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**In the Supreme Court of the United States**

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STATE OF ALASKA, *ET AL.*,  
*Petitioners,*

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR, *ET AL.*,  
*Respondents.*

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*On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit*

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**BRIEF OF ALASKA FEDERATION OF NATIVES AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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**INTERESTS OF THE *AMICUS CURIAE***

The Alaska Federation of Natives (AFN) is a statewide, nonprofit organization representing hundreds of thousands of Alaska Natives—descendants of the original inhabitants of the State of Alaska.<sup>1</sup> AFN’s membership includes 152-federally recognized tribes, 152 Native village corporations and the 12 Native regional corporations established by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* (2012) (ANCSA), and 12 regional nonprofits and tribal consortiums. AFN is governed by a 38-member Board of Directors composed of three representatives from each of the 12 ANCSA regions, as well as two co-chairs elected at large. For over 50 years, AFN has been the principal forum and voice of Alaska Natives in addressing critical public policy issues that affect the cultural and economic well-being of Native peoples and villages.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the intent to file this *amicus curiae* brief 10 days prior to the due date for such brief and have consented to its filing. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for *amicus curiae* state that Van Ness Feldman, LLP (VNF), counsel for Petitioner North Slope Borough, authored this brief in part. VNF has served as AFN’s counsel for nearly 40 years and has a unique understanding of AFN and its interests as well as the complex legal framework pertaining to ownership and management of Alaska Native lands. As such, to protect its interests with respect to the issues underlying the Petition, AFN requested that VNF assist AFN’s counsel of record in the authoring of this brief.

Collectively, AFN's members own more than 44 million acres of land in Alaska. This land was conveyed by Congress to Native corporations for the express purpose of providing the economic and cultural foundation to support the ongoing needs of the Alaska Native people. This purpose would be undermined if the U.S. Court of Appeals for the Ninth Circuit's (Ninth Circuit) expansive interpretation of critical habitat remains in place. AFN agrees with the reasoning put forth in the Petition for a Writ of Certiorari filed by the State of Alaska et al.,<sup>2</sup> and writes separately because the ramifications of the Ninth Circuit's holding extend beyond the parties and areas implicated in this case and would have significant adverse impacts on Alaska Natives throughout the State.

### **SUMMARY OF THE ARGUMENT**

Congress amended the Endangered Species Act (ESA) in 1978 to add a narrow and circumscribed definition of critical habitat to restrain the prevailing practice of designating expansive areas of land with no regard to what was actually necessary for species conservation. In particular, for areas occupied by the species, Congress limited critical habitat to the "specific areas" on which are "found" certain habitat features that are "essential" to the conservation of the species. 16 U.S.C. § 1532(5)(A)(i) (2012). Congress directed the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) to also "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of

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<sup>2</sup> AFN also supports the Petition for a Writ of Certiorari, *Alaska Oil & Gas Ass'n v. Jewell*, No. 16-610 (U.S. Nov. 4, 2016).

specifying any particular area as critical habitat.” *Id.* § 1533(b)(2). The clear and unambiguous intent of Congress was to ensure that any designation of critical habitat was narrowly and specifically crafted to minimize the associated incidental adverse economic and national security repercussions.

The Ninth Circuit, in reversing the district court and upholding the designation of critical habitat for the polar bear, has ignored the clearly expressed intent of Congress and rendered these statutory provisions meaningless. Under the Ninth Circuit’s holding, there is no “standard of specificity” that applies to the application of critical habitat, and expansive areas of land can be protected under the ESA simply based on the unsupported assumption that a species needs “room to roam.” As a result, the Ninth Circuit has sanctioned the imposition of a federal management overlay across broad swaths of land on Alaska’s North Slope and Arctic coastline, including lands owned by the Alaska Native people, with significant economic and national security impacts.

