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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

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

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INTRODUCTION

The United States Fish & Wildlife Service ("FWS") designated 187,157 square miles of land and sea as "critical" to the polar bear's survival, despite anticipating that the designation will result in no additional conservation requirements for the polar bear. In doing so, FWS disregarded undisputed evidence that the designation would impair FWS's cooperative working relationship with Alaska Natives, which FWS readily concedes is essential to any conservation effort for polar bears. This unprecedented critical habitat designation should be set aside because it is counterproductive for polar bears and legally deficient for at least five reasons.

First, FWS's designation of more than a dozen rural communities as critical habitat is unlawful. FWS admits that these communities should not have been included in the designation, yet surprisingly refuses to concede its error. Instead, FWS claims that its own maps are wrong and that it already excluded these communities based on an implausible reading of the Final Rule that is inconsistent with the rule's plain language. This stubborn facts-be-damned approach typifies FWS's entire polar bear critical habitat designation – seeking to impose the largest designation in history despite an absence of factual or legal support, and even in the face of undisputed contrary evidence. The court should reject FWS's nonsensical interpretation of the Final Rule and direct FWS to clearly exclude these communities from the designation.

Second, FWS's decision not to exclude Alaska Native-owned lands, which make up only 0.58% of the critical habitat designation, is arbitrary and capricious because FWS's consideration of the impact of its decision is fundamentally flawed and lacks any support in the record. FWS argues that its decision not to exclude land from a critical habitat designation is categorically free from *any* judicial review. FWS is wrong. The court can and should set this exclusion decision aside because FWS ignored the only evidence in the record demonstrating that the decision

would adversely impact the working relationship between the federal government and Alaska Natives, an essential part of polar bear conservation efforts.

Third, FWS violated its statutory duty to consult with Alaska Native corporations early in the rulemaking process. FWS argues that its failure to consult is not subject to judicial review and does not provide any basis for setting aside the critical habitat designation. Again, FWS is wrong. FWS's illegal failure to consult with all but one of the affected Alaska Native corporations requires that the Final Rule be set aside.

Fourth, FWS's failure to make any determination as to whether the designation of critical habitat was prudent was arbitrary and capricious. FWS argues that no affirmative prudency finding is required, but there is no evidence in the record that FWS considered whether its designation was prudent, as required by statute. Further, even if FWS made an implicit prudence finding, the Final Rule should be set aside because FWS ignored evidence demonstrating that the designation would harm its relationship with essential conservation partners and therefore would be imprudent.

Fifth, FWS exceeded its authority by including a "no disturbance zone" ("NDZ") within barrier island critical habitat. The NDZ does not contain any of the primary constituent elements necessary to support its inclusion in the designated critical habitat. Further, FWS's imposition of a universal one-mile NDZ lacks a rational basis in the evidence before the agency.

For all of the above reasons, the Alaska Native Plaintiffs and North Slope Borough request that the court set aside the critical habitat designation. The designation should be remanded to FWS with instructions to reconsider whether the designation is prudent and, if so, to comply with its legal duties before issuing a more limited and appropriate designation.

ARGUMENT

I. ALTHOUGH FWS ADMITS THAT ALASKA RURAL COMMUNITIES SHOULD BE EXCLUDED FROM THE CRITICAL HABITAT DESIGNATION, THE FINAL RULE FAILS TO EXCLUDE THEM.

FWS admits that the 13 rural communities[1] identified by plaintiffs should not have been designated as polar bear critical habitat.[2] FWS also insists that these communities were excluded by textual description when the Final Rule stated that "manmade structures" are not included in the designation. However, the plain language of the regulations and the Final Rule undermine FWS's contention.

In the promulgated polar bear critical habitat regulations, FWS included a section excluding manmade structures. This exclusion states:

> [c]ritical habitat does not include manmade structures (*e.g.*, houses, gravel roads, generator plants, sewage treatment plants, hotels, docks, seawalls, pipelines) and the land on which they are located existing within the boundaries of designated critical habitat on the effective date of this rule.

50 C.F.R. § 17.95(a)(3). This definition is explicitly limited to discrete, physical structures and their terrestrial footprint. It does *not* encompass local communities, which are not referenced.

Ignoring this plain language, FWS uses a selective quotation from the Final Rule to argue that the definition of "manmade structures" includes all of the North Slope's "local communities."[3] However, the full text belies FWS's argument:

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[1] These communities are: Diomede, King Island, Kivalina, Nunam Iqua, Point Hope, Point Lay, Shaktoolik, Shishmaref, Solomon, St. Michael, Teller, Wales, and Wainwright.

[2] Federal Defendants' Opposition to Plaintiffs' Motions for Summary Judgment and Cross-Motion for Summary Judgment [Doc. 64] ("Fed. Def. Br.") 92-93. Because the Defendants acknowledge that these communities should be excluded from the designated polar bear critical habitat pursuant to the ESA, Plaintiffs do not repeat their substantive arguments for why exclusion is warranted. Memorandum in Support of Alaska Native Plaintiffs' and North Slope Borough's Motion for Summary Judgment [Doc. 56] 14-17.

[3] Fed. Def. Br. 14-15, 92.

