

January 17, 2011

VIA FEDERAL EXPRESS

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U.S. Department of the Interior
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Re: Sixty-Day Notice of Intent to Sue Relating to Critical Habitat Designation for the Polar Bear, 75 Fed. Reg. 76,086 (December 7, 2010)

Gentlemen:

This letter is submitted on behalf of Arctic Slope Regional Corporation (“ASRC”), NANA Regional Corporation, Inc. (“NANA”), Bering Straits Native Corporation (“Bering Straits”), Calista Corporation (“Calista”), Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeaġvik Iñupiat Corporation, Kuukpiik Corporation, Cully Corporation, Kaktovik Inupiat Corporation, and the Iñupiat Community of the Arctic Slope (collectively, the “Alaska Native Interests”) and the North Slope Borough (“Borough”)¹ to notify you of their intent to sue the United States Fish and Wildlife Service (“Service”) due to its failure to satisfy and comply with certain statutory requirements of the Endangered Species Act (“ESA”) when it recently designated critical habitat for the polar bear. The Alaska Native Interests and the Borough provide this 60-day notice letter pursuant to Section 11(g) of ESA, 16 U.S.C. § 1540(g), insofar as it may apply.

¹ ASRC, NANA, Bering Straits, and Calista are Alaska Native Regional corporations created by the Alaska Native Claims Settlement Act of 1971 (“ANCSA”). *See* 43 U.S.C. § 1606. They are the four Regional corporations directly impacted by the critical habitat designation, covering all 32 Alaskan communities in or near the designated land. Tikigaq Corporation (Point Hope), Olgoonik Corporation, Inc. (Wainwright), Ukpeaġvik Iñupiat Corporation (Barrow), Kuukpiik Corporation (Nuiqsut), Kaktovik Inupiat Corporation (Kaktovik), and Cully Corporation (Pt.Lay) are all village corporations in the area created under ANCSA. *See id.* § 1607. The Iñupiat Community of the Arctic Slope is an Alaska Native regional tribal government under the Indian Reorganization Act of 1934, as amended. *See* 25 U.S.C. § 461 *et. seq.*; 75 Fed. Reg. 60,810, 60,813 (Oct. 1, 2010). The Borough is the unit of local government spanning the North Slope of Alaska.

BACKGROUND

For thousands of years before the Service was founded, Alaska Natives successfully coexisted with polar bears as the primary conservation stewards of the Arctic. As the Service has repeatedly recognized, Alaska Natives have been “instrumental” in a wide array of conservation efforts for the species.² As the Service has also repeatedly recognized, the imposition of added government regulations under ESA will not address the primary threat to polar bears – the loss of sea-ice due to climate change.³

Despite the fact that Alaska Natives and Borough residents did not cause and cannot halt the climate change at issue, and that Alaska Natives have consistently been the Service’s staunchest ally in a variety of entirely voluntary conservation efforts, the Service has elected to impose added unnecessary regulatory burdens through the 187,157 square mile critical habitat designation that will disproportionately harm those people who share habitat with polar bears and whose livelihood depends on those lands. This includes, for example, the residents of local villages in the affected area (including, but not limited to, Barrow, Kaktovik, Kotzebue, Wainwright, Point Hope, and Point Lay).⁴ It also includes the Congressionally-created Alaska Native Regional and Village corporations in the area who are employers, landowners, lessors of subsurface rights, and business partners with oil and gas companies and others working in the

² See, e.g., 75 Fed. Reg. 76,086, 76,099 (Dec. 7, 2010) (“*The Native community has been instrumental in assisting us with scientific studies; contributing to the success of the Marking, Tagging and Reporting Program; managing the southern Beaufort Sea population through the Inuvialuit/Inupiat Agreement of 1988; and more recently in the formation and implementation of the U.S./Russia Bilateral Agreement for the Conservation of the Alaska/Chukotka Polar Bear Population. The working relationships that we have developed over the past 20 plus years have often provided the framework for other Service field offices and other agencies wishing to work in Alaska Native communities.*” (emphasis added)).

³ See, e.g., 73 Fed. Reg. 76,249, 76,263 (Dec. 16, 2008) (“Nothing within our authority under section 4(d) of the ESA, above and beyond what we have required in this final special rule, would address the threat to polar bears from loss of sea ice habitat.”).