If left unrestrained by this Court, the Services will be further emboldened to continue the recent trend of designating huge geographic areas as critical habitat in derogation of the explicit statutory criteria. As applied to Alaska Native lands, this approach to critical habitat undermines the express purpose of ANCSA to the detriment of the Native people throughout Alaska. It also unduly burdens Arctic defense and security, resulting in Alaska Native villages being placed unnecessarily at risk. Review by the Court is urgently needed to restore the application of critical habitat to

the bounds that Congress intended and explicitly delineated.

## ARGUMENT

### **I. The Ninth Circuit’s Decision Exceeds the Statutory Constraints on Designation of Critical Habitat to the Detriment of the Alaska Native People.**

On December 7, 2010, FWS designated more than 187,000 square miles of land in Alaska and the adjacent territorial and U.S. waters as critical habitat for the polar bear.<sup>3</sup> Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, 75 Fed. Reg. 76,086 (Dec. 7, 2010). The designation includes a swath of land extending inland along the North Slope of Alaska from the Canadian border to Barrow as “denning” habitat. *Id.* at 76,135-36. FWS also included a long ribbon of barrier islands along the entire northern Arctic coast of Alaska to below the Bering Strait. *Id.* at 76,137. Swept up within this expansive designation are significant areas of land owned by the Alaska Native people, and areas immediately adjacent to 15 established Native villages.<sup>4</sup> The unrefined overlay of ESA critical habitat

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<sup>3</sup>The polar bear was listed as a threatened species under the ESA in 2008 due primarily to projected effects attributed to climate change. Determination of Threatened Status for the Polar Bear, 73 Fed. Reg. 28,212 (May 15, 2008).

<sup>4</sup>The following 13 Alaska Native villages are within barrier island habitat and the no disturbance zone: Diomedes, King Island, Kivalina, Nunam Iqua, Point Hope, Point Lay, Shaktoolik, Shishmaref, Solomon, St. Michael, Teller, Wainwright, and Wales. The Alaska Native villages of Barrow and Kaktovik are within terrestrial denning habitat.

upon these lands imposes significant economic barriers and other impediments to the Alaska Natives' use of these areas to ensure their own survival and perpetuate their traditional way of life.

Contrary to FWS's approach, Congress amended the ESA in 1978 to adopt "fairly rigid guidelines" for the designation of critical habitat to curtail the prevailing practice at the time of "just designating territory as far as the eyes can see and the mind can conceive."<sup>5</sup> Congress sought to better "balance environmental and development interest[s] . . . [and] take into consideration more accurately the development needs of this Nation." 124 Cong. Rec. at 38,123. To effectuate this purpose, Congress, in relevant part, defined critical habitat as "the *specific areas* within the geographical area occupied by the species . . . on which *are found* those physical or biological features (I) *essential* to the conservation of the species and (II) which may require special management considerations or protections." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). While the designation of critical habitat must be based upon the best scientific data available, Congress also directed

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<sup>5</sup> 124 Cong. Rec. 38,131 (1978) (statement of Rep. Bowen). Congress emphasized that critical habitat must be "essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it." *Id.* at 38,154 (statement of Rep. Duncan). However, for this designation, FWS acknowledged that its regulatory action will provide no conservation benefit for the polar bear. See Industrial Economics, Inc., *Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States: Final Report* at ES-5 – ES-6 (2010), [https://www.fws.gov/alaska/fisheries/mmm/polarbear/pdf/fea\\_polar\\_bear\\_14%20october%202010.pdf](https://www.fws.gov/alaska/fisheries/mmm/polarbear/pdf/fea_polar_bear_14%20october%202010.pdf).

the Services to “tak[e] into consideration the *economic impact*, the impact on national security, *and any other relevant impact*, of specifying any particular area as critical habitat.”<sup>6</sup> 16 U.S.C. § 1533(b)(2) (emphasis added). Significantly, this is the singular instance where the statute explicitly directs the Services to consider the economic impacts and regulatory burdens associated with a decision under the ESA.<sup>7</sup>

Congress included these statutory safeguards because it recognized the significant economic impacts that burden lands designated as critical habitat. Under Section 7, the Services are required to consult on any action authorized, funded, or carried out by a federal agency that may affect critical habitat.<sup>8</sup> 16 U.S.C. § 1536(a)(2). If such action is likely to destroy or adversely modify critical habitat, FWS or NMFS will

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<sup>6</sup> See *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) (“we think it readily apparent that another objective (if not indeed the primary one) [of using the best scientific and commercial data] is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives”).