> Therefore, we have determined that ***manmade structures on all types of land ownership*** do not meet the criteria to be considered critical habitat for polar bears, or the definition of critical habitat in section 3(5)(a) of the Act, and should not be included in the final designation. Examples of ***structures*** that are not included as part of designated critical habitat include: Houses, gravel roads, airport runways and facilities, pipelines, central processing facilities, saltwater treatment plants, well heads, pump jacks, housing facilities or hotels, generator plants, construction camps, pump stations, stores, shops, piers, docks, jetties, seawalls, and breakwaters ***on the lands owned or leased by the oil and gas industry, USAF lands, and local communities*** that overlap with this final critical habitat designation for polar bears in Alaska.[4]

While "local communities" are mentioned, they are only mentioned to describe the "types of land ownership" of land on which the excluded structures may be located. Other sections of the Final Rule similarly make clear that although "manmade structures" *owned* within local communities are excluded, the communities are not themselves excluded.[5] This distinction is critical – rural communities are not simply an aggregation of manmade structures. FWS's exclusion of manmade structures would not, for example, exclude dirt roads, boardwalks, or open space between buildings from the designation, nor would it exclude any land adjacent to the communities which may be regularly used by community members or needed for future community development and growth.[6]

Further undermining FWS's argument, FWS explicitly excluded the communities of Barrow and Kaktovik from the mapped designation.[7] If the exclusion of "manmade structures"

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4 PBCH0045514 (emphasis added).

5 *See, e.g.*, PBCH0045492 (listing examples of "manmade structures" without reference to "local communities" and explaining that they are excluded "regardless of landownership"), 0045493 ("[A]ny existing manmade physical structures, including those owned by the Native communities, are not included in the designation.").

6 Ironically, FWS's designation of these locations as critical habitat conflicts directly with FWS's polar bear deterrence guidelines, 50 C.F.R. § 18.34, which specifically authorize members of the public to deter polar bears from these locations.

7 50 C.F.R. § 17.95(a)(6)(ii)-(iii).

was intended to, or did, exclude all existing communities, there would have been no need to separately exclude Barrow and Kaktovik. FWS attempts to explain away this inconsistency by noting that it only received legal boundary information for these two communities.[8] Although FWS has an obligation to map the designation using geographical coordinates,[9] there is no rule requiring that it have third-party legal boundary information before designating (or excluding) critical habitat. Indeed, FWS regularly designates critical habitat without such information, determining the boundaries itself. If FWS can generally designate critical habitat in this manner, then it can certainly draw lines around rural communities in the polar bear critical habitat designation.[10]

The plain language of the Final Rule makes clear that FWS excluded Barrow and Kaktovik (and not the other 13 communities) because FWS believed that these were the only two communities that overlapped with the critical habitat designation. The Final Rule states: "The Secretary has exerted his discretion to exclude the communities of Barrow and Kaktovik, *the only two Alaska communities*, from the final critical habitat designation."[11] FWS attempts to

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[8] Fed. Def. Br. 93. FWS points to no evidence in the record demonstrating that it attempted to obtain this information for the other 13 communities at issue.

[9] *Id.*; 50 C.F.R. § 424.12(c) ("Each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area."); PBCH0045490 ("critical habitat boundaries should be clearly defined for the public" in order to provide "clarity [and] certainty to the public and stakeholders as to which areas are included in the critical habitat designation") (citing 50 C.F.R. § 424.12(c)).

[10] Nonetheless, to avoid errors, FWS should solicit the assistance of these rural communities in determining their boundaries. On May 1, 2012, FWS and National Marine Fisheries Service jointly adopted a regulation clarifying how designated critical habitat should be described. 77 Fed. Reg. 25611 (May 1, 2012) (revising 50 C.F.R. § 424.18(a)). The rule demonstrates the importance of accurate critical habitat maps by establishing that maps will be the official delineation of the designated critical habitat.

[11] PBCH0045492 (emphasis added).

dismiss this as a "lone statement [taken] out of context."[12] To the contrary, this unambiguous and erroneous statement is repeated throughout the Final Rule and no amount of context can change its implication – FWS excluded Barrow and Kaktovik, and not the other 13 communities that overlap with the designation, based solely upon a mistake of fact.[13]

Given that FWS has conceded that the 13 communities should not have been designated as critical habitat, the court should remand the Final Rule to FWS to identify and map the boundaries of the critical habitat designation to exclude rural communities and the land surround the communities which may be regularly used by community members or needed for future community development and growth.[14]

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

A. A decision whether to exclude lands from critical habitat designation under the ESA is reviewable under the APA.

FWS contends that its decisions not to exclude lands from a critical habitat designation cannot be challenged in court no matter how flawed because the decision "'is committed to agency discretion by law'" and "there is no law or standard for the Court to apply to the

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12 Fed. Def. Br. 93.

13 *See* PBCH0045492 ("Only the North Slope communities of Barrow and Kaktovik overlap with the proposed critical habitat designation . . . ."), 0045504 ("[T]he town sites for Barrow and Kaktovik [are] the only formally defined and recognized communities that overlap with the proposed critical habitat."), 0045523 ("Barrow and Kaktovik are the only two Alaska Native communities that overlap with the proposed critical habitat designation."). Notably, in the section of the Final Rule discussing tribal land exclusions, when weighing the benefits of exclusion versus inclusion, FWS only refers to Barrow and Kaktovik, and makes no reference to the 13 other communities purportedly excluded. PBCH0045522-24.

14 *See* PBCH0028780 (critical habitat should exclude areas needed for future development), 0055278-80 (villages, their immediate surroundings, and areas containing future municipal development and construction projects should be excluded from critical habitat), 0055286 (same).

Service's exercise of discretion."[15] FWS is mistaken. FWS is not free to disregard statutory requirements and make decisions arbitrarily, and this court is fully empowered to correct FWS's objective errors.

