bears in Alaska.").

bears for biological analysis.[9] This enables the FWS and scientists to monitor more closely the health and status of the polar bear stocks. They have worked with the federal government to develop "[p]olar bear interaction plans, deterrence programs, safety guidelines, and outreach" programs.[10] They have taken voluntary steps to self-regulate their subsistence harvest of polar bears that is otherwise exempt under federal statutes, providing what the FWS characterized as "significant conservation benefits."[11]

Alaska Natives have also been critical in the formation and implementation of international agreements for the management of polar bear populations. This includes the Inuvialuit/Inupiat Agreement of 1988, which concerned the Southern Beaufort Sea polar bear population, and the recent US-Russia Bilateral Agreement for Polar Bears of the Chukchi Sea Population.[12] Alaska Natives are voluntarily helping to manage all of the polar bear stocks over which they have any control and have helped promote sustainable practices in both Russia and Canada.[13]

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9 *See* PBCH0045494 ("[t]he Native community has been instrumental in assisting us with scientific studies: contributing to the success of the Marking, Tagging and Reporting Program"); PBCH0006584 ("[T]he Service has worked with Alaska Native organizations to better understand the status and trends of polar bear throughout Alaska. For example, Alaska Natives collect and contribute biological specimens from subsistence-harvested animals for biological analysis.").

10 PBCH0045523.

11 PBCH0006584 ("The Service recognizes the significant conservation benefits that Alaska Natives have already made to polar bears through the measures that they have voluntarily taken to self-regulate harvest that is otherwise exempt under the MMPA and the ESA and through their support of measures for regulation of harvest.").

12 *See* PBCH0045494-95; PBCH0005731.

13 *See* PBCH0005705 (Southern Beaufort Seas and Chukchi Sea populations are the only two polar bear populations in Alaska).

III. THE FWS REJECTED REQUESTS TO EXCLUDE ALASKA NATIVE LAND AND COMMUNITIES FROM THE CRITICAL HABITAT DESIGNATION.

In its proposed rule, the FWS solicited comments on whether to exclude areas from the proposed critical habitat designation.[14] Section 4(b)(2) of the ESA grants the Secretary of the Interior authority to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless" the exclusion will result in the extinction of the species.[15] The Alaska Native Plaintiffs and North Slope Borough submitted comments requesting that the FWS exclude Alaska Native-owned land, which equals 0.58% of the polar bear critical habitat designation,[16] all rural villages, and areas of current and proposed development activities.[17]

In its comments, plaintiff Arctic Slope Regional Corporation ("ASRC") explained how, without the requested exclusions, the designation would have adverse economic impacts on Alaska Natives and other North Slope Borough residents.[18] Alaska Native-owned regional and village corporations carry out their mission to provide for the cultural and economic well being of their shareholders in part through the responsible development of the region's natural resources, operating as employers, landowners, lessors of subsurface rights, and business partners with oil and gas companies and others working in the region. Supported by an

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14 *See* PBCH0021734; PBCH0032118.

15 16 U.S.C. § 1533(b)(2).

16 *See* PBCH0045516.

17 *See, e.g.*, PBCH0054541-42 (ASRC and North Slope Borough, Comments on Proposed Designation of Critical Habitat for Polar Bears, December 28, 2009); PBCH0055139 (ASRC, Comments on Proposed Designation of Critical Habitat for Polar Bears and Proposal to Not Provide Exclusions from that Designation, July 6, 2010); PBCH0055123 (Kuupik Corporation, Comments on Proposed Designation of Critical Habitat for Polar Bears and Proposal to Not Provide Exclusions from that Designation, July 6, 2010).

18 *See* PBCH0054534-38; PBCH0055138-43.

independent economic analysis commissioned by ASRC and the State of Alaska,[19] ASRC showed that the critical habitat designation would likely delay or impede these development activities, causing millions of dollars in losses.[20] And even relatively modest economic impacts could force Alaska Natives to abandon their ancestral villages in search of work.[21]

ASRC further explained in its comments that designating Alaska Native-owned lands as critical habitat "will adversely affect the positive working relationship that the FWS has had with the Alaska Native community. Harming that relationship – and thereby diminishing the benefits that polar bears receive from Alaska Natives' many voluntary conservation efforts – would adversely affect polar bears."[22] Granting the requested exclusions would help maintain the "FWS's healthy and productive working relationship with the Alaska Native community."[23] ASRC summarized the benefits of excluding rural villages and Alaska Native-owned lands as follows:

> fostering a good working relationship between FWS and the Alaska Native community, which is essential for polar bear conservation efforts; maintaining strong Iñupiat communities in the region; advancement of Federal Indian Trust obligations; the maintenance of a vibrant cash economy on the North Slope of Alaska; continued employment for Alaska Natives living on the North Slope; and supporting nearly all Alaska Natives financially through the revenue-sharing that depends in large part on the region's development activities.[24]

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19 PBCH0055148-215.

20 PBCH0055138-43.

21 PBCH0055129-30.

22 PBCH0055134.

23 PBCH0055145.

24 PBCH0055132. Kuukpik Corporation, the village corporation for the community of Nuiqsut, concurred with ASRC. "Overall, Kukkpik supports the changes requested by ASRC and believes that those requested changes would have widespread support among the village corporations, tribal groups and municipal governments of the North Slope." PBCH0055124.

Despite having received direct confirmation that the proposed critical habitat designation would impair the positive working relationship that the FWS had been building with the Alaska Native community, the FWS discounted this information in its entirety: "the establishment of critical habitat does not, on its own, prohibit development of any kind. . . . Therefore, we do not expect that the designation of the critical habitat for polar bears in Alaska, as mandated by the Act, will jeopardize the working relationships that we have developed over the past 20 years."[25]

In stark contrast to the conservation benefits associated with excluding Alaska Native-owned lands from the critical habitat designation,[26] the FWS acknowledges that the designation will not result in any "polar bear conservation measures above and beyond those already required" by the listing determination and existing statutory protections.[27] The economic analysis commissioned by the FWS further concluded that because "no incremental conservation measures are anticipated . . . , no incremental economic benefits are forecast from a designation of critical habitat."[28]

The FWS rejected nearly all of the exclusions requested by the Alaska Native Plaintiffs and North Slope Borough. The Final Rule provided the following barebones explanation for denying the request to exclude Alaska Native-owned lands: "because of the uncertainty of future development, we have determined that future activities are speculative at this time. Any future activities that may affect polar bears, and, if there is a Federal nexus, polar bear habitat, would be addressed through section 7 of the Act. In addition there are educational benefits of informing land managers of areas that are essential to polar bears for any projects that involved a Federal

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25 PBCH0045495.

26 *See supra* pp.6-7.

27 PBCH0041501.

28 PBCH0041503, 0041627.

nexus."[29] The FWS rejected out-of-hand comments advising the agency that its failure to exclude Alaska Native-owned lands would compromise the longstanding working relationship between the federal government and Alaska Natives[30] and, accordingly, concluded that exclusion of these lands would provide "[n]o conservation benefits" to polar bears.[31]

The FWS did agree to exclude the communities of Kaktovik and Barrow for reasons remarkably similar to those advanced for excluding all Alaska Native-owned lands and rural communities. The Final Rule states that excluding Kaktovik and Barrow – comprising "an extremely small fraction of the designation (less than one percent of the total designation . . .)" – will "enhance the partnership efforts which have taken many years to develop between the Federal government and the Native communities." This relationship, in turn, is "essential for the conservation of polar bears in Alaska."[32] In balancing these benefits of exclusion with the "benefits" of including the villages in the critical habitat designation, the FWS concluded: "[t]he

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29 PBCH0045493. Although they are not the focus of this summary judgment motion, these two explanations for the FWS's refusal to exclude Alaska Native-owned lands are highly suspect. First, as explained in the summary judgment motion filed by the State of Alaska, it was improper for the FWS to disregard significant potential indirect economic impacts of listing because development on Alaska Native-owned lands was purportedly too "speculative." [Doc. 58, Sec. I.A, I.B] Second, the FWS made no effort to explain how keeping the 0.58% of additional habitat in the critical habitat designation would provide meaningful benefits to polar bears, particularly where Alaska Natives are already fully aware of where polar bears tend to live, eat, and den, and the MMPA already imposes meaningful permitting obligations for activities involving polar bears.