⁴ We note that the Service has specifically stated in several places in the critical habitat designation that “[o]nly the North Slope communities of Barrow and Kaktovik overlap with the proposed critical habitat designation. . . .” 75 Fed. Reg. at 76,096-97 (comments 30, 34, and 35) and 76,128 (excluding Barrow and Kaktovik as communities “which are the two formally defined Native coastal communities that overlap with the polar bear critical habitat designation”). However, the maps that accompany the designation do place the villages and townships of Kotzebue, Wainwright, Point Hope and Point Lay within Unit 3, Barrier Island Critical Habitat. The maps and text references should be corrected to specifically provide that these villages and townships are not within designated critical habitat areas. An elemental principle of fairness and good relations is that there must be absolutely no uncertainty whether an organized community or land conveyed to Alaska Native individuals, tribe or corporation is or is not within designated critical habitat.

region.⁵ As described in earlier public comments, the Service's unjustified and arbitrary refusal to allow even exceedingly modest exclusions from the designation will adversely impact longstanding relationships with the Alaska Native community.⁶ It is an affront to Alaska Natives' sovereignty and flatly inconsistent with the partnership the Service had sought to build with our people.

The critical habitat designation for polar bears is, by far, the largest in history. In response to the proposed designation, representatives from the Alaska Native Interests requested some minimal exclusions:

- (1) Alaska Native-owned lands, including allotments to Alaska Natives and villages. This is substantially less than 1% of the designated area (0.58%).
- (2) Current and proposed local and regional energy development projects, including transportation corridors to them. These include, for example, the Western Arctic Coal Fields, 1002 area of ANWR, the Alpine Field, the Badami Unit, and the barrier islands around the village of Kivalina.⁷

Regrettably, the Service's determination failed to recognize the critical importance of Native-owned lands and assorted energy development projects to the well-being of residents and Alaska Natives state-wide. In particular, the Service dramatically underestimated the economic impact of the designation and, relatedly, failed to consider that even relatively modest economic impacts could disrupt the fragile economic condition of the affected communities. This disruption could force Alaska Natives to abandon their ancestral villages in order to find work and support their families.

The Alaska Native Interests and the Borough have actively sought to provide guidance to the Service during the recent court-ordered ESA actions, including:

- Public comments from ASRC and the Borough on the proposed critical habitat designation (Dec. 12, 2009);
- Public comments from NANA (July 6, 2010);

⁵ See 43 U.S.C. §§ 1606, 1607.

⁶ For example, at the June 17, 2009, public hearing in Barrow, George Olemaun (speaking as acting Borough Mayor) reiterated the Borough's request that villages and surrounding areas be excluded from the critical habitat designation. USFWS, *Polar Bear Critical Habitat Designation Proposal Public Testimony* at 7 (June 17, 2009). Richard Glenn of ASRC echoed the Borough's concern that five villages should not become critical habitat. *Id.* at 12.

⁷ Alaska Native Interests also noted that additional exclusions may be warranted in the future depending on the economic and cultural needs of residents and interested business partners as new information becomes available.

- Public comments from ASRC on the proposed critical habitat designation (July 6, 2010);
- Public comments from the Borough (July 6, 2010);
- Public comments from Kuukpik Corporation (July 6, 2010);
- In 2008, ASRC intervened to defend the Service's actions in listing the polar bear as a "threatened" species and in the promulgation of the "4(d) Rule." *Ctr. for Biological Diversity v. Kempthorne* (CV-08-1339-CW) (N.D. Calif.). This case was later transferred to the U.S. District Court for the District of Columbia.

The public comments referenced above are incorporated here by reference.

THE DEPARTMENT OF INTERIOR'S UNIQUE DUTY TO ALASKA NATIVES

We are disappointed that the Department of Interior (the "Department") has essentially ignored many long-term needs of Alaska Natives during this rulemaking process. The critical habitat designation here is doubly disappointing because it flies in the face of the Department's repeated proclamations that it would give special consideration to Alaska Natives, especially when it came to ESA and climate change issues.

Secretarial Order No. 3289, entitled Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources, requires the Department to "[a]ddress the impacts of climate change on American Indians and Alaska Natives, for whom the Department holds trust responsibilities on behalf of the Federal government." *Id.* § 1. The Order states that "[c]limate change may disproportionately affect" Alaska Natives and their lands "because they are heavily dependent on their natural resources for economic and cultural identity." *Id.* § 5. In recognizing the Department's "primary trust responsibility" for the Federal government for Alaska Natives, the Order confirms that "[t]ribal values are critical to determining what is to be protected, why, and how to protect the interests of their communities." *Id.*

As is widely recognized, the critical habitat designation is driven entirely by climate change. Alaska Natives are being disproportionately impacted by the designation and, as the Department's economic analysis recognizes, Alaska Natives living on the North Slope are heavily dependent on their natural resources for survival. To the extent that the critical habitat designation impairs our ability to benefit from our resources, including our subsurface rights, Alaska Natives will suffer. Our communities depend on responsible natural resource development for jobs, vital tax revenues, royalties, and dividends for Native shareholders. Alaska Native shareholders already struggle with high unemployment rates.⁸ Our tribal values

⁸ There are four Alaska Native Regional Corporations directly impacted by the critical habitat designation (ASRC, Bering Straits, Calista, and NANA). As the Department's Economic Analysis noted: "With respect specifically to the Alaska Native population of these Corporations, however, the unemployment rate is *more than twice the state average*."