Although the Secretary is afforded discretion in deciding whether to exclude areas when designating critical habitat,[16] that discretion is not unlimited. Section 4(b)(2) imposes a "*categorical requirement*" that the Secretary take into consideration economic and other relevant impacts in making exclusion decisions, although it leaves it to the Secretary's discretion how to substantively balance these factors.[17] If the Secretary fails to comply with this statutory requirement and does not consider relevant impacts, a court should set aside the exclusion decision under the APA as "not in accordance with the law."[18] Moreover, if the Secretary considers an impact, but the consideration of the impact is fundamentally flawed and "runs

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[15] Fed. Def. Br. at 84 (quoting 5 U.S.C. § 701(a)(2)). FWS disregards that the exception to the general rule of judicial review for actions "committed to agency discretion" is "very narrow," only "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). That is not the case here.

[16] *See, e.g.*, *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 126-27 (D.D.C. 2004) ("the [FWS] has discretion when it comes time to decide whether to exclude areas from a critical habitat designation").

[17] *Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("[T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.' It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." (citing 16 U.S.C. § 1533(b)(2))). Although the requirement to consider impacts is found in the first sentence in Section 4(b)(2) relating to the designation of critical habitat, as the Department of the Interior itself recognizes, the balancing of these impacts in fact takes place when the Secretary makes exclusion decisions under the second sentence of Section 4(b)(2). *See* PBCH0027020-22.

[18] 5 U.S.C. § 706(2)(A) (directing court to "set aside" agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

counter to the evidence before the agency," a court should set aside the exclusion decision as arbitrary and capricious.[19] This requirement applies and limits the Secretary's discretion whether the Secretary decides to exclude or not to exclude an area from a critical habitat designation.

Accordingly, in *Wyoming State Snowmobile Association v. U.S. Fish and Wildlife Service*, the court held that FWS's 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 FWS's own conclusions regarding the economic impacts of the decision.[20] The court enjoined the critical habitat designation rule as to certain areas, pending consideration by FWS of *all* economic impacts and a reevaluation of the exclusion requests.[21] FWS contends, wrongly and without elaboration, that the court in *Wyoming State Snowmobile Association* "did not review or find unlawful the Service's decision not to exclude an area."[22] But this is exactly what the court did:

> In the 2009 CHD Rule, the Secretary decided not to exclude any lands from critical habitat based on economic impacts. This decision derives from an economic impact analysis in which the Service failed to comply with the intent of Congress which requires it to consider the full analysis of all the economic impacts. Therefore, the Secretary's exclusion decision as to the U.S. Forest Service lands in Washington currently managed by the LCAS is not in accordance with the ESA and it does not comply with the

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19 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983); *see also Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir.1997) (court reviewing ESA decision under the APA asks whether FWS considered "the relevant factors and articulated a rational connection between the facts found and the choice made") (quoting *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir.1993)).

20 741 F. Supp. 2d 1245, 1266-67 (D. Wyo. 2010).

21 *Id.* at 1267-68.

22 Fed. Def. Br. 85.

procedures required by law.[23]

In short, the court may review FWS's decision not to exclude the requested lands.

Similarly, in *Center for Biological Diversity v. Bureau of Land Management*, the court concluded that a FWS decision to exclude portions of critical habitat was arbitrary and capricious because the agency relied on an assumption about the economic impact of the exclusion for which there was "no factual basis in the record" and that was contradicted by the agency's own data.[24] FWS argues that this case is inapposite because it involved a decision *to exclude* an area from critical habitat, which is subject to additional statutory requirements by which it can be evaluated. But the court in *Center for Biological Diversity* overturned BLM's exclusion decision because the decision violated a statutory requirement that applies equally to *all* exclusion decisions: the requirement that an agency's consideration of the impacts of it decision not be fundamentally flawed and without support in the record.[25]

Following *Wyoming State Snowmobile Association* and *Center for Biological Diversity*, the court may review and should overturn FWS's decision not to exclude Alaska Native-owned lands pursuant to the APA as based on a fundamentally flawed consideration of the impacts of

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[23] *Wyo. State Snowmobile Ass'n*, 741 F. Supp. 2d at 1267.

[24] 422 F. Supp. 2d 1115, 1149 (N.D. Cal. 2006). The court also held that, "in relying on an unsubstantiated assumption that was critical to its exclusion decision, the Service did not rely on the 'best scientific and commercial data available' as required by the ESA." *Id.* at 1150 (quoting 16 U.S.C. § 1533(b)(2)).

[25] FWS cites two cases in support if its position: *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 2006 WL 3190518 (E.D. Cal. Nov. 2, 2006), an unpublished case, and *Cape Hatteras Access Preservation Alliance v. U.S. Department of the Interior*, 731 F. Supp. 2d 15 (D.D.C. 2010), which relies on *Home Builders*. For the reasons explained above, the courts in these cases incorrectly concluded that an agency's decision not to exclude an area from a critical habitat designation is not subject to any statutory requirements or judicial oversight. Plaintiffs submit that the decisions they cite, which affirm the right of the court to overturn agency decisions based on obvious, verifiable, and harmful errors, are more persuasive.

that decision.

B. FWS's consideration of the impact of its decision not to exclude Alaska Native-owned lands on its relationship with Alaska Natives was fundamentally flawed and ran counter to the evidence before it.