30 PBCH0045494-95.

31 PBCH0016116 (Information Memorandum for the Regional Director, August 6, 2010). The reference to "no conservation benefits" was removed from this memorandum prior to the publication of the final rule, *see* PBCH0036151 (Polar Bear Critical Habitat – Potential Exclusions, September 9, 2010), but the memorandum still did not acknowledge any affirmative conservation benefits of excluding all Alaska Native-owned lands and nothing in the administrative record or final rule suggests that the FWS had changed its view or acknowledged the conservation benefits of excluding Alaska Native-owned lands.

32 PBCH0045523-24.

benefit of sustaining current and future partnerships outweighs the extra outreach efforts associated with critical habitat and the additional section 7 requirements under the Act."[33] Although the text of the Final Rule indicates that FWS intended to exclude the entire "village district of Kaktovik,"[34] the detailed map of the exclusion clearly shows that the FWS in fact did not do so, and designated the southern portion of the village as critical habitat.[35]

The Final Rule states that Barrow and Kaktovik are the only two communities that overlap with the critical habitat designation.[36] This is demonstrably false. The FWS's own mapping shows that the following thirteen communities fall within the barrier island habitat, either on the barrier islands themselves or in the no disturbance zone surrounding the islands: Diomede, King Island, Kivalina, Nunam Iqua, Point Hope, Point Lay, Shaktoolik, Shishmaref, Solomon, St. Michael, Teller, Wainwright, and Wales.[37] In all, the FWS failed to acknowledge the existence of more than a dozen Alaska Native communities. The rule and record do not contain any discussion as to why these communities were not excluded but Barrow and (part of) Kaktovik were.

STANDARD OF REVIEW

A challenge to actions taken by the FWS under Section 4 of the ESA is properly brought

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33 PBCH0045523.

34 PBCH0045529.

35 *See* App. A, p. 13 (Map 99-0241, Kaktovik Townsite). The maps included in Appendix A are found in the First Supplemental Administrative Record. [Doc. 49]

36 PBCH0045492.

37 *See* App. A, p. 1 (Map 99-0161, Wainwright); 2 (Map 99-0163, Point Lay); 3 (Map 99-0165, Point Hope); 4 (Map 99-0166, Kivalina); 5 (Map 99-0174, Shishmaref); 6 (Map 99-0176, Diomede & Wales); 7 (Map 99-0177, King Island); 8 (Map 99-0178, Teller); 9 (Map 99-0180, Solomon); 10 (Map 99-0182, Shaktoolik); 11 (Map 99-0184, St. Michael); 12 (Map 99-0188, Nunam Iqua).

under the ESA citizen suit provision,[38] and is judged by the standards for agency action contained in the Administrative Procedure Act ("APA").[39] To the extent that any claimed violation of a duty in making an ESA decision may not be brought under the ESA citizen suit provision, it is appropriately pled directly under the APA.[40] Judicial review of such a challenge is based upon the administrative record and is appropriately resolved on a motion for summary judgment.[41] Summary judgment must be granted if "there is no genuine dispute as to any material fact and . . . the movant is entitled to a judgment as a matter of law."[42]

The APA directs the court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[43] In making this determination, the court "ask[s] whether the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'"[44] In making this inquiry, the court "must engage in a careful, searching review to ensure that the agency had made a rational analysis and decision on the record before it."[45] An agency action is "arbitrary and capricious if the agency . . . relied on factors which Congress has not intended it to consider, entirely failed to

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38 *See* 16 U.S.C. § 1540(g)(1); *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

39 *See Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005).

40 *See Bennett*, 520 U.S. at 175-78.

41 *See City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) ("'[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994).

42 Fed. R. Civ. P. 56(e).

43 5 U.S.C. § 706(2)(A).

44 *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (quoting *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)).

45 *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 927 (9th Cir. 2008).

consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[46] While a court will defer to an agency's technical analysis, "it need not defer to the agency when the agency's decision is without substantial basis in fact."[47]

ARGUMENT

I. THE FWS ERRED IN DESIGNATING RURAL VILLAGES AS CRITICAL HABITAT.

In the Final Rule, the FWS erroneously included thirteen rural villages within the lands designated as polar bear critical habitat. The designation of these villages violated the ESA because the villages lack the physical or biological features essential to the conservation of the species and because the FWS failed to evaluate whether the benefits of excluding the villages from the designation outweighed the benefits of including them. The FWS also erroneously designated part of Kaktovik as critical habitat, despite stating that it was excluding Kaktovik.

When designating critical habitat, the FWS must identify those "specific areas within the geographic area occupied by the species . . . on which are found those physical or biological features . . . essential to the conservation of the species."[48] It is a mandatory prerequisite that "PCEs must be 'found' on occupied land before that land can be eligible for critical habitat

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46 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

47 *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *see also Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1119 (9th Cir. 2004) (Judicial review "must not rubber-stamp . . . administrative decisions that [a court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.") (internal quotations omitted).

48 16 U.S.C. § 1532(5)(A)(i)(I).

designation."[49] Accordingly, the FWS "may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation."[50]

As the FWS acknowledges in the Final Rule, villages do not contain PCEs essential to the conservation of the polar bear and, therefore, should not have been included within the designated critical habitat. The FWS explained in the context of its decision to exclude the Native communities of Barrow and Kaktovik:

> Native communities, which consist of relatively dense core areas of human habitation in remote locations along the northern and western coasts of Alaska, generally *do not have the necessary PCEs for polar bear denning, resting, and feeding*. Children and adults can be active during all the daylight hours in the summer and during the periods of complete darkness in the winter. *Polar bears are actively deterred from the Native communities* for both human and bear safety. Typically polar bears that remain too long in these communities are *killed because of concerns for human safety*. To minimize negative bear-human interactions and intentional or unintentional disturbance by humans, *polar bears are actively deterred from denning in or near the Native coastal communities*.[51]

Obviously, if polar bears are actively deterred and/or killed when they venture too close to Native communities, these locations cannot be considered viable denning, resting, and feeding habitat. Likewise, current Native communities are, by definition, not "free from human disturbance."[52] Accordingly, the FWS's inclusion of more than a dozen villages and part of Kaktovik in its designation of critical habitat was arbitrary and capricious.

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49 *Cape Hatteras Access Pres. Alliance v. U S. Dep't of the Interior*, 344 F.Supp.2d 108, 122 (D.D.C. 2004) (citations omitted).

50 *Id.*

51 PBCH0045523 (emphasis added).

52 PBCH0045517 (defining barrier island habitat PCE).

Assuming, *arguendo*, that the villages were properly included within polar bear critical habitat, the FWS violated Section 4(b)(2) of the ESA by failing to conduct a balancing test to determine whether the benefits of excluding the villages from the designation outweighed the benefits of including them.[53] Indeed, the FWS did not even acknowledge that these villages fell within the critical habitat designation; the *only* villages that the FWS determined overlapped with the designation were Barrow and Kaktovik. This is wrong. As depicted in the maps attached to this memorandum as Appendix A, the Alaska Native communities of Diomede, King Island, Kivalina, Nunam Iqua, Point Hope, Point Lay, Shaktoolik, Shishmaref, Solomon, St. Michael, Teller, Wales, and Wainwright all are located within the barrier island unit of the critical habitat designation. This error of fact is the sole apparent justification for the FWS's failure to conduct any balancing of benefits with respect to excluding these Alaska Native communities.

