No. 16-___

IN THE

Supreme Court of the United States

ALASKA OIL AND GAS ASSOCIATION,
AMERICAN PETROLEUM INSTITUTE,

Petitioners,

v.

SALLY JEWELL, Secretary of the Interior,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JEFFREY W. LEPPO
Counsel of Record
JASON T. MORGAN
RYAN P. STEEN
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 624-0900
jeffrey.leppo@stoel.com

November 4, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Under Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533(a) the U.S. Fish and Wildlife Service (the "Service") must designate "critical habitat" for any species it lists as threatened or endangered. Section 3 of the ESA, 16 U.S.C. § 1532(5), narrowly defines critical habitat to *specific*, carefully limited areas where the *particular* features essential to maintaining the species are actually *found*. The Service long applied the statute that way, carving out focused areas truly essential to species conservation.

More recently, however, the Service has begun making designations that encompass huge swaths of territory, shifting the burden to states, native communities, and regulated parties to prove that specific areas do not actually have those essential features in subsequent proceedings with the agency. This about-face has nothing to do with species conservation, as the Service concedes that these designations actually serve little or no conservation benefit.

This practice persists because the Ninth Circuit, which decides the vast bulk of cases under this statute, has adopted an exceptionally lax and inexact standard regarding the specificity with which the Service must determine that particular habitat is critical for a species. The result, as clearly framed by this case, is that the Service can now freely impose sweeping designations (in this case an area the size of California), that overlap with existing human development (including, even, industrial areas), thereby imposing significant impacts on state and tribal sovereignty and economic activity, with virtually no judicial review as to whether all areas within the designation are actually critical (or even

helpful) to the conservation of the species. The question presented is:

Whether the Ninth Circuit's exceedingly permissive standard improperly allows the Service to designate huge geographic areas as "critical habitat" under the ESA when much of the designated area fails to meet the statutory criteria?[1]

[1] A similar question is presented by the State of Alaska and Native groups in a separate petition for certiorari filed on November 4, 2016 in this Court in *State of Alaska, et al. v. Sally Jewell*.

RULES 14.1 AND 29.6 STATEMENT

Plaintiffs-Appellees below and petitioners here are the Alaska Oil and Gas Association and the American Petroleum Institute.

Additional Plaintiffs-Appellees below were the State of Alaska, Arctic Slope Regional Corporation, the North Slope Borough, NANA Regional Corporation, Inc., Bering Straits Native Corporation, Calista Corporation, Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeagvik Inupiat Corporation, Kuupik Corporation, Kaktovik Inupiat Corporation, and the Inupiat Community of the Arctic Slope. These entities have filed their own petition for certiorari with the Court.

Defendants-Appellants below were Sally Jewell, Secretary of the Interior, Daniel Ashe, Director of the U.S. Fish and Wildlife Service, and the U.S. Fish and Wildlife Service.

Intervenors-Defendants-Appellants below were the Center for Biological Diversity, Defenders of Wildlife, and Greenpeace, Inc.

Petitioner Alaska Oil and Gas Association is a nonprofit trade association representing the oil and gas industry in Alaska. No parent corporation or publicly held company has a 10 percent or greater ownership interest in the Alaska Oil and Gas Association.

Petitioner American Petroleum Institute is a nonprofit trade association representing the oil and gas industry in the United States. No parent corporation or publicly held company has a 10 percent or greater ownership interest in the American Petroleum Institute.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

On December 7, 2010, the U.S. Fish and Wildlife Service (the "Service") designated a 187,000-square-mile contiguous block of the Arctic (an area larger than the State of California) as critical habitat for the polar bear pursuant to Section 4 of the Endangered Species Act ("ESA"). 75 Fed. Reg. 76,086 (Dec. 7, 2010). The ESA narrowly defines critical habitat as "the specific areas within the geographical area occupied by the species, . . on which are found those physical or biological features . . . essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). As the plain language makes clear, critical habitat for the polar bear (and every other species) is statutorily limited to the "specific areas" where features essential to polar bear conservation are "found." *Id*.

The Service's 187,000-square-mile designation is the antithesis of the congressional intent expressed in the statute. In promulgating the designation, the Service determined that the "physical or biological features" included things like "[s]teep, stable slopes" for denning, "unobstructed, undisturbed access between den sites and the coast," and "refuge from human disturbance." 75 Fed. Reg. at 76,133. The Service proceeded to identify some of those "essential features" in "specific areas" within the range of the polar bear. But the Service did not limit the designation to those specific areas. Instead, the Service drew broad lines around the various features (in some cases in 20-mile swaths, and in other cases just pushing out to the 200-mile jurisdictional limit), thereby encompassing a contiguous block larger than the State of California. Swept within that enormous block of land are the entire ancestral homelands for certain Native

communities, as well as the largest and most productive oil field in North America.

In this litigation, an uncommon coalition of Alaska Natives, the North Slope Borough, the State of Alaska, and Alaska's oil and gas industry (collectively, "Plaintiffs") challenged the Service's polar bear critical habitat designation. Plaintiffs represent the stakeholders who live, work, own property, and govern in the areas designated as critical habitat, alongside polar bears—the Arctic's top predator. This coalition of Plaintiffs has successfully managed the potentially lethal interactions with polar bears for many decades (and for some of the Plaintiffs, for millennia) without negatively impacting polar bear populations. Currently, those interactions are governed by the Marine Mammal Protection Act, 16 U.S.C. § 1361, et seq. ("MMPA"), which authorizes Plaintiffs to actively keep polar bears away from homes and businesses. *See* 50 C.F.R. § 18.34(b)(2) ("Guidelines for use in safely deterring polar bears.").