(continued . . .)

include, at their most basic level, building and maintaining vibrant communities so that we can hand down our traditions to succeeding generations. The critical habitat designation is not expected to result in a single additional conservation measure to help polar bears,⁹ but it carries the risk of significantly impacting our local communities and economies. We are asking that you reconsider the Department's failure to provide reasonable exclusions to the largest critical habitat designation in history. The Department's current stance provides essentially no benefit to the polar bear while disproportionately harming Alaska Natives.

The designation is also inconsistent with Executive Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). The critical habitat designation is a policy that "has tribal implications" because it has substantial direct effects on Alaska Native communities. *Id.* § 1. The Department had an obligation to consult with Alaska Native leaders as to the need for the critical habitat designation and any alternatives that would limit the scope of that designation or otherwise preserve the prerogatives and authority of Alaska Natives. *Id.* § 3(c)(3). Here, the Department had a choice about whether to grant the reasonable exclusions (less than one percent of the total designation) sought by the Alaska Native Interests. There was no "need" to designate critical habitat for polar bears on the lands that the Alaska Native Interests wanted excluded from the designation. There were alternatives here that would have preserved the Alaska Natives' prerogatives and authority: namely, providing modest exclusions that would help enable Alaska Natives to continue their efforts towards economic independence and self-reliance. *See id.* § 2(c) (supporting Alaska Natives' self-determination).¹⁰

The Department's decision is also at odds with other policies and orders that Alaska Natives had relied upon.¹¹ Secretarial Order No. 3225 (Jan. 19, 2001) states that "[t]he participation of affected Alaska Natives will be ensured to the maximum extent practicable in *all aspects of the management* of subsistence species that are candidate, proposed or listed species under the ESA *and their habitat . . .*" *Id.* § 3 (emphasis added). When regulations are needed

(. . . continued)

Employment opportunities in this region are very limited." Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States, Final Report (Oct. 14, 2010), at 2-6 (emphasis added).

⁹ *Id.* at ES-5.

¹⁰ The Department is required to consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175. *See* Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267.

¹¹ *See, e.g.,* Tribal Consultation, Memorandum of Nov. 5, 2009, 74 Fed. Reg. 57,881 (Nov. 9, 2009) ("History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.").

to address habitat protection programs, “full consultation with the affected Alaska Natives will occur during the development and implementation of such regulations.” *Id.* Consultation is not simply informing Alaska Natives what the Department plans to do; we were and are entitled to meaningful consultation on a government-to-government basis. *Id.* § 4. That simply has not happened here.¹²

ESA VIOLATIONS

The ESA requires that the Service designate critical habitat “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular habitat as critical habitat.” 16 U.S.C. § 1533(b)(2). The Act generally defines critical habitat as those areas that are occupied by the species and which contain features that are essential to the conservation of the species, and that may require “special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). The Secretary’s obligation for designating critical habitat is also constrained by the directive in the ESA that any such designation be accomplished “to the maximum extent prudent and determinable,” 16 U.S.C. § 1533(a)(3)(A), a phrase not further defined in the Act itself. A designation will not be prudent if it “would not be beneficial to the species.” *See* 50 C.F.R. § 424.12(a)(1)(ii). Also, the Secretary is afforded the ability to exclude areas from designation upon a determination that the benefits of excluding the area outweigh the benefits of so designating the area as critical habitat, provided that such exclusion will not result in the extinction of the species. 16 U.S.C. § 1533(b)(2). For the reasons stated below, the Service failed to meet these obligations in designating such a vast expanse of geographic area as critical habitat without properly weighing the best scientific data available, failing to properly exercise authority to exclude Alaska Native lands and communities, and failing to properly conduct the required consideration of economic impacts to Alaska Native interests.

1. The Service failed to properly exercise its authority to balance the purported conservation benefits to polar bears of the designation of critical habitat with the economic effects and “other impacts” of excluding those areas. Accordingly, the Service’s designation of polar bear critical habitat is arbitrary, capricious and an abuse of discretion, and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2).