The FWS's decision to exclude Barrow and Kaktovik strongly suggests that had the FWS correctly identified the thirteen Alaska Native communities falling within the critical habitat designation, it would have determined that the benefits of excluding them outweighed the benefits of including them and likewise excluded them. The rationale set forth by the FWS for excluding Barrow and Kaktovik is not specific to those communities but applies to all Native communities included within polar bear critical habitat and warrants their exclusion: "Native communities . . . generally do not have the necessary PCEs for polar bear denning, resting, and feeding"; exclusion of Native communities will enhance partnership efforts with Alaska Natives, which is essential for the conservation of polar bears in Alaska; and Native communities only

[53] *See* 16 U.S.C. § 1533(b)(2) (authorizing Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat").

comprise an extremely small fraction of the critical habitat designation, so their exclusion will not result in extinction of the species.[54]

While the Secretary is afforded discretion in determining whether to exclude certain areas when designating critical habitat,[55] he must exercise that discretion in a consistent manner so as not to create an arbitrary and capricious result.[56] Here, the FWS's failure to exclude all villages appears to be based solely upon a mistake of fact – the FWS erroneously believed that it *was* excluding all villages that overlapped with designated critical habitat. Since it is now known that this is not the case, the FWS's analysis regarding the exclusion of Barrow and Kaktovik should also be applied to exclude the remaining portion of Kaktovik and the thirteen other villages that overlap with polar bear critical habitat. A failure to do so would produce an irrational result that is inconsistent with the evidence before the agency.

II. THE FWS'S DECISION NOT TO EXCLUDE ALASKA NATIVE-OWNED LAND FROM THE CRITICAL HABITAT DESIGNATION WAS ARBITRARY AND CAPRICIOUS.

Section 4(b)(2) of the ESA directs the Secretary of the Department of Interior to designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, *and any other relevant impact*, of specifying any particular area as critical habitat."[57] It then grants the Secretary

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54 PBCH0045523-24.

55 *See, e.g.*, *Cape Hatteras Access Pres. Alliance*, 344 F. Supp. 2d at 126-27 ("the [FWS] has discretion when it comes time to decide whether to exclude areas from a critical habitat designation").

56 *See Indep. Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) ("The treatment of cases A and B, where the two cases are functionally indistinguishable, must be consistent. That is the very meaning of the arbitrary and capricious standard."); PBCH0016115 (FWS memorandum stating in context of polar bear critical habitat designation that "it [is] important to apply the consistent criteria for all the proposed exclusion areas").

57 16 U.S.C. § 1533(b)(2) (emphasis added).

authority to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless" the exclusion will result in the extinction of the species.[58]

The FWS designated approximately 187,000 square miles as polar bear critical habitat, of which 0.58% is owned by Alaska Natives. The FWS's decision not to exclude these Alaska Native-owned lands from the critical habitat designation was arbitrary and capricious because it was based on a conclusion – that the decision would have no impact on the working relationship between the federal government and Alaska Natives, an essential part of polar bear conservation efforts – that runs counter to the only evidence before the agency. Accordingly, the FWS's failure to exclude such lands should be vacated as arbitrary and capricious.

As the FWS recognizes, in making critical habitat designation and exclusion decisions, consideration of the relationship between the federal government and Alaska Native and Indian tribes is of critical importance.[59] Accordingly, the FWS requested public comment on: (1) the

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[58] *Id.* A decision whether to exclude areas from critical habitat designation is reviewable under the APA and should be set aside as not in accordance with the law if the Secretary does not consider relevant impacts or as arbitrary and capricious if the Secretary considers an impact, but the consideration of the impact is fundamentally flawed. *See Wyoming State Snowmobile Ass'n v. U.S. Fish and Wildlife Serv.*, 741 F.Supp.2d 1245, 1266-67 (D. Wyo. 2010) (FWS decision not to exclude an area from a critical habitat designation was "not in accordance with law" because it was based on a flawed economic impact analysis that ignored the FWS's own conclusions regarding the economic impacts of the decision); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F.Supp.2d 1115, 1149 (N.D. Cal. 2006) (BLM decision to exclude portions of critical habitat "was arbitrary and capricious" because the agency based this decision on an assumption about the economic impact of the decision that lacked support in the record).

[59] *See, e.g.*, PBCH0005499-500 (listing in internal FWS guidance document "relationships with Tribes" as a consideration in determining exclusions and describing "[p]reservation or encouragement of partnerships" and "[r]emov[ing] possible disincentive to participate in conservation planning efforts" as potential benefits of exclusion); PBCH0045523, 0045525 (excluding Barrow and Kaktovik because of the expected impact such exclusion would have on the working relationship between the federal government and Alaska Natives and the corresponding benefits to polar bear conservation); *see also Ctr. for Biological Diversity v. Norton*, 240 F. Supp.2d 1090, 1105 (D. Ariz 2003) (recognizing adverse impact on working

"[p]otential effects [of the designation] on native cultures and villages," and (2) "the likelihood of adverse social reactions to the designation of critical habitat" and "the consequences of such reactions . . . to the conservation and regulatory benefits of the proposed critical habitat designation."[60] The FWS anticipated, even before receiving a single comment from Alaska Natives in response to this request, that the designation would have "no impact to Native owned lands [or] partnerships."[61]

Alaska Native representatives took the FWS at their word and submitted comments confirming that by overreaching in its designation and refusing to exclude the 0.58% of the critical habitat designation owned by Alaska Natives, the FWS would harm Alaska Native communities and adversely affect the longstanding working relationship between it and Alaska Natives, which was crucial to polar bear conservation efforts.[62]

There is no dispute that the cooperation of Alaska Natives is essential for the conservation of polar bears in Alaska. The FWS admitted as much in its answer in this action and in the Final Rule.[63] But, the FWS disbelieved the statements of Alaska Native representatives that the failure to exclude Alaska Native-owned lands would damage the

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relationship with tribe as an appropriate grounds for excluding area from critical habitat designation).

60 *See* PBCH0021734, 0032118.

61 PBCH0021754.

62 PBCH0055128, 0055130.

63 *See* Answer ¶ 3 ("Defendants admit that the cooperation of Alaska Natives is an important element of conservation of the polar bear[.]"); PBCH0045523; *see also* PBCH0006584 ("The Service recognizes the significant conservation benefits that Alaska Natives have already made to polar bears through the measures that they have voluntarily taken to self-regulate harvest that is otherwise exempt under the MMPA and the ESA and through their support of measures for regulation of harvest. This contribution has provided significant benefit to polar bears throughout Alaska, and will continue by maintaining and encouraging the involvement of the Alaska Native community in the conservation of the species.").

relationship between the federal government and Alaska Natives, wrongly stating: "the establishment of critical habitat does not, on its own, prohibit development of any kind. . . . Therefore, we do not expect that the designation of the critical habitat for polar bears in Alaska, as mandated by the Act, will jeopardize the working relationships that we have developed over the past 20 years."[64] As a result, the FWS incorrectly concluded that there were "[n]o conservation benefits to polar bear habitat if [Alaska Native-owned lands were] excluded."[65]

By failing to accurately describe the implications of the critical habitat designation, the FWS arbitrarily and capriciously concluded that designating Alaska Native-owned lands as critical habitat would cause no harm to the working relationship with Alaska Natives. First, the *only* evidence actually in the record on this issue confirms that the failure to exclude Alaska Native-owned lands *will* jeopardize those working relationships. There is *no* contrary evidence supporting the FWS's position. Even if the FWS did not consider an adverse impact to these relationships to be certain, the FWS was not permitted to simply reject the evidence it received.[66] Troublingly, there is no indication in the record that the FWS meaningfully considered the Alaska Native comments and this issue. The FWS reached its uninformed conclusion just a few weeks after the diametrically-opposed comments were submitted.[67] And as discussed further

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64 PBCH0045495.