<sup>7</sup> Congress authorized the Services to exclude an area from within a designation if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” 16 U.S.C. § 1533(b)(2). While FWS excluded the Alaska Native villages of Barrow and Kaktovik and existing manmade structures from the critical habitat designation, it declined to exclude other Alaska Native lands. 75 Fed. Reg. at 76,109.

<sup>8</sup> The relevant regulations define “action” broadly to include the “granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid,” and “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

prepare a biological opinion and offer a reasonable and prudent alternative (RPA) to the proposed action that would avoid the destruction or adverse modification of critical habitat. *Id.* § 1536(b)(4)(A). Typically, the proponent of a federal action will have to accept and implement the RPA, adopt other similar modifications or mitigation measures, or not proceed with the contemplated action. As one would expect, the legal and economic consequences of the consultation obligation are significant. This is particularly true within Alaska because of the unique planning and logistical obstacles associated with the harsh climate, remote operation areas, and limited windows of seasonal access.

The Ninth Circuit's decision disregards the explicit criteria that Congress established for the proper designation of critical habitat. As described in the Petition for Writ of Certiorari, the district court correctly found that FWS lacked evidence demonstrating the location of the requisite essential physical or biological habitat features necessary to support the expansive designation. *E.g., Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 1001-02 (D. Alaska 2013) (App. 94a-96a) (no evidence regarding the location of essential features in 99% of denning habitat); *id.* at 1002-03 (evidence of denning on some barrier islands, but no explanation of the location of the other essential features). In reversing, and upholding the designation, the Ninth Circuit found, in part, that the district court applied "a standard of specificity that the ESA does not require," and brushed aside the lack of evidentiary support based on "the unassailable fact that bears need room to roam." *Alaska Oil & Gas Ass'n*

*v. Jewell*, 815 F.3d 544, 555, 559 (9th Cir. 2016) (App. 24a, 31a). The Ninth Circuit also disregarded the obvious fact that an area cannot be “critical” if the species is actively hazed and deterred from using it, which is what legally occurs in the designated critical habitat immediately adjacent to Alaska Native villages. *Id.* at 559-60 (App. 33a-34a).

The Ninth Circuit’s acquiescence to FWS’s expansive approach to critical habitat has significant implications for the Alaska Native people who are already grappling with the effects of climate change. Approximately 40% (229 of 567) of the federally recognized tribes in the United States are located in Alaska. U.S. Dep’t of the Interior, *Alaska Region Overview*, <http://www.bia.gov/WhoWeAre/RegionalOffices/Alaska/> (last visited Nov. 30, 2016). The State is already experiencing the effects of climate change, such as earlier spring snowmelt, reduced sea ice, warmer permafrost, drier landscapes, and more extensive pest outbreaks and wildfires. F. Stuart Chapin et al., Chapter 22 Alaska, *Climate Change Impacts in the United States* 516 (2014). Native villages on the coast of Alaska, such as Newtok, Shishmaref, and Kivalina, are being forced to consider relocating because of damage related to climate-related coastal erosion.<sup>9</sup> *Id.* at 518. In other areas, permafrost thaw is causing uneven sinking of the ground which damages public infrastructure such as buildings, roads, airports, and

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<sup>9</sup> The U.S. Army Corps of Engineers estimated the cost of relocating Newtok at \$80-130 million, Shishmaref at \$100-200 million, and Kivalina at \$95-125 million. U.S. Army Corps of Eng’rs, *Alaska Village Erosion Technical Assistance Program* 40 (2006), [http://www.housemajority.org/coms/cli/AVETA\\_Report.pdf](http://www.housemajority.org/coms/cli/AVETA_Report.pdf).



community water and sewer supplies.<sup>10</sup> *Id.* at 520. Obviously, these impacts have significant economic, social, and cultural effects on the people that live in the affected areas.