The Service failed to determine whether the benefits associated with the inclusion of Native-owned lands and certain proposed energy projects are outweighed by the benefits derived from their exclusion, as required by 16 U.S.C. § 1533(b)(2). While the Service included an entire section devoted to “Tribal Lands – Exclusions Under Section 4(b)(2) of the Act,” in its final rule designating the critical habitat, it failed to distinguish the town sites of Barrow and

¹² The Service’s Native American Policy (June 28, 1994) states that it recognizes the sovereign status of Native American governments and that its policy is aimed at “cultivating and maintaining effective partnerships between the Service and Native American governments[.]” *Id.* at 3. The Service promises to consult with Native American governments on wildlife resource matters of mutual interest to the extent allowed by law. *Id.* at 5.

Kaktovik (which were excluded from the designation) from other Native-owned lands (which were not excluded from the designation).¹³ The Service did not perform the required balancing test *at all* with respect to Native-owned lands generally, and we intend to challenge the failure to specifically exclude other Native lands and communities from the designation.

Even as described by the Service, the “benefits” of including Native-owned lands and villages are essentially non-existent: According to the Service, the first “benefit” of inclusion is costly consultation under Section 7 of the ESA whenever any project has a federal nexus in order to ensure that any resulting actions do not result in the destruction or adverse modification of designated critical habitat. The second “benefit” of inclusion is that the designation “may provide educational benefits by informing land managers of areas that are essential to polar bears.”¹⁴

As to the first “benefit” of inclusion, Native-owned lands and villages constitute just 0.58% of the total polar bear critical habitat designation, and their exclusion would therefore not appreciably diminish the value of critical habitat for the species. Even if all of the Native-owned lands were excluded, polar bears would still have more than 186,000 square miles of critical habitat left: 99.42% of the contemplated designation.¹⁵ When justifying the exclusion of the U.S. Air Force radar sites, the Service noted that the lands in question that “overlap with the polar bear critical habitat designation are less than 1 percent of the total polar bear critical habitat designation.”¹⁶ Likewise, Barrow and Kaktovik’s exclusion were justified as being less than one percent of the total designation.¹⁷ The same is true for all Native-owned lands – they represent less than one percent of the total polar bear critical habitat designation at issue. These are lands that were conveyed pursuant to federal laws for a specific congressionally-established purpose: to serve the purpose of the economic betterment of Alaska Natives. As such, the purpose of these particular federal land conveyances did not receive adequate consideration by the Service. Further, Alaska Natives and Borough residents have for generations, undertaken measures to preserve polar bears and cooperate formally and informally with the Service in conservation projects in numerous commissions, international agreements, and deterrence programs. More than any people on earth, Alaska Natives have learned to coexist with polar bears and share the land with them, as reflected in thousands of years of history and current ongoing projects on the

¹³ See 75 Fed. Reg. at 76,127-29.

¹⁴ *Id.* at 76,128.

¹⁵ See *Butte Envtl. Council v. United States Army Corps of Engineers*, 2010 WL 2163186 (9th Cir. June 1, 2010) (finding that 0.26% of slender Orcutt grass habitat was a “very small percentage of the total critical habitat” and its loss would not appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species).

¹⁶ 75 Fed. Reg. at 76,124.

¹⁷ *Id.* at 76,129.

North Slope. Excluding Native-owned lands would lawfully recognize this cooperation and would not cause any increased threat to polar bears.

As to the second “benefit” of inclusion – education – any conceivable value has already been achieved in terms of notifying land managers about areas that are essential to polar bears. When these lands were listed as potentially qualifying for critical habitat status on October 29, 2009, the land managers were put on notice. This has been perhaps the most widely-publicized critical habitat designation in history, and certainly it has been for Alaska. In addition, although providing general information is not a substitute for meaningful and required government-to-government consultation, Alaska Natives and Borough residents received information from the Service during outreach programs, meetings, and public hearings.¹⁸ The Alaska Native community and Borough residents are well aware of the areas utilized by polar bears. Excluding these villages and Native-owned lands from the designation will not result in a loss of any educational benefit obtained. The Service does not need to educate Alaska Natives about where polar bears like to den and hunt.

When assessing a possible exclusion of Barrow and Kaktovik from the designation, the Service expressly confirmed that “[t]he continued cooperation with the Native communities in northern and western Alaska is essential for the conservation of polar bears in Alaska. Excluding the Native-owned lands for these two villages will enhance the partnership efforts which have taken many years to develop between the Federal government and the Native communities.”¹⁹ The Service also concluded that “The benefit of sustaining current and future partnerships outweighs the extra outreach efforts associated with critical habitat and the additional section 7 requirements under the Act.”²⁰ These statements are true, however, for *all* Native-owned lands and communities – not just the two villages of Barrow and Kaktovik.