In failing to exclude Alaska Native-owned land from the designation of polar bear critical habitat, FWS disregarded the only evidence in the record and wrongly concluded that its decision would have no impact on the working relationship between the federal government and Alaska Natives,[26] which is "essential" for the ongoing conservation of polar bears.[27] By disregarding this evidence, FWS failed to recognize any adverse conservation consequences that might arise from designating Alaska Native-owned lands as critical habitat. While the FWS offers two rationales for its conclusion that the designation would not adversely affect its relationship with Alaska Natives, neither of these rationales has merit.[28]

FWS first argues that its relationship with Alaska Natives will not be affected by the designation because the agency excluded all rural communities from the designation. This rationale should be rejected because it is entirely absent from the administrative record and appears for the first time in FWS's brief.[29] It likewise fails because, as explained above, FWS

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[26] *See* Memorandum in Support of Alaska Native Plaintiffs' and North Slope Borough's Motion for Summary Judgment [Doc. 56] ("Pl. Br.") 18-23; PBCH0055128, 0055130 (comment by Alaska Native representatives stating that FWS's refusal to exclude the 0.58% of the critical habitat designation owned by Alaska Natives would harm Alaska Native communities and adversely affect the longstanding working relationship between FWS and Alaska Natives).

[27] PBCH0045523 ("The continued cooperation with the Native communities in northern and western Alaska is essential for the conservation of polar bears in Alaska."); Doc. 35 ¶ 3 ("Defendants admit that the cooperation of Alaska Natives is an important element of conservation of the polar bear[.]").

[28] *See* Fed. Def. Br. 29-30, 95.

[29] Courts are forbidden from considering such "post hoc rationalizations" in conducting review under the APA. *See, e.g., Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) (refusing to consider rationale for agency decision that was "entirely absent from the

did not exclude all rural villages within the designation. Even if FWS had excluded all rural communities and this rationale appeared in the administrative record, that exclusion does not rationally support FWS's conclusion that there will be no adverse impact to its relationship with Alaska Natives. The inclusion of rural communities was obviously troubling to Alaska Natives, but so too was the inclusion of the remainder of Alaska Native-owned lands, where future development may take place providing crucial economic opportunities to Alaska Natives. Whether or not rural communities were included, Alaska Native representatives made clear that any decision by FWS not to exclude the remainder of Alaska Native-owned lands would adversely affect the relationship between the federal government and Alaska Natives.[30]

FWS next argues that its relationship with Alaska Natives will not be affected by the designation because the designation would not, on its own, prohibit any development. This rationale, as plaintiffs demonstrated in their opening brief, is likewise unsupportable.[31] Alaska Native representatives voiced concerns about many types of potential impacts on development, including those that fell short of a flat prohibition on development.[32] Indeed, FWS's decision to exclude Barrow and Kaktovik to enhance its relationship with Alaska Natives demonstrates the agency's own belief that the designation of critical habitat *does* impact these relationships, regardless of whether or not the designation prohibits development.

In essence, FWS is claiming that it is in a better position to determine how its exclusion

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administrative record" and first articulated in a legal brief; "We are limited to the explanations offered by the agency in the administrative record.").

30 *See* PBCH0054522-26, 0054532-33, 0055128, 0055130.

31 *See* Pl. Br. 21-22.

32 *See* PBCH0055138-43. Many of these concerns were outlined in the economic analysis commissioned by ASRC and the State of Alaska. *See* PBCH0055148-215.

decisions will affect Alaska Natives' working relationship with federal agencies than Alaska Natives themselves. But a positive relationship is not unilaterally determined – FWS's belief that the relationship is not jeopardized does not make it so. The very act of telling Alaska Natives that the working relationship with FWS will be unaffected by the agency's heavy-handed and arbitrary designation undermines that relationship. Indeed, this lawsuit is testament to the fact that the Alaska Native Plaintiffs do not believe that the Final Rule's limited exclusions go far enough and that FWS's disregard of their legitimate concerns has done considerable damage to the cooperative relationship with Alaska Natives in the region.

FWS insists that it is not prohibited from "designating areas whenever there is opposition by a group involved in species conservation."[33] Of course, plaintiffs have never suggested otherwise; they acknowledge that FWS has discretion to weigh the impacts of the critical habitat designation in making an exclusion decision, including the impact of that decision on cooperative partnerships. FWS is not free, however, to disregard evidence identifying negative impacts of its decision and engage in a balancing test that only considers the purported positive conservation benefits of a designation – precisely what happened here.[34] Accordingly, FWS's decision was arbitrary and capricious and should be set aside.

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

In their opening brief, plaintiffs demonstrated that FWS did not meaningfully consult with affected Alaska Native corporations early in the development of the critical habitat

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[33] Fed. Def. Br. 95-96.

[34] This is not a case where, for example, FWS acknowledged that there was evidence that its working relationship with Alaska Natives may be jeopardized by the action but nevertheless concluded that the positive conservation benefits of this designation outweighed this potential negative impact.

designation, as required by law.[35] In response, FWS argues that it has no enforceable duty to consult with Alaska Native corporations.[36] The law is otherwise. By law, "[t]he Director of the Office of Management and Budget and all Federal agencies *shall* [] consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175."[37] Executive Order 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."[38] The self-evident purpose of this law is to require consultation with Alaska Native corporations and ensure that their voices are heard on issues impacting them and their shareholders.

FWS cannot point to any express language in this law limiting the enforceability of its duty to consult, because there is no such language. Instead, FWS tries to read this limitation into the law's direction to federal agencies to consult with Alaska Native corporations "*on the same basis*" as Indian tribes under Executive Order 13175 and the executive order's final section, which provides that the order "is not intended to create any right . . . enforceable at law by a party against the United States [or] its agencies."[39] But FWS offers no support for its conclusion that the phrase "on the same basis" incorporates the final section of Executive Order 13175

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35 *See* Pl. Br. 24-33.

36 *See* Fed. Def. Br. 110-13. FWS hopes to evade an APA violation by disputing the legal enforceability of the statute, since otherwise the designation would not be in accordance with the consultation law. *See* 5 U.S.C. § 706(2) (court shall "hold unlawful and set aside agency action" found to be "not in accordance with the law").