Given the isolated and unforgiving environment of Alaska, the unencumbered use of land is essential to the survival of the Alaska Native people who rely upon the region's natural resources for subsistence, economic development, and to sustain their traditional way of life. Most Native villages are isolated and not connected to the State's highway system or electrical grid; the cost of living is high; and there is limited access to food, fuel, health care, and other services that are taken for granted in other parts of the United States. *Id.* at 516. The Alaska Native people are dependent upon subsistence hunting and fishing to sustain themselves. *Id.* at 523. As a result, these predominantly rural Alaska Native villages are particularly vulnerable to impacts associated with climate change.

The Services, for their part, have responded to climate-related habitat effects by listing Alaska species under the ESA. *See* 16 U.S.C. § 1533(a). The polar bear was the first species listed in the U.S. Arctic because of climate change. 73 Fed. Reg. 28,212. Several years later, NMFS listed the Alaska populations of the bearded and ringed seals as

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<sup>10</sup> The estimated additional costs of maintaining public infrastructure due to permafrost thaw could be \$3.6 to \$6.1 billion by 2030, and \$5.6 to \$7.6 billion by 2080. Peter H. Larsen et al., *Estimating future costs for Alaska public infrastructure at risk from climate change*, Global Environmental Change (Aug. 2008), 442-457.

threatened species based on the projected loss of sea ice by the end of the century. Threatened Status for the Beringia and Okhotsk Distinct Population Segments of the *Erignathus barbatus nauticus* Subspecies of the Bearded Seal, 77 Fed. Reg. 76,740 (Dec. 28, 2012); Threatened Status for the Arctic, Okhotsk, and Baltic Subspecies of the Ringed Seal and Endangered Status for the Ladoga Subspecies of the Ringed Seal, 77 Fed. Reg. 76,706 (Dec. 28, 2012). FWS has announced that it will decide whether to list the Pacific walrus in 2017.<sup>11</sup> These climate-related species listings are not limited to the Arctic, and are likely to occur in other areas of Alaska as the effects of climate change continue to affect the State.<sup>12</sup>

The listing of a species under the ESA triggers the mandatory statutory requirement to designate critical habitat for that species, if prudent and determinable. 16 U.S.C. §§ 1533(a)(3)(A), 1533(b)(6)(C). As exemplified by the polar bear designation, in recent years, the Services have disregarded the explicit statutory criteria and the clear intent of Congress, and have designated expansive blocks of critical habitat

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<sup>11</sup> FWS, *National Listing Workplan, 2017-2023* 2 (Sept. 2016), [https://www.fws.gov/endangered/improving\\_ESA/pdf/Listing%207-Year%20Workplan%20Sept%202016.pdf](https://www.fws.gov/endangered/improving_ESA/pdf/Listing%207-Year%20Workplan%20Sept%202016.pdf).

<sup>12</sup> FWS will consider listing the yellow cedar in southeast Alaska in 2019. *Id.* at 9. FWS has also received ESA petitions to list the Western bumble bee and tufted puffin, both of which occur in Alaska. 90-Day Findings on 25 Petitions, 80 Fed. Reg. 56,423, 56,431 (Sept. 18, 2015) (finding that petition to list contiguous U.S. distinct population segment of tufted puffin may be warranted); 90-Day Findings on 29 Petitions, 81 Fed. Reg. 14,058, 14,071 (Mar. 16, 2016) (finding that petition to list the Western bumble bee may be warranted).

that are neither specific nor limited to where essential habitat features are found. For example, NMFS recently proposed to designate approximately 350,000 square miles as critical habitat for the Arctic ringed seal. Designation of Critical Habitat for the Arctic Ringed Seal, 79 Fed. Reg. 73,010 (Dec. 9, 2014). As more Alaska species are listed, more portions of the State will be designated as critical habitat with significant implications if the Services' expansive approach, and the Ninth Circuit's acquiescence to that approach, goes unreviewed and unchecked.