In addition, the Service failed to consider that the viability of Barrow and Kaktovik – and all Alaska Native communities– depends at least in part on Alaska Natives’ ability to develop their natural resources that were provided by Congress through enactment of ANCSA.

Because the Service failed to fully consider an important impact of the polar bear critical habitat designation and failed to discharge a statutory condition precedent to critical habitat designation, the final rule designating such critical habitat is invalid as a matter of law.²¹ The Service’s only reference to a potential exclusion of Native-owned lands does not perform the required balancing test (or, at a minimum, does so in an arbitrary and capricious way). In response to a comment, the Service indicated that the Secretary would not exclude undeveloped Native Village and Corporation lands because (1) it was uncertain whether and when there would be future development of those lands, and (2) there are educational benefits of informing land

¹⁸ *See id.* at 76,131-32.

¹⁹ *Id.* at 76,128.

²⁰ *Id.*

²¹ *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

managers about areas that may be essential to polar bears.²² As explained above, any educational benefit from a possible designation has already been obtained. Whether or not future development of these lands is certain, there are still substantial benefits associated with excluding the lands, as explained in the Alaska Native Interests' and the Borough's prior comments. Implementing the requested exclusions would allow for continued cooperation on polar bear conservation efforts both domestically and internationally and an increased likelihood that the Alaska Natives will be able to benefit from their natural resources, as provided under ANCSA and the Alaska Native Allotment Act of 1906, as amended (the "Allotment Act").

The Service expressly requested public comment on whether it should use its authority under Section 4(b)(2) to exclude certain areas from designation, whether there would be adverse social reactions to the designation that might undermine the conservation benefits of the proposed designation, and whether the proposed designation would have adverse effects on Native cultures and villages.²³ In response, the Alaska Native Interests' comment letters offered compelling and detailed information about the adverse economic impacts that the designation would have unless the requested exclusions were granted, and the comment letters described how those impacts would harm Native cultures and villages that depend on the income from those natural resources for basic needs. Those letters also explained that Alaska Natives' cooperative relationships with the Service would be compromised by the overreaching designation.²⁴ Yet, nowhere in the final rule does the Service actually make a finding that the benefits of including the lands in question outweigh the benefits of excluding them from designation as critical habitat as required by Section 4(b)(2), despite requesting comments on this specific issue. In light of the provisions of Section 4(b)(2), providing express authority to exclude lands, the Service's own request for public comment on this very issue, the detailed and geographically specific exclusion requests, and the associated detailed rationale, including the Service's admission that there are no anticipated or foreseeable conservation benefits from the designation of polar bear critical habitat, the Service's failure to engage in a balancing analysis and to rationally explain its conclusion is arbitrary, capricious, an abuse of discretion and a violation of the ESA. Indeed, had the Service lawfully conducted the comparison required by Section 4(b)(2) based on the record established in this rulemaking, it could only have concluded that exclusion of these lands is warranted.

²² See 75 Fed. Reg. at 76,098 (responding to Comment 37).

²³ See 75 Fed. Reg. 24,545, 24,546 (May 5, 2010).

²⁴ The Service flatly asserts that the establishment of critical habitat does not prohibit development, but "simply ensures consultation with Federal action [sic] agencies on actions that may affect designated critical habitat if a Federal nexus in the project exists. Therefore, we do 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 past 20 years." 76 Fed. Reg. at 76,100. This statement ignores the comments from the Alaska Native Interests confirming that those working relationships *will* be jeopardized.

2. *The Service did not reasonably consider the actual economic impact and other relevant impacts of designating the identified areas as critical habitat. This renders the Service's designation of critical habitat arbitrary and capricious and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2).*

Critical habitat designations by the Service may only be made after taking into account economic and other relevant impacts.²⁵ The Service's economic analysis, however, stubbornly ignores unfavorable data, does not consider the economic purposes of ANCSA, and is so deeply flawed that it fails to provide the required assessment of these impacts.

Specifically, the Service's economic analysis grossly underestimates the significant additional costs of conducting Section 7 consultations and fails to account at all for other costs, including among others, the high probability of litigation involving any matters of economic development in the Arctic, project delay, project slippage, deferred production or closure, uncertainty and risk.²⁶ Conservatively, the Service's economic analysis underestimates reasonably identifiable and certain economic impacts attributable to the Service's designation of polar bear critical habitat of between tens of millions and billions of dollars.