37 Pub. L. 108-199, Div. H, § 161, 118 Stat. 452 (Jan. 23, 2004) (emphasis added), as amended Pub. L. 108-447, Div. H, § 518, 118 Stat. 3267 (Dec. 8, 2004).

38 Executive Order 13175 of November 6, 2000, 65 Fed. Reg. 67249 (Nov. 9, 2000).

39 *Id.* § 10.

related to judicial review.[40] On its face, the phrase "on the same basis" relates to the timing and manner of *consultations* on regulations that have substantial direct impacts on Indian tribes, not the enforceability of the law. Of the ten sections in Executive Order 13175, only one, entitled "Consultation," creates the obligation to consult with Indian tribes and defines how an agency complies with that obligation. By using the phrase "consult . . . on the same basis," Congress clearly intended to incorporate this consultation section and thereby define the contours of the duty to consult with Alaska Native corporations.

There is no indication in the phrase "on the same basis" (or anywhere else in the statute) that Congress meant to incorporate sections in the executive order unrelated to consultation. Indeed, some of the other sections are uniquely related to Indian tribes and *could not* be meaningfully transferred to Alaska Native corporations.[41] If Congress had intended to require federal agencies to consult with Alaska Native corporations without creating any right that could be asserted in court, as FWS suggests, it could have done so easily and clearly – by saying so or expressly incorporating the language from the final section of Executive Order 13175. It did not do so. In the absence of such language, the Public Law creates a legally enforceable duty to consult with Alaska Native corporations.[42]

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[40] Fed. Def. Br. 111, 112.

[41] For example, Section 2 of Executive Order 13175 directs agencies formulating policies with tribal implications to consider the federal government's trust obligations towards Indian tribes and the right of Indian tribes to self-government. Section 6 relates to the manner in which an application by an Indian tribe for a waiver of statutory or regulatory requirements will be reviewed.

[42] FWS suggests that Congress's decision to create an enforceable duty to consult with Alaska Native corporations is "illogical" and "implausible" when no such duty exists with respect to Indian tribes. Fed. Def. Br. 113. Although FWS may question Congress's decision, imposing a legally enforceable duty on federal agencies to consult with Alaska Native corporations in no way produces absurd results or demands that the court ignore the most

FWS next argues that, even if a duty to consult exists, it was not triggered in this case because the designation of polar bear critical habitat was "required by statute."[43] But the designation of critical habitat is not some "required," non-discretionary, ministerial duty for which consultation would be meaningless. As FWS forcefully argues in this proceeding, it has considerable discretion in designating critical habitat and deciding whether to grant exclusions.[44] FWS cannot have it both ways. FWS's argument is further undermined by its acknowledgment in the Final Rule that the designation triggered its "responsibility" under Executive Order 13175 to consult with Federal Tribes[45]; if the designation triggered a duty to consult with Federal Tribes, it likewise triggered a duty to consult with Alaska Native corporations.

Finally, FWS claims that it adequately addressed the concerns of Alaska Native corporations by responding in the Final Rule to comments submitted by Alaska Native representatives.[46] However, the opportunity to comment on the completed critical habitat designation along with the general public "does not compensate for the lost opportunity to consult with [FWS] in the formation of" the proposed critical habitat designation.[47]

In their opening brief, plaintiffs demonstrated that FWS did not meaningfully consult

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plausible interpretation of the statutory language. Alaska Native corporations are, after all, a creation of Congress and have greater capacity to confer with federal agencies than many individuals living in remote communities.

43 *See* Fed. Def. Br. 113-14 (quoting Executive Order 13175 § 5(b)).

44 *See, e.g.*, Fed. Def. Br. 3 ("Congress afforded the Service a large amount of discretion in the designation of critical habitat."), 87 ("[T]he Service has discretion under the ESA to deny an exclusion request.").

45 PBCH0045526.

46 Fed. Def. Br. 110-11.

47 *Cal. Wilderness Coal.*, 631 F.3d at 1093; *see also id*. at 1093 ("[A]lthough the nature of consultation makes it difficult to determine the precise consequences of its absence, the prejudice to the party excluded is obvious.").

with affected Alaska Native corporations early in the development of the critical habitat designation, as required by law.[48] Indeed, there were *no* discussions between FWS and any affected Alaska Native corporation other than ASRC (including nine plaintiffs in this action) in the development of the critical habitat designation. Nor were there *any* efforts by FWS to initiate such discussions. FWS identifies no evidence in the record to dispute these critical facts.[49] Instead, FWS simply parrots the Final Rule's list of notice-and-comment proceedings involving Alaska Native representatives.[50] These efforts – general information sessions, notification of the proposed rule, comment periods, and two public meetings – fall woefully short of satisfying FWS's duty to consult with Alaska Native corporations.[51] Moreover, plaintiffs identified specific, substantive examples of how FWS's failure to consult with Alaska Native corporations may have impacted FWS's decision to their detriment, including FWS's objectively incorrect conclusions that "Barrow and Kaktovik are the only two Alaska Native communities that overlap with the proposed critical habitat designation"[52] and that its decision not to exclude Alaska

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48 *See* Pl. Br. 24-33; 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)); *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011) (concluding that statutory obligation to consult required 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").

49 FWS cites its list of contacts that includes information for various Alaska Native corporations. *See* Fed. Def. Br. 18, n.7 (citing PBCH0021192). The fact that FWS had this contact information readily at hand makes its failure to engage in any dialogue with these corporations even more indefensible.

50 *See id.* at 16-18.