These designations place Alaska Natives in the untenable position of both bearing the brunt of climate-related effects to their lands and subsistence resources, and being further impacted by the economic consequences of the Services' overbroad regulatory response to climate change. The Services' listing of Alaska species and designation of critical habitat does nothing to stop the international greenhouse gas emissions contributing to climate change.<sup>13</sup> Instead, the Services' actions impose a federal management overlay on all designated lands and, through the ESA

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<sup>13</sup> Following the listing of the polar bear, FWS promulgated a rule under ESA Section 4(d) that exempted incidental take caused by activities outside the current range of the polar bear from the ESA statutory prohibition on take. Special Rule for the Polar Bear Under Section 4(d) of the Endangered Species Act, 78 Fed. Reg. 11,766 (Feb. 20, 2013) (*see* 50 C.F.R. § 17.40(q)(4)); *see also* Memorandum from Dale Hale, Director, to FWS Regional Directors at 1-2 (May 14, 2008), <https://www.fws.gov/policy/m0331.pdf> ("The best scientific data available today do not allow us to draw a causal connection between GHG emissions from a given facility and effects posed to listed species or their habitats, nor are there sufficient data to establish that such impacts are reasonably certain to occur.").

Section 7 consultation process, allow the Services to dictate how any activity involving a modicum of federal funding, authorization, or control can be conducted. The perpetuation of these expansive critical habitat designations will add the additional burden of unnecessary federal regulation to an already overburdened people.

While Alaska Natives recognize the need to protect species, and the habitats upon which they depend, these conservation measures must only be imposed within the bounds established by Congress. Contrary to the Ninth Circuit's holding, Congress explicitly included a "standard of specificity" by which a designation of critical habitat is to be measured. The definitional requirement to limit such application to those "specific areas" where essential habitat features "are found" was imposed to prevent the very designation of territory "as far as the eyes can see and the mind can conceive" that occurred here. Given the Ninth Circuit's overly permissive approach to critical habitat, review by this Court is necessary to ensure that critical habitat designations remain within the bounds that Congress intended.

## **II. The Overbroad Designation of Critical Habitat on Alaska Native Lands Undermines the Purpose of ANCSA.**

FWS's overbroad designation of polar bear critical habitat imposes federal management oversight and economic burdens across huge expanses of northern Alaska. Included within this area are lands conveyed by Congress through ANCSA to Alaska Native corporations so that they can provide for the health, education, and welfare of the Native people of Alaska.

The unrefined application of ESA critical habitat to these lands undermines the purpose of ANCSA by imposing barriers to development on the very lands that Congress granted to Alaska Natives to provide for their own economic benefit.

Congress passed ANCSA in 1971 to address the “immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims.” 43 U.S.C. § 1601(a). In doing so, Congress diverged from previous approaches to American Indian policy in the lower 48 states, and sought to avoid creating “a reservation system or lengthy wardship or trusteeship.” *See id.* § 1601(b); *see also Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 523-24 (1998). Instead, Congress divided Alaska into 12 geographic regions, and directed the formation of 12 corresponding Alaska Native regional corporations along with more than 200 Native village corporations. 43 U.S.C. §§ 1606(a), 1606(d), 1607(a). Alaska Natives were enrolled as shareholders in those corporations according to their place of residence or origin. *Id.* §§ 1606(g); 1607(a).

In exchange for the extinguishment of their aboriginal land claims, ANCSA authorized the conveyance of approximately 44 million acres of land—12% of the land in Alaska (about the size of New England)—to the newly formed Native regional and village corporations.<sup>14</sup> *Id.* §§ 1611, 1613. Congress intended that the conveyance of these lands would ensure that Alaska Natives have the necessary means

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<sup>14</sup> These conveyances made the Alaska Native corporations the third-largest landowners in Alaska, following the federal government and the State.

by which to provide for their own economic and social well-being, and to maintain their subsistence and cultural traditions. *See id.* § 1601(b) (settlement to be accomplished “in conformity with the real economic and social needs of Natives”); *id.* § 1606(r) (Native Corporations authorized “to provide benefits . . . to promote the health, education, or welfare of [its] shareholders”).