The Service did not properly or adequately consider the economic purposes of the conveyances in the Arctic to Alaska Natives, which, founded as they are on Federal Indian law, do not stand on the same basis as ordinary commercial land conveyances. The Service should have considered the Congressionally-established economic purposes for these land conveyances, whether they occur under ANCSA or the Allotment Act. In each case, the conveyance to the Alaska Native Interests was mandated by federal law, and the primary basis of the conveyance was to provide for the betterment, including the economic betterment, of Alaska Natives. The Service failed to properly consider these purposes, which are fundamental as a matter of federal law, when it conducted its economic analysis.

3. *The Service's designation of critical habitat, assessment of economic impact, and decision not to exclude certain areas from the critical habitat designation are not consistent with the best science mandate of the ESA. The Service's designation of critical habitat is therefore arbitrary and capricious, and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2).*

Critical habitat designations must be made on the basis of the best available science and commercial data. An important purpose of this best science mandate "(if not indeed the primary

²⁵ 16 U.S.C. § 1533(b)(2).

²⁶ As noted in ASRC's public comments on the proposed critical habitat designation (July 6, 2010), it was expected that environmental advocacy groups would use the critical habitat designation in litigation to challenge development in the Arctic. This expectation has already been realized. On January 13, 2011, the Center for Biological Diversity announced that it had formally notified the Department that it intends to sue the Department for "its failure to protect polar bear critical habitat from harmful oil and gas development in Alaska." See Press Release, Center for Biological Diversity (January 13, 2011).

one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”²⁷

The Service has violated the best science mandate of the ESA in numerous respects, including the following:

- The Service has failed to exclude appropriate areas from the critical habitat designation.
- The Service has over-designated vast areas as critical habitat.
- The Service has failed to assess the economic impact of its designation and to assess other relevant factors.

4. *The Service improperly designated vast areas that lack the physical and biological features “essential to the conservation of the species.” This was arbitrary and capricious and violated ESA Sections 3(5)(A), 16 U.S.C. § 1532(5)(A), and 4(a)(3), 16 U.S.C. § 1533(a)(3).*

The ESA defines critical habitat as “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 protection.” 16 U.S.C. § 1532(5)(A)(i) (emphasis supplied). The features that satisfy the Act’s requirements are called Primary Constituent Elements (“PCEs”). 50 C.F.R. § 424.12(b)(5).

PCEs must be “found” on occupied land before that land can be eligible for critical habitat designation.²⁸ These PCEs must be actually present at the time of designation; lands cannot be designated on the expectation that the PCEs will be present at some time in the future.

The final critical habitat designation, which is larger than 48 states, includes huge areas that do not contain any biological or physical attributes essential to conservation of the polar bear species. For example:

- The designation of nearly 180,000 square miles identified as critical sea ice habitat is defined to include areas that have so little sea ice during certain seasons of the year that these areas are, functionally, ice-free open water, and other areas that have such limited summer ice concentrations that they serve as, at most, marginal habitat rather than critical habitat.

²⁷ *Bennett*, 520 U.S. at 176-77.

²⁸ See 16 U.S.C. § 1532(5)(A)(i); *The Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d 108, 122 (D.D.C. 2004) (“the Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation”).

- The designation of 5,657 square miles of the North Slope coastal plain as terrestrial denning critical habitat for the polar bear encompasses an area over 99 percent of which is not suitable for polar bear denning.
- The designation of terrestrial denning critical habitat and barrier island critical habitat includes areas in close proximity to pre-existing industrial activity, communities,²⁹ residents, and regular human activity that are either unsuitable for denning or other sensitive polar bear behaviors or will have no impact on those behaviors. With respect to organized communities and surrounding lands, such a designation is inconsistent with assertions by the Service that these areas generally do not have the necessary PCEs for polar bear denning, resting and feeding³⁰ and that polar bears are actively deterred from communities. It is logically inconsistent to determine that an area is “essential” for the conservation of a listed species but is also an area for which there are active deterrence programs fully recognized and supported by the Service. Moreover, there is no explicit determination that the areas within and surrounding these communities are essential for the conservation of the species.
- The designation of barrier island critical habitat, including a one-mile “no disturbance zone” includes barrier islands, barrier island habitat and surrounding areas that lack suitable topography or other habitat features essential to the conservation of polar bears.

The Service has violated the ESA in designating areas that do not possess physical or biological features essential to the conservation of the species.

5. *The Service improperly designated areas that do not require special management measures, either now or in the foreseeable future. This was arbitrary and capricious and violated ESA Sections 3(5)(A), 16 U.S.C. § 1532(5)(A), and 4(a)(3), 16 U.S.C. § 1533(a)(3).*

To qualify as critical habitat, lands must not only be occupied by the species at the time it is listed, but must also contain those physical and biological features (I) essential to the conservation of the species and (II) *which may require special management considerations or protections*.³¹

²⁹ See footnote 4.