51 *See* Pl. Br. 27-31; *Cal. Wilderness Coal.*, 631 F.3d at 1087 (holding that an interpretation of consultation "to mean no more than notice-and-comment" proceedings already required would render a statutory consultation requirement meaningless).

52 PBCH0045523.

Native-owned lands would not damage its relationship with Alaska Natives. Because FWS's failure to consult with Alaska Native corporations was not in accordance with law and was not harmless, the court should set aside the Final Rule, or, at a minimum, set aside FWS's decision not to exclude Alaska Native-owned lands.[53]

IV. THE FWS ARBITRARILY AND CAPRICIOUSLY FAILED TO CONSIDER AVAILABLE DATA BEFORE DETERMINING WHETHER IT WAS PRUDENT TO DESIGNATE CRITICAL HABITAT.

FWS contends that it need not affirmatively find that a designation is prudent before designating nearly 200,000 square miles of land and adjacent water as critical habitat.[54] In the alternative, FWS claims that it implicitly found that the designation was prudent, either because it did not find that the designation was "not prudent" or because it discussed several benefits associated with critical habitat designation.[55] FWS's positions lack merit.

The governing statute and regulations provide that the Secretary shall designate critical habitat "to the maximum extent *prudent* and determinable."[56] It necessarily follows that a finding of prudence is a predicate to any critical habitat designation because that finding serves as the requisite justification for, and defines the outer bounds of, any designation. Logically, FWS cannot designate critical habitat to the maximum extent prudent without first drawing a conclusion that doing so – and to a particular extent – is actually prudent. Further, the regulations specify that this prudence determination requires weighing the evidence in the record and considering the net effect of the designation on the species, including both the anticipated

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53 *See Cal. Wilderness Coal.*, 631 F.3d at 1090-96 (concluding that agency's failure to consult was not harmless and vacating agency action).

54 *See id.*

55 *See id.* at 24-30.

56 16 U.S.C. § 1533(a)(3)(A) (emphasis added); 50 C.F.R. § 424.12(a).

benefits *and* adverse effects of a designation.[57] If the net effect would be beneficial to the species, the designation is deemed prudent and should proceed. If not, the designation is deemed "not prudent" and no designation is made.[58] This prerequisite weighing process is particularly crucial where, as is the case here, there is undisputed evidence that the designation will have a probable adverse impact on the species.[59]

FWS asserts that, through its regulations, it has interpreted the ESA to not require an affirmative prudency finding before designating critical habitat. The cited regulation, however, only relates to when FWS must provide a written explanation of its reasons for not designating critical habitat.[60] Plaintiffs have never claimed that FWS was required to provide a detailed explanation of its reasons supporting a prudency finding. Rather, there must simply be some evidence in the record that FWS actually considered all of the relevant evidence and determined that a designation was prudent. FWS regularly makes this prudency finding (that it now claims is unnecessary) in its final rules when designating critical habitat.[61] But FWS failed to make any

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57 *See* 50 C.F.R. § 424.12(a)(1)(ii); *see also* 49 Fed. Reg. 38,900, 38,901 (Oct. 1, 1984) ("It is this net effect, taking into account potential risks and benefits of a particular designation, that will guide the Services in decisions regarding the prudence of a particular designation.").

58 *See* 50 C.F.R. § 424.12(a). Although not relevant here, the designation may also be deemed not prudent if the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of that threat. *See id.* § 424.12(a)(1)(i).

59 PBCH0055134.

60 Fed. Def. Br. 22 (citing 50 C.F.R. § 424.12(a)).

61 *See, e.g.*, 75 Fed. Reg. 18960, 18995 (Apr. 13, 2010) ("We have therefore determined that designation of critical habitat is prudent for the following 47 Kauai species: [listing species]."); 74 Fed. Reg. 37314, 37318 (July 28, 2009) ("Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to these species and may provide some measure of benefit, we find that designation of critical habitat is prudent for Limnanthes floccosa ssp. grandiflora and Lomatium cookie."); 73 Fed. Reg. 25354, 25358 (May 6, 2008) ("Accordingly, we determine that designation of critical habitat will not increase

prudency finding for the polar bear critical habitat designation and offers no good reason for this failure. FWS acted arbitrarily when it departed from its earlier precedent without explanation.[62]

FWS next argues that critical habitat must generally be designated unless FWS finds unusual circumstances warranting a "not prudent" finding and, because FWS did not make any such finding in this case, the designation was mandatory and no affirmative prudence finding was necessary.[63] In the alternative, FWS contends that its failure to make a "not prudent" finding is the same thing as an affirmative finding of prudence.[64] Both arguments fail. The fact that FWS must designate habitat "to the maximum extent prudent" and that a "not prudent" determination may be unusual does not somehow relieve FWS from its duty to determine that a designation is prudent. While Congress expected that designations would be made frequently, there is nothing in the statute, regulations, or legislative history to suggest that FWS could simply skip any determination of prudence or ignore evidence that showed that designation was potentially imprudent.

The core problem is that FWS is asking the court to assume, despite a complete lack of

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the degree of threat to the species and will be beneficial for the Louisiana black bear; therefore, we determine that designation of critical habitat is prudent for this subspecies."); 70 Fed. Reg. 58335, 58348 (Oct. 6, 2005) ("The Service believes critical habitat for the Salt Creek tiger beetle is both prudent and determinable."); 70 Fed. Reg. 46366, 46384 (Aug. 9, 2005) ("Therefore, we believe that designation of critical habitat for the southwest Alaska DPS of the northern sea otter would be prudent."); 67 Fed. Reg. 6459, 6466 (Feb. 12, 2002) ("Therefore, we find that critical habitat is prudent for the three snails and the amphipod."); 66 Fed. Reg. 59367, 59371 (Nov. 28, 2001) ("[W]e believe that the designation of critical habitat for this species would be prudent."); 65 Fed. Reg. 26438, 26457 (May 5, 2000) ("Therefore, we now find that critical habitat designation is prudent, but not determinable, for the Alabama sturgeon.").