A fundamental purpose of ANCSA was that the Native corporations would use the conveyed lands for their economic benefit. *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003) (Alaska Native corporations “receive land from the federal government for the purpose of economic development in Native communities”). For example, as reported in the House of Representatives:

When determining the amount of land to be granted to the Natives, the Committee took into consideration . . . the land needed by the Natives *as a form of capital for economic development.*

The 40,000,000 acres is a generous grant by almost any standard. . . . The acreage occupied by Villages and needed for normal village expansion is less than 1,000,000 acres. While some of the remaining 39,000,000 acres may be selected by the Natives because of its subsistence use, *most of it will be selected for its economic potential.*

H.R. Rep. 92-523, at 5 (Sept. 28, 1971) (emphasis added); *id.* at 16 (“The mineral deposits . . . [are] included as part of the total economic settlement. We feel it is very important for these mineral deposits to be

available to all of the natives to further their economic future.”). Thus, Congress clearly envisioned that the vast majority of conveyed ANCSA lands would be selected based on economic potential.

In addition, Congress explicitly intended that the Native corporations would use and develop these lands to benefit both their shareholders and all Alaska Natives. Each regional corporation is required to share 70% of the annual revenue from timber resources and use of the subsurface estate with all 12 regional corporations. 43 U.S.C. § 1606(i)(1)(A); *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 732 (9th Cir. 1978) (ANCSA Section 7(i) “was intended to achieve a rough equality in assets among all the Natives. . . [and] insures that all of the Natives will benefit in roughly equal proportions from these assets.”) (citation omitted). And half of these revenues are further distributed to the village corporations within the boundaries of each regional corporation and to those shareholders not residing in these villages. 43 U.S.C. § 1606(j). Thus, through these revenue sharing provisions, the economic benefits provided by resources extraction on ANCSA lands support all Alaska Natives throughout the State.

The courts have subsequently affirmed that economic development for the benefit of the Alaska Native people is a primary consideration with respect to ANCSA lands. For example, in *City of Angoon v. Marsh*, the Ninth Circuit considered whether land conveyed to an Alaska Native village corporation, which was located within a newly created national monument, was subject to a separate statutory prohibition on the sale or harvest of timber “within the

monument.”<sup>15</sup> 749 F.2d 1413, 1416 (9th Cir. 1984), *later proceedings at* 803 F.2d 1016 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987). Noting that ANCSA land was intended to serve the “economic and social needs of the Natives,” the Ninth Circuit reversed the lower court’s injunction on the cutting of timber because it “would defeat the very purpose of the [ANCSA] conveyance.” *Id.* at 1418 (“it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic well being by [later] forbidding the only real economic use of the lands so conveyed.”); *see also Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 997 (9th Cir. 1994) (“On the basis of the legislative history and [ANCSA’s] requirement that Natives incorporate, we have no doubt that Congress intended, at least, that those Native corporations that did select land for its economic potential would be able to develop that land and to realize that potential.”).

The designation of critical habitat on ANCSA lands imposes economic burdens that impair the ability of Alaska Natives to develop those lands for their own economic benefit. This conflict is created by the obligation to conduct Section 7 consultation on federal actions that may affect the designated area. 16 U.S.C. § 1536(a)(2). As noted above, there are significant costs

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<sup>15</sup> The national monument was created pursuant to the Alaska National Interest Lands Conservation Act (ANILCA). Enacted in 1980, ANILCA set aside more than 100 million acres of federal land in Alaska as new or expanded conservation system units and required federal land managers to balance the national interest in Alaska’s scenic and wildlife resources with Alaska’s economic development and infrastructure needs. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C., 43 U.S.C., 48 U.S.C.).



associated with ESA consultations, which are further magnified in Alaska due to the unique operating conditions and permitting-related project delays. For example, for a hypothetical oil field in polar bear critical habitat, the State calculated that economic impacts of a delay in development could range from \$202.8 million (one-year delay) to \$2.6 billion (five-year delay). 75 Fed. Reg. at 76,106. These additional costs pose significant threats to pending and future natural resource development projects, and will result in lost revenue, wasted expenditures, and missed employment opportunities. The repercussions for Alaska Natives will be felt state-wide, and will only increase in severity if the Services continue to over-designate expansive areas as critical habitat.