65 PBCH0016116.

66 *See Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007) (holding that the FWS "may not ignore evidence simply because it falls short of absolute scientific certainty" and that in the absence of rigorous scientific studies, "credible anecdotal evidence . . . cannot be ignored").

67 The comment stating that the designation would jeopardize the FWS's working relationship with Alaska Natives was first identified on a summary of public comments on July 20, 2010. *See* PBCH0032548. In an August 4, 2010 draft response to public comments, the FWS rejected this comment using language that remained essentially unchanged in the Final Rule. *Compare* PBCH0032865 *with* PBCH0045495. Thus, it appears that the FWS took just

below, the FWS did not engage in any consultation with Alaska Native interests to determine whether its actions would in fact damage existing relationships (or to try to mitigate such damage assuming the FWS failed to granted the requested exclusion).

Second, the explanation offered by the FWS as to why the failure to exclude Alaska Native-owned lands would not affect the relationship between federal government and Alaska Natives is fundamentally flawed. The FWS contends in the Final Rule that there will be no adverse impact to the relationship because the critical habitat designation will "not, on its own, prohibit development."[68] This reflects a deep misunderstanding of Alaska Natives' concerns, which were stated in their public comments. While a flat prohibition on development would obviously be incredibly troubling,[69] even "lesser" impacts of the designation – for example, project delays and added litigation – are a source of major concern.[70] Alaska Native communities are fighting for survival. Their continued existence is threatened due to a lack of economic opportunities. ASRC and the State of Alaska commissioned an economic analysis that found that the polar bear critical habitat designation would likely have a significant adverse economic impact on development of Alaska Native-owned and other North Slope lands.[71] But

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two weeks to disbelieve the Alaska Natives whose working relationships they now state are essential to conservation of the polar bear.

[68] PBCH0045495.

[69] Although the FWS claims that the designation will not prohibit any development, federal agencies have regularly prohibited or minimized activities within designated critical habitat, including in Alaska. *See, e.g.*, EPA Alaska Offshore Seafood Processing NPDES General Permit, NPDES Permit No. AK-G52-4000 at 5-6 (Dec. 2009) (prohibiting commercial fishing activities within the entire area designated as critical habitat for Stellar sea lion, spectacled eider, and Stellar's eider by restricting NPDES discharges into critical habitat) (available at: http://yosemite.epa.gov/R10/water.nsf/95537302e2c56cea8825688200708c9a/bc30f88057c7455088256c870082cd07/$FILE/AKG524000%20FP.pdf).

[70] *See* PBCH0055138-43.

[71] PBCH0044627-94.

whether or not development is *actually* prohibited or made more costly at some time in the future, the FWS's decision not to exclude Alaska Native-owned lands despite strong concerns voiced by Alaska Natives about huge negative impacts clearly has the potential to affect the relationship between the federal government and Alaska Natives. Simply disregarding Alaska Natives' legitimate concerns, or telling them that those concerns are unfounded despite compelling evidence to the contrary, undermines the relationship that the FWS claims it is trying to preserve.

The explanation offered by the FWS is also undermined by the FWS's own explanation of its decision to exclude Barrow and Kaktovik. The Final Rule states that excluding these Alaska Native communities would "enhance the partnership efforts which have taken many years to develop between the Federal government and the Native communities" and describes "sustaining current and future partnerships" as a benefit of these exclusions.[72] The basis for the FWS's decision to exclude Barrow and Kaktovik – i.e., the benefit of enhancing and sustaining its partnership with Alaska Natives – directly contradicts its assertion that designation of critical habitat will not affect partnerships with Alaska Natives generally. If the critical habitat designation is such a non-event that it will not jeopardize relationships with Alaska Natives generally, there is no plausible reason why granting an exclusion would sustain such relationships with Alaska Natives in Barrow and Kaktovik. The reason for the disconnect, of course, is that as Alaska Natives have repeatedly made clear – and as the FWS's decision to exclude Barrow and Kaktovik expressly acknowledges – exclusions are critically important to maintaining these relationships and protecting the economic viability of Alaska Native communities.

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[72] PBCH0045523.

Further, the FWS's decision to exclude Barrow and Kaktovik obviously did not achieve the FWS's goal of preserving the cooperative relationship between the Federal government and Alaska Natives. The plaintiffs in this lawsuit include the village corporations for Barrow (Ukpeaġvik Iñupiat Corporation) and Kaktovik (Kaktovik Inupiat Corporation); the regional corporation for both communities, with its headquarters in Barrow (ASRC); and the tribal government covering both communities (Iñupiat Community of the Arctic Slope). These plaintiffs believe strongly that the limited exclusions of Barrow and only part of Kaktovik did not go far enough and that the government's cavalier disregard of their legitimate concerns has done considerable damage to the cooperative relationship with Alaska Natives in the region.

Had the FWS properly considered the impact of its decision on its working relationship with Alaska Natives, there is a strong indication that it would have excluded Alaska Native-owned lands from the designation of critical habitat. When considering potential exclusions, the FWS stated that "it [is] important to apply the consistent criteria for all the proposed exclusion areas."[73] Applying consistent criteria here would have led to exclusions for all Alaska Native-owned lands. Specifically, Alaska Native-owned lands constitute "an extremely small fraction of the designation (less than one percent of the total designation . . .)." Further, the exclusion of such lands would sustain partnerships between the federal government and Alaska Natives that are "essential" to polar bear conservation efforts. Finally, the benefits of excluding these lands easily outweigh any purported benefits from Section 7 consultation and educating land managers.[74]

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[73] PBCH0016115.

[74] It is particularly galling that, when responding to Alaska Natives' requested exclusions, the FWS used its standard "boilerplate" reasoning that critical habitat designation educates land managers about where the species can be found. *Compare* PBCH0006649 ("In the case of [species], the benefits of critical habitat include public awareness of [species] presence….") (file

The FWS had discretion regarding how much weight to give any factor in deciding whether to exclude Alaska Native-owned lands. But it was *not* free to base its rejection of the request to exclude these lands on a conclusion that runs counter to the only evidence in the record.[75] Because it relied on a flawed and incorrect conclusion, the FWS's decision was arbitrary and capricious and should be set aside.

III. THE FWS BREACHED ITS STATUTORY DUTY TO CONSULT WITH ALASKA NATIVE CORPORATIONS.

Alaska Native corporations and their interests were ignored during the rule-making process, in violation of the FWS's statutory obligation to consult with them early in the process of developing the critical habitat designation for polar bears. The FWS treated its consultation obligations as a box to be checked off, rather than a meaningful part of the rulemaking process. The proper remedy is to vacate the critical habitat designation rule or, in the alternative, the decision not to exclude Alaska Native-owned lands and communities.

A. The FWS was required to consult with Alaska Native corporations.

All federal agencies, including the FWS, have a statutory duty to consult with Alaska Native corporations on regulations like the critical habitat designation. In 2004, Congress enacted a statute providing that "[t]he Director of the Office of Management and Budget and all Federal agencies shall hereafter consult with Alaska Native corporations on the same basis as

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name: pCH_boilerplate_ 4(b)(2)_with exclusions-26Jan09.doc) *with* PBCH0045493 ("In addition there are educational benefits of informing land managers of areas that are essential to polar bears…."). This is misguided on two fronts. First, Alaska Natives do not need the FWS to tell them where polar bears tend to live, eat, and den. Second, this task has already been achieved through the well-publicized issuance of the polar bear critical habitat designation.

[75] *See supra* n.58; *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) (agency action must be reversed when the agency has "offered an explanation for its decision that runs counter to the evidence before the agency").