³⁰ See 75 Fed. Reg. at 76,128 (“In addition, Native communities, which consist of relatively dense core areas of human habitation in remote locations along the northern and western coasts of Alaska, generally do not have the necessary PCEs for polar bear denning, resting and feeding. Children and adults can be active during all of the daylight hours in the summer and during the periods of complete darkness in the winter. Polar bears are actively deterred from the Native communities for both human and bear safety.”).

³¹ 16 U.S.C. §1532(5)(A)(i) (emphasis supplied).

Most, if not all, of the lands designated as critical habitat require no special management considerations or protections, and therefore do not meet the required criteria for critical habitat designation. Initially, the Service has fundamentally failed to explain *why* special management considerations or protections may be required. The Service may designate critical habitat only if it first makes a finding that the listed species habitat “may require” special management considerations or protections.³² The Service has recognized that the conservation measures being implemented under the Marine Mammal Protection Act (“MMPA”) and the ESA are already expected to sufficiently avoid potential destruction or adverse modification of polar bear habitat.³³

The Service also may not satisfy its statutory obligations by relying on speculative future concerns. Although the word “may” indicates that the need for special management “need not be immediate, it is mandatory that the specific area designated have features which, in the future, may require special consideration or protection.”³⁴ That determination, like every part of a critical habitat decision, must be based on the best science mandate of the ESA. If the data show – as they do here – that there is no current or reasonably identifiable future unmet need with regard to polar bear habitat management, the Service cannot satisfy its statutory obligations and therefore should not designate critical habitat.

6. *The Service’s 187,157 square mile designation exceeded the maximum extent prudent for polar bears. This was arbitrary and capricious and violated ESA Section 4(a)(3), 16 U.S.C. § 1533(a)(3).*

The scope of the Service’s designation is subject to a “prudence” limitation. The Service may only designate critical habitat to the extent “prudent and determinable.”³⁵ Under the Service’s regulations, “[a] designation of critical habitat is not prudent when ... [s]uch designation of critical habitat would not be beneficial to the species.”³⁶ This is one of those rare circumstances where designating an additional 0.58% of lands (owned by Alaska Natives) and villages would not be beneficial to polar bears.³⁷

³² See *The Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 124 (Service cannot designate critical habitat without making “mandatory” finding that special management may be required).

³³ See 75 Fed. Reg. at 76,103.

³⁴ *The Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 124-25 (internal quotation marks omitted).

³⁵ 16 U.S.C. § 1533(a)(3)(A).

³⁶ 50 C.F.R. § 424.12(a).

³⁷ With respect to the villages, as noted previously, it is illogical in the extreme, and therefore not prudent, to place lands for which there are active polar bear deterrence programs into no disturbance or other critical habitat designations.

The Service should only undertake designation of critical habitat when that action provides a net benefit for the species.³⁸ Here, it is hard to identify any real benefits of designating critical habitat for polar bears. By the Service's own assessment, designating nearly 200,000 square miles of critical habitat will not mitigate or remove climate change, the primary threat to polar bears. Certainly, with respect to the miniscule percentage of the designation that the Alaska Native Interests sought to have excluded, any benefit is at best nominal.

Rather than provide a benefit to the bears, the Service's decision has adversely affected the working relationship that the Service has had with the Alaska Native community and Borough residents, the only day-to-day conservationists for polar bears. Harming that relationship – and thereby diminishing the benefits that polar bears receive from many voluntary conservation efforts – will adversely affect polar bears. The scope of the Service's designation may provide a disincentive for residents and Alaska Natives to continue implementing voluntary conservation efforts. Thus, the designation of Native-owned lands and villages is not beneficial to the species – it provides no conservation benefit to the bear, does not address the underlying issue of receding sea ice, but undermines the continuance of conservation measures voluntarily undertaken by residents and Alaska Natives.³⁹

Alaska Natives feel that the Service has not carefully considered their concerns, as is required, and that as a result, their serious concerns have been marginalized. When representatives of the Alaska Native Interests demonstrated that the financial impact of the critical habitat designation could run into the tens or even hundreds of millions of dollars – which would effectively cripple many Alaska Native communities – those concerns were dismissed as speculative. Alaska Natives will be less willing to voluntarily assist the Service in conservation efforts when the Service perfunctorily dismisses our bedrock concerns that our communities are being put at risk by a totally unnecessary and counterproductive critical habitat designation. If the Department and the Service want us to build positive relationships and view them as partners, they must start treating us like partners and acknowledge our legitimate concerns.


Thank you for considering this notice. We look forward to discussing how our concerns may be addressed. If you have any questions regarding this notice, please do not hesitate to contact the undersigned.