Instead of indiscriminately including ANCSA lands within critical habitat,<sup>16</sup> these impacts to economic development could have readily been avoided if FWS adhered to the ESA statutory directive to only

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<sup>16</sup> For Indian tribes in the lower 48 states, Department of the Interior Secretarial Order 3206 states that:

Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

S.O. 3206, App., § 3(B)(4) (1997). However, other than the Metlakatla Indian Community, S.O. 3206 does not apply in Alaska, and the Services have failed to account for the application of the ESA, and the resulting impacts, to the unique nature of Alaska Native lands, the diverse systems of Alaska Native governance in Alaska, or the special interest of the Alaska Native people in the land.

designate “specific areas” where essential physical or biological features “are found.” 16 U.S.C. § 1532(5)(A)(i). A more refined and exacting approach to this designation, and those in the future, would better harmonize FWS’s implementation of the ESA with the intent of Congress in ANCSA to secure the Alaska Natives’ economic and social well-being. Instead, FWS’s expansive approach, if allowed to perpetuate unrestrained, undermines the very purpose of ANCSA’s land conveyances and threatens the future of all Alaska Natives.

### **III. The Overbroad Designation of Critical Habitat in Alaska Impacts National Security Interests.**

Along with economic impacts, the ESA mandates that impacts on national security also be considered prior to the designation of critical habitat. 16 U.S.C. § 1533(b)(2). This consideration is especially pertinent in the Arctic. Thawing ice has led to increased shipping activity, a push to develop natural resources, and a rise in geopolitical tensions. These issues not only implicate the safety of Alaska Native villages—which are on the proverbial and actual frontline—but also the welfare and security of the country in general. In expansively designating critical habitat along the United States’ sole Arctic coast, FWS failed to recognize the severe implications that such an indiscriminant designation will have on national security.

Northern Alaska has long played a crucial role in national security. In 1943 the United States initiated a 10-year exploration of the area. The study noted that:

The northern part of Alaska is important to the defense of the United States. It is the only United States segment of the perimeter of the Arctic Ocean; it is relatively close to the great Alaskan Air Force bases; it faces across the Chukchi Sea directly at the easternmost part of [Russia]; it is crossed by many potential great-circle air routes between major population centers in the northern hemisphere; [and] it contains natural resources of coal, gas, and petroleum . . . .

John C. Reed, *Exploration of Naval Petroleum Reserve No. 4 and Adjacent Areas Northern Alaska, 1944-53* 173 (1958). For those same reasons, the importance of the area has endured and even amplified. In May 2015, a Senate Report regarding Domain Awareness in the Arctic, noted that the Secretary of Defense regarded the Arctic as “a major area of importance to the United States, both strategically and economically in the future.” S. Rep. No. 114-255, at 289 (2015).

A key driver of the Arctic’s increasing national security significance is climate change. Diminishing Arctic sea ice will have consequences for weather in the United States, access to mineral and biological resources, economics and cultures of people in the region, and increased commercial shipping on two trans-Arctic sea routes. See Ronald O’Rourke, Cong. Research Serv., R41153, *Changes in the Arctic: Background and Issues for Congress* 1 (2016). The possibility of increased shipping and mineral development has already led to international disputes as countries, including Russia and China, have stepped-up commercial and military activity in the

region. *See id.* at 62-63; *see generally also* Vsevolod Gunitskiy, *On Thin Ice: Water Rights and Resource Disputes in the Arctic Ocean*, 61 *J. of Int'l Aff.* 261, 265-67 (2008).