Indian tribes under Executive Order No. 13175."[76] Executive Order No. 13175, in turn, requires that agencies "consult[] with tribal officials early in the process of developing a proposed regulation" that has implications for the tribe and "imposes substantial direct compliance costs."[77]

Congress was explicit and unambiguous – agencies "shall" engage in consultation with Alaska Native corporations early in the process of developing covered regulations. Courts in the

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[76] Pub. L. 108-199, Div. H, § 161, 118 Stat. 452 (Jan. 23, 2004), as amended Pub. L. 108-447, Div. H, § 518, 118 Stat. 3267 (Dec. 8, 2004). Congress has previously defined Native Corporations to include both regional corporations (e.g., Arctic Slope Regional Corporation (ASRC), NANA Regional Corporation, Inc., Bering Straits Native Corporation, Calista Corporation) and village corporations (e.g., Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeaġvik Iñupiat Corporation, Kuukpik Corporation, Cully Corporation, and Kaktovik Inupiat Corporation). *See* 43 U.S.C. § 1602(m) (defining "Native Corporation").

[77] Executive Order 13175 of November 6, 2000, 65 Fed. Reg. 67249 (Nov. 9, 2000). Section 5 contains the "Consultation" requirement and reads in relevant part:

> (b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless: (1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or (2) the agency, prior to the formal promulgation of the regulation, (A) consulted with tribal officials early in the process of developing the proposed regulation; (B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and (C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

Ninth Circuit properly recognize that "shall means shall,"[78] and this language imposes a mandatory and non-discretionary duty for the federal agency to perform.

There is no question that critical habitat designation has substantial implications for Alaska Native corporations, including plaintiffs in this action, and thus requires consultation. The FWS does not dispute that the impacts of critical habitat designation on Alaska Natives are sufficient to trigger its consultation obligations under Executive Order 13175. In the Final Rule, the FWS acknowledges its "responsibility" under the Order "to communicate meaningfully with recognized Federal Tribes on a government-to-government basis."[79] Yet, inexplicably, with respect to Alaska Native corporations, the FWS acknowledges no concomitant obligation. Alaska Native corporations own land affected by the critical habitat designation[80] and their shareholders include much of the population within the proposed designation. If the critical habitat designation has an impact on tribes sufficient to trigger the FWS's consultation obligations, it clearly has an impact on Alaska Native corporations sufficient to require consultation on the same basis.

Nonetheless, the FWS acknowledges only a "responsibility to inform affected Native Corporations . . . of [its] proposed critical habitat designation."[81] As discussed in greater detail below, informing affected Alaska Native corporations of an already-drafted critical habitat

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78 *Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001) (internal quotations and citations omitted).

79 PBCH0045526.

80 PBCH0041531.

81 PBCH0045522. As confirmation that Alaska Native corporations were flatly ignored in this process, a FWS briefing to the Secretary of the Interior several months before the proposed critical habitat designation was published did not identify Alaska Native corporations, or even Alaska Natives, as members of the "Interested Public[]." PBCH0018150. It did reference the Nanuuq Commission, which, as explained below, does not represent the breadth of Alaska Native interests.

designation is a far cry from meaningful consultation with the corporations early in the process of drafting the designation and is not what is required by statute.

B. The FWS failed to consult with Alaska Native corporations.

The FWS failed to satisfy their statutory obligation to consult meaningfully with Alaska Native corporations early in the process of drafting the critical habitat designation. Indeed, the record is notable for its almost complete absence of examples of "consultation" with Alaska Native corporations during the entire promulgation of the critical habitat designation rule.

The Final Rule describes these efforts by the FWS to consult with affected Alaska Native communities:

- "[W]e presented general information regarding the designation of polar bear critical habitat at the Inuvialuit Game Council and North Slope Borough meeting on April 29, 2009, in Barrow, Alaska, and at the Alaska Nanuuq Commission Meeting on August 25–26, 2009, in Nome, Alaska."[82]

- "Following the release of the proposed critical habitat designation on October 29, 2009 (74 FR 56058), we attempted to notify all potentially affected Native communities and local and regional governments, and we requested comments on the proposed rule."[83]

- "We held a public hearing in Barrow, Alaska [on June 17, 2010], to enable Alaska Natives to provide oral comment. We invited the 15 villages in the [Alaska Nanuuq] Commission to participate in the hearing, and we offered the opportunity to provide oral comment via teleconference."[84]

- The Nanuuq "Commission [was] kept fully informed throughout the rulemaking process for the listing of the polar bear as a threatened species, [and] that

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82 PBCH00455497; *see also* PBCH0045526 ("During this meeting, we explained what critical habitat is and that, if designated, special management considerations may be needed for the features determined to be essential to the species.").

83 PBCH0045497; *see also* PBCH0045526-27 ("[We] actively solicited comments from Alaska Natives living with the range of the polar bear. . . . We published notices in the **Federal Register** . . . [and] also notified the primary communities located within the range of polar bear in Alaska by mail of the opportunity to provide oral or written comments prior to public hearings we held in Anchorage on June 15, 2010, and Barrow on June 17, 2010.").

84 PBCH0045526.

> organization was asked to serve as a peer reviewer of the proposed critical habitat designation."[85]

Notably, the Final Rule makes no reference to consultation with Alaska Native corporations because there were no such efforts by the FWS. The only discussions that took place between the FWS and Alaska Native corporations took place between the FWS and ASRC at the instigation of ASRC. The FWS *made no efforts* to reach out to and consult with any of the other nine Alaska Native corporations – the other three regional corporations and the six village corporations – that are plaintiffs in this lawsuit and are affected by the critical habitat designation. A statutory "consultation obligation is an affirmative duty."[86] The FWS's communication with just one of the many affected Alaska Native corporations, and only then at the initiation of the corporation, falls woefully short of satisfying this obligation.

According to the FWS, its anemic efforts to "consult" with anyone in the Alaska Native community entailed, in their entirety: (1) presenting "general information" regarding critical habitat prior to the initial proposed critical habitat designation at a meeting between the Borough and a Canadian wildlife management society, and at a subsistence hunting group meeting in Nome; (2) some "attempt," presumably the mailing, to "notify" all potentially affected Native communities of their opportunity to comment on the proposed critical habitat designation; (3) a public hearing in Barrow where the public was invited to provide comment; and (4) informing a subsistence hunting group concerning a *different regulatory action* (the listing of the polar bear as a threatened species) and requesting that the subsistence group serve as a peer reviewer of the

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85 *Id.*

86 *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1088 (9th Cir. 2011) (quoting *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir. 1984)).

proposed designation. These are facially inadequate to satisfy the statutory consultation obligation.

First, the FWS candidly admits that it did not make meaningful efforts to consult or coordinate with anyone in the Alaska Native community, including Alaska Native corporations, *prior* to issuing the initial proposed critical habitat designation for polar bears.[87] A presentation of "general information" is not "meaningful consultation." It is not even consultation; a presentation of general information is a pronouncement of what the FWS intends to do. Consultation, on the other hand, contemplates actual dialogue and a meaningful opportunity for Alaska Native corporations to provide input early in the development of a regulation.[88]

Second, an "attempt" to "notify" Alaska Native communities about a proposed regulation is, again, not consultation. The statutory duty requires actual consultation, not an attempt at unilateral notification. The same goes for mailings.

Third, open comment periods and public meetings where any person could comment on the proposed critical habitat designation cannot seriously be understood to constitute consultation. The Ninth Circuit in *California Wilderness Coalition v. U.S. Department of Energy*, a 2011 case addressing this very issue, soundly rejected a federal agency's argument that

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[87] *See* PBCH0045497 (acknowledging that there was no "extensive coordination with the Alaska Native community prior to proposing to designate critical habitat"). In a signed draft of the proposed critical habitat designation dated less than a month before it was published in the Federal Register, the FWS implicitly acknowledges that *no prior consultation* had occurred, but instead, that the FWS "*will consult* with the Alaska Nanuuq Commission" on the proposed designation. PBCH0018115 (emphasis added). At some point over the next month, this language was deleted and a reference was added to the August 2009 meeting with the Commission. PBCH0021756.