62 *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 12 F. Supp. 2d 1121, 1135 (D. Or. 1997) ("An agency acts arbitrarily when it departs from its precedent without giving good reason." (quoting *N. Cal. Power Agency v. FERC*, 37 F.3d 1517, 1522 (D.C. Cir. 1994))).

63 Fed. Def. Br. 23-24.

64 *Id.* at 24.

record support, that FWS actually weighed the appropriate evidence and made an informed decision that a "not prudent" finding was not warranted. Nothing in the record indicates that FWS ever considered the evidence showing that the adverse effects of the designation may outweigh the potential benefits. To the contrary, there is affirmative evidence that FWS did *not* weigh the information describing negative impacts of the designation as provided by the Alaska Native Plaintiffs. FWS simply announced that, despite undisputed concrete evidence to the contrary, it expected the designation would not jeopardize the working relationships with the Alaska Native Plaintiffs.[65] FWS cannot wish away evidence it does not like by substituting surmise and speculation over actual evidence from Alaska Natives that the designation would alienate them and be detrimental to polar bears.[66] This failure to balance the possible adverse consequences of designating critical habitat against the negligible benefits of designation was arbitrary and capricious. To the extent that FWS performed any balancing whatsoever, its failure to consider and weigh the undisputed evidence of these adverse consequences was a failure to consider all relevant factors as required for a determination that the designation of polar bear critical habitat was prudent.

FWS notes that the designation is not expected to result in significant additional conservation measures for polar bears, but proclaims that this "does not mean that critical habitat has no conservation value."[67] Under FWS's approach, any conservation benefit mandates a

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65 PBCH0045495 (noting that the designation of critical habitat does not prohibit development and concluding that FWS did "not expect that the designation of critical habitat for polar bears in Alaska, as mandated by the Act, will jeopardize the working relationships that we have developed over the last 20 years").

66 *See Ctr. for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078 (D. Ariz. 2009).

67 Fed. Def. Br. 26. The principal conservation "benefit" identified by FWS appears to be the benefit of educating the public as to the areas most important to polar bears. *See, e.g., id.* at

critical habitat designation.[68] This approach is flawed because it ignores half of the balancing test. As FWS itself has recognized, the key question is whether the designation provides *net* conservation benefits – the conservation benefits must outweigh any negative conservation consequences. FWS focuses entirely on the existence of any conservation benefits, regardless of whether the negative consequences may in fact render the designation imprudent.

FWS makes three flawed arguments as to why its undisputed antagonism of Alaska Natives, and the resulting prejudice to polar bear conservation efforts, does not render the designation imprudent. First, FWS contends that the "prudence" determination considerations of ESA Section 4(a)(3)(A) "are more properly considered" under the purportedly unreviewable exclusionary authority of the second sentence of ESA Section 4(b)(2).[69] A prudence determination for a designation under Section 4(a)(3)(A) precedes the Secretary's decision as to whether to exclude certain property from that designation under the second sentence of Section 4(b)(2).[70] Indeed, FWS claimed to have made its prudence determination even before collecting any data that would be relevant to its determination of whether to exclude portions of a designation under the second sentence of Section 4(b)(2).[71] Tellingly, FWS's own Solicitor's opinion agrees that the case law under Section 4(a)(3) does not apply to exclusion determinations

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2, 5, 25. With all due respect, Alaska Natives, who have been coexisting with polar bears for thousands of years, do not need the Federal government to tell them where polar bears tend to live, eat, and den.

68 *Id.* at 26-28.

69 *Id.* at 28. These decisions are reviewable, as discussed *supra* at § II.A.

70 *See, e.g.*, 75 Fed. Reg. 1741, 1743 (Jan. 13, 2010) (determination that designation of critical habitat for jaguar is prudent under § 4(a)(3)(A) and stating that FWS will later conduct a § 4(b)(2) analysis in connection with the proposed designation); 76 Fed. Reg. 74018, 74021-22, 74031 (Nov. 30, 2011) (same for Southern Selkirk Mountains population of woodland caribou).

71 *See* PBCH0005787; PBCH0021734.

under the second sentence of Section 4(b)(2).[72]

Second, FWS claims to have "fully addressed" the Alaska Native Plaintiffs' statement that the designation would alienate the Alaska Native community. Incredibly, FWS asserts that the Alaska Natives' description of this alienation is "hollow" because the designation excluded local communities.[73] FWS misunderstands the scope and depth of Alaska Natives' concerns with the designation, as discussed in detail *supra* at Section II.B. If FWS had bothered to engage in meaningful consultation with the Alaska Native Plaintiffs during the rulemaking process, it would understand why Alaska Natives' concerns are not "hollow."

Third, FWS notes that its antagonism of the Alaska Native Plaintiffs does not compel a "not prudent" finding, no matter how important they may be to the conservation of the species.[74] FWS attacks a straw man here. The plaintiffs never argued that FWS's alienation of conservation partners "compels" anything, aside from a rapidly deteriorating relationship. Instead, FWS's failure to consider the evidence in the record prevented FWS from properly assessing whether the designation really was prudent. FWS is not compelled to agree with the Alaska Native Plaintiffs, but it must at least consider this relevant evidence as required by law. FWS's response that Alaska Natives' valid concerns cannot force FWS to do anything speaks volumes about FWS's refusal to consider the undisputed evidence in the record.