Climate change paired with the overzealous designation of critical habitat will have a detrimental effect on the ability of Alaska Native people to remain in Alaska's northernmost region. In northern Alaska, Native villages play a unique national security role. Due to their proximity to the northern most waters of the United States and location in one of the most sparsely populated areas of the nation, these villages are integral national security partners for monitoring climate change, maintaining territorial domain awareness, and quickly identifying and responding to changes in geopolitical stability. Alaska Native populations within designated critical habitat will have a difficult time adequately adapting to their changing climate environment with the additional restrictions placed on the area. And if Alaska Native villages are forced to relocate, the United States will lose an essential collaborator in maintaining national security in the Arctic.

Even if Alaska Native populations remain in the area, it will be essential for the United States to adequately track climate change, monitor and engage in Arctic energy development and resource management, prepare for increased maritime activity, and enhance Arctic territorial domain awareness in order to preserve national security. *See generally* Arctic Executive Steering Committee, *Implementation Framework for the National Strategy for the Arctic Region* (Mar. 2016) [hereinafter *Arctic Strategy*

*Implementation Framework*]; Dep't of Def., *Arctic Strategy* (Nov. 2013). This is particularly true in the northernmost portion of Alaska—*i.e.*, the area designated as critical habitat by FWS.

The expansive designation of polar bear critical habitat also results in dangerous impacts on national security by preventing and impeding development of the infrastructure and strategic military capabilities needed to adequately protect the nation's interest in the Arctic. Due to the remote landscape and harsh conditions of northern Alaska, access and construction are already difficult. The designation will only lead to additional costs and delays for deeply needed improvements. For example, the Arctic Strategy Implementation Framework specifically calls for the construction, maintenance, and improvement of ports and other infrastructure needed to preserve the mobility and safe navigation of United States vessels and aircraft, including radar capabilities. *Arctic Strategy Implementation Framework*, at 5. While the U.S. Air Force requested exemption of 12 radar sites from the critical habitat designation, FWS only exempted five sites. 75 Fed. Reg. at 76,098. For all sites not exempted—including the seven currently existing sites and any future radar sites and facilities—construction or other improvement activities will likely be cost prohibitive. As a result, instead of the location of future military radar infrastructure and improvements being dictated by military defense strategy, they will be sited based upon the costs associated with developing projects within critical habitat areas.

This chilling effect on the development of new technologies and strategic defense programs will have far reaching negative impacts. The U.S. Government Accountability Office has noted that since 2010 the Coast Guard is challenged by limited maritime domain awareness and a lack of communication infrastructure. *See* U.S. Gov't Accountability Office, GAO-16-453, *Arctic Strategy is Underway, but Agency Could Better Assess How Its Actions Mitigate Known Arctic Capability Gaps* (2016). This lack of infrastructure and domain awareness is most prominent on the United States' Arctic coastline. However, as a result of the designation of critical habitat on the northern shores of Alaska, the Coast Guard will be unable to prioritize these highly needed maritime infrastructure improvements due to the additional costs and the limited funding available. *See* U.S. Committee on the Marine Transportation System, *U.S. Arctic Marine Transportation System: Overview and Priorities for Action* (2013).

Similarly, a key provision of the Arctic Strategy Implementation Framework calls for the update and installation of instrumentation on the Arctic coast to monitor the effects of climate change, including the construction of a permanent National Water Level Observing Network station to monitor sea level rise. *Arctic Strategy Implementation Framework*, at 14. The increased costs and regulatory oversight associated with development of such infrastructure within the designated critical habitat could result in this climate monitoring instrumentation being sited at a less scientifically viable location or entirely thwarted.

Ultimately, FWS's overly broad critical habitat designation will place an undue burden on Arctic defense and security. The far-reaching negative impacts of the incremental regulations, costs, and oversight applied to military and security infrastructure on the northernmost coast of the United States will result in Alaska Native villages being placed unnecessarily at risk. These effects could have been avoided if FWS had adhered to the constraints that Congress imposed on the designation of critical habitat.

### CONCLUSION

For the foregoing reasons, AFN respectfully urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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