[88] *See* Executive Order 13175 § 5(a) ("Each agency shall have an accountable process to ensure *meaningful and timely input* by tribal officials in the development of regulatory policies that have tribal implications." (emphasis added)).

its statutory "consultation" obligation required no more than notice-and-comment proceedings.[89] The court concluded that the statute instead required the federal agency to confer with the affected parties *before* taking an action, a conclusion "supported by all the applicable rules of statutory construction" and "amply supported, if not compelled, by [the Ninth Circuit's] relevant precedent"[90] The federal agency in *California Wilderness Coalition*, as in this case, was already required by another statutory provision to provide an opportunity for public comment.[91] The court explained that an interpretation of consultation "to mean no more than notice-and-comment" proceedings would render the statutory consultation requirement meaningless.[92] The statutory obligation to consult with Alaska Native corporations, if it means anything, must require more than a notice-and-comment and public meetings available to the general public.

This distinction is well illustrated by the fact that the Alaska Native community used the open comment period and public meetings as an opportunity to request that the FWS engage in meaningful consultation. For example, in their written comments, ASRC and the North Slope Borough "recommend[ed] that the FWS expand its coordination efforts" with Alaska Natives.[93] Similarly, a FWS Division Chief who had attended the June 2010 meeting in Barrow described one of the "key issues" raised at the meeting as the "need for complete consultation with tribes (meaning, need to go to all villages)."[94]

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89 631 F.3d 1072, 1086-90 (9th Cir, 2011).

90 *Id.* at 1087.

91 *See* 16 U.S.C. § 1533(b)(5)(E) (requiring the FWS to hold a public meeting on critical habitat designation if requested); 5 U.S.C. § 553(c) (requiring an agency to give the public the opportunity to submit comments on a proposed rule).

92 *Cal. Wilderness Coal.*, 631 F.3d at 1087.

93 PBCH0054362.

94 PBCH0032489.

Finally, coordination with the Alaska Nanuuq Commission, while commendable, does not satisfy the FWS's statutory obligation to consult with Alaska Native corporations. The Alaska Nanuuq Commission was established to represent rural villages concerning the conservation and sustainable subsistence use of polar bears. It is composed of village representatives whose interests may not align with those of Alaska Native corporations as they relate to the impacts of the critical habitat designation.[95] The Commission focuses on issues relating to the subsistence hunting of polar bears. As the FWS failed to recognize, there are many important Alaska Native interests implicated by the critical habitat designation regarding economic and social issues that go beyond subsistence hunting.[96] ASRC and the Borough expressly notified the FWS that the Alaska Nanuuq Commission had a limited role and that coordination with that single entity was insufficient.[97]

For the foregoing reasons, the FWS failed to satisfy its statutory obligation to consult with affected Alaska Native corporations.

C. The failure to consult with Alaska Native corporations was not harmless error.

The FWS's failure to comply with the statutory mandate to consult with Alaska Native corporations was not harmless. "[A]lthough the nature of consultation makes it difficult to determine the precise consequences of its absence, the prejudice to the party excluded is

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95 *Cf. Cal. Wilderness Coal.*, 631 F.3d at 1086 (holding that agency meeting with NARUC, an organization including representatives of all fifty states, did not satisfy agency's obligation to consult with affected states).

96 *See* PBCH0033154 (FWS Division Chief stating incorrectly during August 10, 2010 meeting with federal agencies that "Native community is most concerned with subsistence access"). As explained in public comments, Alaska Natives were also deeply concerned about the critical habitat designation's impact on the villages' economies and the likely loss of jobs that could drive Alaska Natives from their ancestral homes in search of work. *See, e.g.*, PBCH0055129-30.

97 *See* PBCH0054361-62.

obvious."[98] Alaska Native corporations were deprived their opportunity to exchange information and opinions with the FWS and describe their varied interests "early in the process of developing [the] proposed regulation," as required by statute. Their opportunity to comment on the completed critical habitat designation along with the general public "does not compensate for the lost opportunity to consult with [the FWS] in the formation of" the proposed critical habitat designation.[99]

Moreover, there is a substantive component to the FWS's failure to make the statutorily required effort to seek Alaska Native corporations' input on the critical habitat designation. For example, as discussed above, the FWS incorrectly concluded that "Barrow and Kaktovik are the only two Alaska Native communities that overlap with the proposed critical habitat designation" and only granted exclusions as to these communities.[100] In fact, there are more than a dozen other communities that are within the barrier islands habitat unit. An early exchange of information between Alaska Native corporations and the FWS would have avoided such objective errors.

Further, as described earlier, the FWS failed to exclude Alaska Native-owned lands – which are just 0.58% of the overall designation – because it wrongly concluded that this decision would not damage the FWS's relationship with Alaska Natives, the primary conservation stewards for polar bears, and thus had no impact on polar bear conservation efforts. Had the FWS actually consulted with Alaska Native corporations and others in the community early in the process, it would have understood that this relationship and its substantial conservation

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98 *Cal. Wilderness Coal.*, 631 F.3d at 1093.

99 *Id.*

100 PBCH0045523.

benefits were being put at risk through the unnecessary designation of Alaska Native-owned lands.

The prejudice caused by the FWS's failure to consult with Alaska Native corporations is particularly severe in this case because the FWS decision of whether to exclude areas based on economic and other impacts is for the most part discretionary.[101] No particular result is compelled by the statute and regulations, making an exchange of opinions prior to any decision critically important. "In such a situation, . . . a court can hardly conclude that the agency's refusal to consult with the affected [parties] had no bearing on the substance of the decision reached."[102]

IV. DEFENDANTS ARBITRARILY AND CAPRICIOUSLY DESIGNATED CRITICAL HABITAT WITHOUT DETERMINING WHETHER IT WAS PRUDENT AND WITHOUT CONSIDERING AVAILABLE DATA.

The FWS may only designate critical habitat for the polar bear to the extent prudent and determinable.[103] This is a substantive limitation on both the scope and the existence of any critical habitat designation. Under governing regulations, a designation is not prudent if it "would not be beneficial to the species."[104] Accordingly, as a threshold matter, prior to the designation of critical habitat, the FWS is required to assess whether such designation would be prudent. There is no evidence in the record that the FWS *ever* made the requisite finding of prudence. But even assuming the FWS made a prudence determination in 2008, as it claims in

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101 *See* 16 U.S.C. § 1533(b)(2) (Secretary "may" exclude areas from critical habitat designation).

102 *Cal. Wilderness Coal.*, 631 F.3d at 1094.

103 16 U.S.C. §§ 1533(a)(3)(A), 1533(b)(6)(C)(ii).

104 50 C.F.R. § 424.12(a)(1)(ii); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp.2d 1122, 1171 (E.D. Cal. 2008) ("It is 'not prudent' to complete a designation of critical habitat where it would be detrimental to the species." (quoting 50 C.F.R. § 424.12(a)(1))).

the Final Rule, it was arbitrary and capricious for the FWS to rely on this outdated determination in designating critical habitat in 2010 and ignore comments submitted by the Alaska Natives stating that such designation would be detrimental to the polar bear.