FWS does not, and cannot, identify any express affirmative prudence finding in the Final Rule, and it fails to show that it properly considered undisputed evidence on the issue before

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72 *See* Doc. 65-3, at 21-22 ("To conclude otherwise, and read the case law under section 4(a)(3) as applying to exclusion determinations under section 4(b)(2) would be directly contrary to the wide discretion that Congress intended to afford the Secretary under section 4(b)(2)….").

73 Fed. Def. Br. 29.

74 Fed. Def. Br. 30.

designating critical habitat. Accordingly, the designation must be vacated and remanded with directions that FWS consider all available data, including the anticipated adverse consequences of a designation, and determine whether or not a designation is prudent.

V. FWS EXCEEDED ITS AUTHORITY BY INCLUDING THE NO DISTRUBANCE ZONE WITHIN POLAR BEAR CRITICAL HABITAT.

A. The no disturbance zone does not contain a PCE.

It is well established that "PCEs [primary constituent elements] must be 'found' on occupied land before that land can be eligible for critical habitat designation."[75] In explaining the purpose of the NDZ, FWS attempts to conflate the purpose of NDZ with the PCEs found on barrier island habitat.[76] This is inconsistent with the plain language of the Final Rule.

The Final Rule explicitly states that it is the barrier islands themselves, and not the NDZ, that contain the requisite PCE. FWS states "[c]oastal barrier islands and spits off the Alaska coast provide ***areas free from human disturbance*** and are important for denning, resting, and migration along the coast."[77] Barrier islands are also used for "denning by parturient females, as a ***place to avoid human disturbance***, and to move along the coast to access den sites or preferred feeing locations."[78]

In contrast, FWS's justification for including the NDZ as part of designated barrier island habitat is based solely upon the role of the NDZ in protecting the attributes already inherent in the barrier islands and spits. FWS states that it included the NDZ to "protect" or maintain the

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[75] *Cape Hatteras Access Pres. Alliance*, 344 F. Supp. 2d at 123 (citing 16 U.S.C. § 1532(5)(A)).

[76] Fed. Def. Br. 48 ("The Service used the term '[NDZ]' merely to provide a clear explanation for why the barrier island habitat must necessarily extend some distance beyond the edge of each barrier island.").

[77] PBCH0045509 (emphasis added), 0045517.

[78] PBCH0045510 (emphasis added).

"functional usefulness" of the barrier islands.[79] FWS never claimed that the NDZ itself provides an area free from human disturbance or justified the designation of the NDZ on that basis.

Accordingly, as explained by FWS, it is the barrier island habitat that provides polar bears a physical location free from human disturbance and not the NDZ. Because the purpose of the NDZ is to "protect" a PCE, and the NDZ does not contain a PCE, FWS erred by including the NDZ within designated polar bear critical habitat.

B. FWS has not provided a rational basis for the no disturbance zone.

FWS arbitrarily and capriciously included the NDZ as part of barrier island critical habitat without a rational basis because the record demonstrates that the NDZ is redundant, overbroad, and unnecessary.

First, FWS acknowledges that coastal barrier islands and spits already "provide areas free from human disturbance."[80] Accordingly, the NDZ is a redundant measure that includes areas within the critical habitat designation that are not essential for polar bear conservation and do not contain PCEs. Because FWS fails to demonstrate that the NDZ was adopted pursuant to the relevant statutory and regulatory criteria, it lacks a rational basis and is arbitrary and capricious.

Second, by relying exclusively on the 2008 Anderson and Aars study, FWS irrationally imposed a NDZ that is overbroad. The results of the Anderson and Aars study are only applicable to responses of polar bear females and cubs to approaching snowmobiles. Accordingly, the need for the NDZ only arises in the denning context, and only in those locations where there are known polar bear dens. FWS acknowledges that denning on the western barrier

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79 PBCH0045488 ("the [NDZ] surrounding the barrier islands should adequately protect polar bears . . . from human disturbance"), 0045491 (NDZ is "sufficient to maintain the functional integrity of the suitable barrier island habitat"); *see also* PBCH0045515.

80 PBCH0045509.

islands is a "rare occurrence," and can only speculate that it may become more common in the future.[81] Because the scientific justification for the NDZ is predicated upon denning polar bears and the record demonstrates that barrier islands are used sparingly for that purpose, FWS lacked a rational basis for imposing the NDZ broadly to all barrier island habitat irrespective of the presence of polar bears or the use of barrier islands for denning.[82]

Finally, by indiscriminately imposing the NDZ, FWS ignored evidence that polar bears utilize habitat in close proximity to human activities.[83] In response, FWS asserts that because it excluded developed areas of rural communities and oil and gas activity its designation cannot be irrational.[84] Notwithstanding that, as explained above, FWS only excluded the manmade structures and not the entire communities or oil fields, FWS misses the point. The record demonstrates that polar bears do utilize habitats that are disturbed by human presence, which undermines the justification for FWS's broad imposition of the NDZ. Obviously, in areas currently impacted by human activities, the NDZ is unnecessary. Further, there is no rational basis to impose a one-mile NDZ for all areas and life stages when the evidence demonstrates that polar bears frequently coexist with humans at shorter distances.

CONCLUSION

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

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81 *See* Fed. Def. Br. 51 n.17.

82 *See, e.g., Cape Hatteras Access Pres. Alliance*, 344 F. Supp. 2d at 122 ("Service may not cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation").

83 *See* Pl. Br. 41.

84 *See* Fed. Def. Br. 52.

DATED this 3rd day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2012, 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