³⁸ 49 Fed. Reg. 39,800, 39,803 (1984).

³⁹ Compare Proposed Rule To List the Ozark Hellbender Salamander as Endangered, 75 Fed. Reg. 54,561, 54, 577 (Sept. 8, 2010) (finding that designating critical habitat for the Ozark Hellbender Salamander was “not prudent” because the critical habitat designation would increase the degree of threat to the species “and, at best, provide nominal benefits” for it). See also *Missouri ex rel. Nixon v. Sec’y of Interior*, 158 F. Supp.2d 984, 987 (W.D. Mo. 2001) (noting that the Service must balance the benefits derived from designating critical habitat against the potential adverse consequences to the species from increased public antagonism and other threats).

Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

A handwritten signature in dark ink, appearing to read "Rex Rock, Sr.", written over a horizontal line.

By: Rex Rock, Sr.

Its: President

NORTH SLOPE BOROUGH

By:

Its:

NANA REGIONAL CORPORATION, INC.

By:

Its:

BERING STRAITS NATIVE CORPORATION

By:

Its:

CALISTA CORPORATION

By:

Its:

Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

By:

Its:

NORTH SLOPE BOROUGH

By: *[Signature]*, FAW NESS FELDMAN, P.C.
Its: *Attorney*

NANA REGIONAL CORPORATION, INC.

By:

Its:

BERING STRAITS NATIVE CORPORATION

By:

Its:

CALISTA CORPORATION

By:

Its:

Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

By:
Its:

NORTH SLOPE BOROUGH

By:
Its:

NANA REGIONAL CORPORATION, INC.


By:
Its:

BERING STRAITS NATIVE CORPORATION

By:
Its:

CALISTA CORPORATION

By:
Its:

Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

By:
Its:

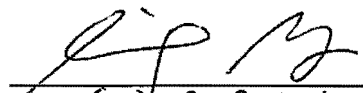
NORTH SLOPE BOROUGH

By:
Its:

NANA REGIONAL CORPORATION, INC.

By:
Its:

BERING STRAITS NATIVE CORPORATION



By: Grant R. Schubert
Its: President & CEO

CALISTA CORPORATION

By:
Its:

Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

By:
Its:

NORTH SLOPE BOROUGH

By:
Its:


NANA REGIONAL CORPORATION, INC.

By:
Its:

BERING STRAITS NATIVE CORPORATION

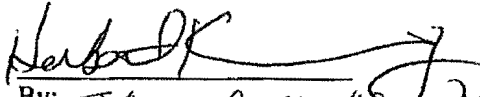
By:
Its:

CALISTA CORPORATION



By: MARCIA R. DAVIS
Its: GENERAL COUNSEL

TIKIGAQ CORPORATION


By: TIKIGAQ CORPORATION, President
Its:

OLGOONIK CORPORATION, INC.

By:
Its:

UKPEAGVIK IÑUPIAT CORPORATION

By:
Its:

KUUKPIK CORPORATION

By:
Its:

IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE

By:
Its:

TIKIGAQ CORPORATION

By:
Its:

OLGOONIK CORPORATION, INC.

June Childress
By:
Its: *President*

UKPEAGVIK IÑUPIAT CORPORATION

By:
Its:

KUUKPIK CORPORATION

By:
Its:

IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE

By:
Its:


TIKIGAQ CORPORATION

By:
Its:

OLGOONIK CORPORATION, INC.

By:
Its:

UKPEAGVIK INUPIAT CORPORATION


By: Anthony E. Edwarden
Its: President

KUUKPIK CORPORATION

By:
Its:

INUPIAT COMMUNITY OF THE ARCTIC SLOPE

By:
Its:

TIKIGAQ CORPORATION

By:
Its:

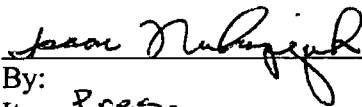
OLGOONIK CORPORATION, INC.

By:
Its:

UKPEAGVIK INUPIAT CORPORATION

By:
Its:

KUUKPIK CORPORATION



By: *Pres.*
Its:

INUPIAT COMMUNITY OF THE ARCTIC SLOPE

By:
Its:

TIKIGAQ CORPORATION

By:
Its:

OLGOONIK CORPORATION, INC.

By:
Its:

UKPEAGVIK IÑUPIAT CORPORATION

By:
Its:


KUUKPIK CORPORATION

By:
Its:

IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE

Doreen Lampe 1-12-2011
By:
Its:

KAKTOVIK INUPIAT CORPORATION


By: Philip P. Tikluk Jr.
Its: PRESIDENT

CULLY CORPORATION



By: Dolly Norton
Its: President / CEO