The critical habitat designation should be vacated because the FWS never made the requisite finding of prudence before promulgating the relevant rule. In the 2010 Final Rule, as the sole justification that designating polar bear critical habitat would be prudent, the FWS simply attempted to adopt a purported finding from the 2008 rule listing polar bear as threatened.[105] However, there was no such finding. In the 2008 listing rule, the FWS concluded that critical habitat for the polar bear was not determinable at that time; it did not reach any conclusion as to whether any such determination was prudent or would be beneficial to the species.[106] Indeed, it would have been difficult to do so absent some investigation into the impacts of the as-yet wholly undetermined critical habitat designation. The FWS candidly admitted that it had not gathered sufficient data as of the time of listing to evaluate such impacts.[107]

Tellingly, in the 2009 proposed rule to designate polar bear critical habitat, published seventeen months after the purported prudence determination was made, the FWS requested

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105 *See* PBCH0045486 ("At the time of listing [the polar bear as a threatened species], we determined that critical habitat for the polar bear was prudent, but not determinable."); PBCH0045488 ("In the final rule listing the polar bear as a threatened species (May 15, 2008, 73 FR 28212) and our proposed rule to designate critical habitat (October 29, 2009, 74 FR 56058), we determined that the designation of critical habitat for the polar bear is prudent."). Similarly, the October 2009 proposed rule to designate critical habitat provided: "In our final listing rule, we determined that the designation of critical habitat was prudent, but not determinable at that time." PBCH0021735.

106 *See* PBCH0005787 ("Additionally, we have not gathered sufficient economic and other data on the impacts of a critical habitat designation. These factors must be considered as part of the designation procedure. Thus, we find that critical habitat is not determinable at this time.").

107 *See id.*

comments and information that would permit a determination of whether the critical habitat designation was prudent:

> We particularly seek comments concerning: (1) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation, *such that the designation of critical habitat is prudent*.[108]

The FWS's continuing requests in 2009 and 2010 for comments about whether or not habitat should be designated as critical habitat based on prudential considerations confirms that no final prudence determination was ever reached in 2008. The FWS simply skipped the step and failed to subsequently remedy this defect. Because the FWS never complied with the ESA requirement to determine whether designating polar bear critical habitat was prudent, the critical habitat designation should be vacated as arbitrary and capricious and not in accordance with law.

Even assuming *arguendo* that the FWS had determined that critical habitat designation was prudent but not determinable in May 2008, its reliance on this determination when it promulgated the final rule designating critical habitat in 2010 was arbitrary and capricious because the determination was based upon inadequate and outdated information. When the Secretary of Interior concludes that critical habitat is not determinable concurrently with the original listing decision, as was the case here, the later eventual designation – and any related prudence determination – must be based on current data. Once the designation became determinable, "the Secretary must publish a final regulation, *based on such data as may be*

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[108] PBCH0021734 (emphasis added). The FWS would echo this request again in May 2010. *See* PBCH0032118.

available at that time, designating, to the maximum extent *prudent*, such habitat."[109] In other words, because the FWS's Final Rule was published on December 7, 2010, the determination of whether the critical habitat designation was prudent (and the proper scope of any critical habitat to be designated) must be "based on such data as may be available at that time."

This timing requirement is important here because the FWS received data after the 2008 listing rule establishing several facts that were critical to a prudence determination. First, the designation would severely impair the FWS's working relationship with the Alaska Native community, a relationship that the FWS relies on heavily for conservation of the polar bear here and abroad.[110] Second, alienating the Alaska Natives who voluntarily engage in most of the conservation efforts that protect polar bears will be detrimental to polar bears.[111] Third, the designation would have negligible conservation benefits and would not result in a single additional conservation measure for the species.[112] Taken together, these facts established that the critical habitat designation would be detrimental to polar bears and not prudent. The FWS was required to consider and apply this data, rather than its own speculation or guesswork that designation of critical habitat would not impair the FWS's working relationships with the Alaska Native community, when determining whether the designation of polar bear critical habitat would be prudent.[113]

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109 16 U.S.C. § 1533(b)(6)(C)(ii) (emphasis added).

110 PBCH0055134.

111 *Id.*; PBCH0055132.

112 PBCH0041501.

113 *Ctr. for Biological Diversity v. Kempthorne*, 607 F. Supp.2d 1078, 1091 (D. Ariz. 2009) ("[The FWS] may not base a determination on speculation or surmise or disregard superior data." (internal quotation omitted)) (setting aside a critical habitat determination where the FWS overlooked probative scientific evidence regarding its determination of whether or not designation of critical habitat was prudent).

If the FWS had properly considered the comments of the Alaska Natives, it should have determined that designating the full extent of polar bear critical habitat would not be prudent. When deciding whether or not it is prudent to designate critical habitat, the FWS has confirmed it may conclude that a critical habitat designation is not prudent "[i]n those cases in which the possible adverse consequences would outweigh the benefits of designation."[114] "To the extent possible, the Services will attempt to undertake only those regulatory actions of net benefit to the conservation of species and their habitats."[115] As explained above, the "benefits" of the critical habitat designation to polar bears are, at best, negligible. Further, by designating the largest critical habitat in history with dubious benefits for polar bears and potentially catastrophic harm for the people actually sharing habitat with polar bears (i.e., the North Slope Borough's residents and other Alaska Natives in the region), the FWS has succeeded in alienating the very people whose cooperation is most essential for any conservation efforts involving polar bears both here and abroad. The FWS's overbroad and unnecessary critical habitat designation, and the careless way in which it was thrust upon Alaska Natives and others, has alienated and antagonized the FWS's conservation partners to the point that the designation is detrimental to the species. By failing to balance the possible adverse consequences that accompany alienating the Alaska Native community against the negligible benefits of designation, "the [FWS] failed to consider all relevant factors as required" for any determination that the designation of polar bear critical habitat was prudent.[116]

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[114] *NRDC v. U.S. Dep't of Interior*, 113 F.3d 1121, 1125 (9th Cir. 1997) (quoting Final Rule, 49 Fed. Reg. 38900, 38903 (Oct. 1, 1984) (court's emphasis omitted)).

[115] 49 Fed. Reg. at 38903. The regulation refers to "Services" because it applies to both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

[116] *NRDC*, 113 F.3d at 1125 (reversing critical habitat designation). *NRDC* involved the FWS's failure to weigh potential risks and advantages when making a determination that a

V. IN DESIGNATING THE "NO DISTURBANCE ZONE" AS CRITICAL HABITAT, THE FWS EXCEEDED ITS STATUTORY AUTHORITY AND ACTED ARBITRARILY AND CAPRICIOUSLY.

In the Final Rule, the FWS designated three "units" as critical habitat: sea ice habitat, terrestrial denning habitat, and barrier island habitat.[117] The barrier island habitat contained not only "off-shore islands," but also "water, sea ice, and land habitat within 1.6 kilometers (1 mile) of the barrier islands," a "no-disturbance zone" ("NDZ").[118] The FWS stated that the 1 mile "distance was chosen because this distance approximates the mean distance females and cubs reacted to snowmobiles at Svalbard . . . , and because adult females are the most important age and sex class in the population."[119] The FWS's designation of the NDZ as critical habitat exceeded its statutory authority under ESA Section 4 and lacked a rational basis.

A. The FWS exceeded its statutory authority under ESA Section 4 by designating the NDZ as critical habitat.

Pursuant to ESA Section 4, the FWS is limited to designating as critical habitat only those geographic areas that contain PCEs – the physical or biological features essential to the conservation of the species.[120] One feature that the FWS may consider when designating critical

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designation of critical habitat was not prudent. The analysis, however, remains the same when considering an affirmative finding that a designation is prudent. In either case, the FWS is required to consider all relevant factors and articulate a rational connection between the facts found and the choice made. *Id.* at 1126.

117 PBCH0045515.

118 PBCH0045531.

119 PBCH0045510.

120 *See* 16 U.S.C. §§ 1532(5)(A), 1533(a)(3)(A); *Cape Hatteras Access Pres. Alliance v. U S. Dep't of the Interior*, 344 F.Supp.2d 108, 123 (D.D.C. 2004) ("That PCEs must be 'found' on an area is a prerequisite to designation of that area as critical habitat.").

habitat is "habitats that are protected from disturbance."[121] In its Final Rule, the FWS designated actual coastal barrier islands and spits as critical habitat based on this feature, explaining that they "*provide areas free from human disturbance* and are important for denning, resting, and migration along the coast."[122] The FWS's designation of barrier islands and spits is seemingly consistent with the requirement of Section 4 to only designate habitat that contains PCEs, to the extent these areas contain the identified features.

In addition to barrier islands and spits, the FWS also designated the NDZ as critical habitat in order to "*adequately protect polar bears* denning, resting, or moving along the coastal barrier islands *from human disturbance*."[123] As is evident from this explanation, the NDZ does not contain PCEs at all, but rather was designated solely as a means to protect those PCEs already provided by the proximate barrier islands and spits. By including the NDZ as part of the barrier island habitat despite its lack of PCEs, the FWS acted contrary to the requirements of ESA Section 4 and its implementing regulations.

ESA Section 4 and its implementing regulations do not define PCEs to include buffer zones or protective management measures, nor authorize the FWS to designate critical habitat on that basis. Instead, the proper mechanism to impose protective measures for the polar bear such as the NDZ is through ESA Section 7 consultation or through the Marine Mammal Protection Act ("MMPA") permitting process. Section 7 requires federal agencies to consult with the FWS when undertaking a federal action that may affect a species or its designated critical habitat and

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121 50 C.F.R. § 424.12(b)(5). Other PCEs include "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types." *Id.* § 424.12(b).

122 PBCH0045509 (emphasis added).

123 PBCH0045488 (emphasis added); *see also* PBCH0045491 (the purpose of the NDZ is to "maintain the functional integrity of the suitable barrier island habitat for resting, denning, and movements along the coast").

directs the FWS to impose "reasonable and prudent measures" to "minimize such impact" on the species.[124] Similarly, the MMPA directs the FWS, when authorizing incidental take, to identify measures to minimize adverse impacts on the species or its habitat.[125] Particularly relevant here, the FWS has under the MMPA already imposed a 1.6 km (1-mi) buffer surrounding known polar bear dens.[126]

A FWS employee explicitly questioned the use of the critical habitat designation as a means to impose protective measures when these other statutory mechanisms exist:

> There seems to be a recurring theme that critical habitat designation is a means to regulate or manage take. This comes up first in the document regarding the "no-disturbance" zone around barrier islands (exclusion 4d). If take (including impacts from disturbance) is currently adequately managed under the MMPA and ESA, *this zone and the associated regulatory oversight are redundant and unnecessary*. Thus, the *logic behind this zone is not clear*, and our failure to consider this specific requested exclusion is more noticeable. On the contrary, if disturbance-caused take is not being adequately managed through the existing regulatory processes, *it is not clear how including this zone in critical habitat will solve this*.[127]

The FWS's designation of the NDZ as barrier island habitat, using the critical habitat designation process to impose protective management measures, exceeded its authority under Section 4.

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124 16 U.S.C. §§ 1536(a)(2), 1536(b)(4)(ii).

125 16 U.S.C. §§ 1371(a)(5)(A)(i)(II)(aa); 1371(a)(5)(D)(ii)(I).

126 50 C.F.R. § 18.128(a)(2)(iii); PBCH0045513.

127 PBCH0032563-64 (Memorandum from Ted Swem, Fairbanks Fish and Wildlife Field Office, to Thomas Evans, Marine Mammals Management, July 20, 2010) (emphasis added).

B. The FWS failed to provide a rational basis for its designation of the NDZ as critical habitat.

The FWS's inclusion of the NDZ as part of the barrier island PCE is arbitrary and capricious because the FWS failed to provide a rational basis justifying both the imposition of the NDZ and the distance selected.[128]

In the Final Rule, the FWS fails to provide a rational basis for imposing the NDZ. First, the FWS acknowledges that coast barrier islands and spits already "provide areas free from human disturbance."[129] Accordingly, adopting the NDZ to provide an area free from human disturbance is unnecessary, redundant, and clearly not essential to the conservation of the polar bear. Second, by indiscriminately including all barrier islands and spits and broadly applying the NDZ to all such geographic features, the FWS has included areas that currently support human activity. For example, as explained previously, the barrier island PCE includes the Alaska Native communities of Diomede, King Island, Kivalina, Nunam Iqua, Point Hope, Point Lay, Shaktoolik, Shishmaref, Solomon, St. Michael, Teller, Wainwright, and Wales. Because these areas are not, and will not be, free from human disturbance, the FWS has not provided a rational basis justifying the need for the NDZ in these locations. Finally, the FWS's justification for the NDZ conflicts with numerous observations, as provided by several commenters, that polar bears utilize habitat in close proximity to human activities.[130] Despite the seemingly negligible impacts associated with these interactions, the FWS's only response is an unsupported assertion

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128 *See, e.g.*, *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) ("agency action must be reversed when the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency").

129 PBCH0045509.

130 *See*, *e.g.*, PBCH0054076-77 (Denali comment letter (Dec. 22, 2009)); PBCH0054097 (AOGA comment letter (Dec. 23, 2009)); PBCH0054349 (ASRC comment letter (Dec. 28, 2009)).

that polar bears "are unlikely to use these [barrier island] habitats if disturbed by the presence of humans."[131] The FWS made no attempt to reconcile the imposition of the NDZ with evidence demonstrating that such a buffer zone is unnecessary.

In addition, in imposing the NDZ, the FWS failed to provide a rational explanation for why the one-mile buffer was appropriate. As its sole support, the FWS relies upon one study noting that female polar bears with cubs react to approaching snowmobiles at a mean distance of 1,534 meters.[132] In relying upon this study, the FWS failed to explain why it was disregarding other expert opinions, and the observations submitted by commenters, suggesting that a narrower buffer zone distance would be sufficient. For example, in response to a request from the FWS, Dr. Stephen Herrero posited that a reasonable buffer distance for resting bears on barrier islands would be "somewhere between 100-200m. If you want to respect resting polar bears I'd probably go with 200m."[133] By not acknowledging and explaining differing expert opinions, and the conflicting evidence in the record, the FWS failed to provide reasonable support for the NDZ.

VI. THE PROPER REMEDY IS TO VACATE THE CRITICAL HABITAT DESIGNATION.

The APA requires that a reviewing court "hold unlawful and set aside agency action" found to be "arbitrary, capricious" or "without observance of procedure required by law."[134] The

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131 PBCH0045491.

132 PBCH0007258-64 (Magnus Andersen & Jon Aars. *Short-term Behavioural Responses of Polar Bears (Ursus Maritimus) to Snowmobile Disturbance*. 31 Polar Biology 501–07 (2008)).

133 PBCH0007023. Dr. Herrero is a world-renowned bear biologist whose input was sought by Dr. Terry DeBruyn, the FWS polar bear project leader, stating: "I feel you have the best background to make a reasonable estimate [of an appropriate 'buffer' distance]." *Id.*

134 5 U.S.C. §§ 706(2)(a), 706(2)(d); *see also Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090 (9th Cir. 2011) ("When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action.").

court should vacate the critical habitat designation because the FWS improperly failed to exclude all but two Alaska Native communities, based its decision not to exclude Alaska Native-owned lands on conclusions that lacked any support in, and were expressly contradicted by, the evidence in the record, failed to consult with Alaska Native corporations in the process of developing the critical habitat designation as required by statute, failed to properly determine whether designation of critical habitat was prudent, and improperly designated a one-mile no disturbance zone as part of the barrier island unit. In the alternative, the court should vacate the FWS's designation of Alaska Native-owned lands, Alaska Native communities, and the no disturbance zone as critical habitat, and order the FWS to reconsider this decision after taking into account the affect of the decision on the relationship between the federal government and Alaska Natives and after consulting with affected Alaska Native corporations.

CONCLUSION

For the foregoing compelling reasons, the Alaska Native Plaintiffs and North Slope Borough request that their motion for summary judgment and their requested relief be granted.

DATED this 21st day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2011, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case Nos. 3:11-cv-00025-RRB; 3:11-cb-00036-RRB; and 3:11-cv-00106-RRB who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Kevin M. Cuddy