This coalition found common ground in opposition to the polar bear critical habitat designation, centered around two factors. *First*, the designation materially impacts state and tribal sovereignty, and the property rights of companies and Native Corporations, by improperly declaring the areas around where they live and work as essential to polar bear conservation. The sweeping designation overlaps almost all of the existing and proposed oil and gas operations on the North Slope, covers all of the home lands of some Native groups, and covers lands selected by the State of Alaska and Native groups pursuant to federal law to ensure the economic future of the people of Alaska.

The North Slope is the core of Alaska's economy, and the Service's designation of broad portions of the North Slope as critical habitat severely threatens the future of the State's economy moving forward.

Second, the polar bear critical habitat designation will do nothing to help conserve the polar bear. Polar bears are threatened by projected loss of sea ice habitat due to climate change, *not on-the-ground activities in the Arctic*. Polar bears and their habitat are already properly managed under the MMPA. *See In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 222 (D.D.C. 2011) (polar bears have been "effectively managed and protected . . . for thirty years"). Even the Service agreed on this point, conceding that the polar bear designation will have *no conservation benefit* and explaining that it is "unable to foresee a scenario in which the designation of critical habitat results in changes to polar bear conservation requirements." U.S. Fish & Wildlife Serv., *Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States: Final Report* at ES-5 – ES-6 (Oct. 14, 2010), https://www.fws.gov/alaska/fisheries/mmm/polarbear/pdf/fea_polar_bear_14%20october%202010.pdf.

Plaintiffs filed suit in federal district court in Alaska seeking invalidation of the designation on grounds that the designation far exceeded the narrow definition of critical habitat by including vast areas that contained no essential features. The district court agreed, and issued a detailed opinion finding that the record provided no evidence of essential features in "ninety-nine percent" of the areas designated as denning habitat. App. *infra* 86a. As the district court explained, "the Service cannot designate a large swath of land in northern Alaska as 'critical habitat' based

entirely on one essential feature that is located in approximately one percent of the entire area set aside." *Id*. The district court further explained that the lack of any evidence of essential features "is especially stark concerning the inclusion of the areas around Deadhorse, Alaska, as such area is rife with humans, human structures, and human activity." *Id*.

The Ninth Circuit reversed on appeal by excusing the Service from the burden of producing evidence in the record to support the existence of essential features found missing by the district court. Instead, the panel relied on the "unassailable fact that bears need room to roam," even though "room to roam" is not one of the physical or biological features essential to the conservation of the polar bear in the final rule, and even though the final rule makes no mention of the need for "room to roam." App. *infra* 28a.

The Ninth Circuit's decision leaves an untenable situation for the people of Alaska, and everyone within the broad jurisdictional reach or influence of the Ninth Circuit. In the United States, there are 700 listed animal species and 903 listed plant species. U.S. Fish & Wildlife Serv., Listed Species Summary, http://ecos.fws.gov/ecp0/reports/ box-score-report (last updated Oct. 27, 2016). This long list includes many less charismatic species like the Oahu tree snail and the salt creek tiger beetle, all of which *must* receive their own critical habitat designations. And these lists are growing, with at least 30 more species on the candidate list. The Ninth Circuit's improper and permissive standard leaves the Service free to make grossly inexact designations of critical habitat on state and private lands, regardless of the consequences, and with virtually no burden to demonstrate that the designation is useful or helpful to these species.

Review by this Court is the only mechanism to bring this arbitrarily lax practice back into line with the plain language and intent of Congress.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Alaska Oil and Gas Association ("AOGA") and American Petroleum Institute ("API") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra* 1a-41a) is reported at 815 F.3d 544. The opinion of the district court (App. *infra* 48a-95a) is reported at 916 F. Supp. 2d 974.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2016. After the court of appeals extended the time to file, petitioners filed a timely petition for rehearing en banc on May 6, 2016. By order dated June 8, 2016, the court denied the petition for rehearing en banc. App. *infra* 47a. On August 30, 2016, Justice Kennedy extended the time for filing petitions for certiorari to November 4, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

16 U.S.C. § 1533(a)(3)(A)(i) provides in relevant part:

> The Secretary, . . . shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of

such species which is then considered to be critical habitat[.]

16 U.S.C. § 1533(b)(2) provides in relevant part:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

16 U.S.C. § 1532(5) defines "critical habitat" as follows:

> (A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, 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; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> . . . .
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area

which can be occupied by the threatened or endangered species.

STATEMENT OF THE CASE

A. Statutory Framework - Critical Habitat

1. The ESA Requires the Service to Designate Critical Habitat and Protect That Habitat from Destruction or Modification.

Congress originally enacted the ESA in 1973 in response to a rise in the number and severity of threats to the world's wildlife, with the intent of preserving threatened and endangered species and the habitat on which they depend. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 177 (1978). The protections of the ESA are triggered when a species is listed as "threatened" or "endangered" under Section 4 of the ESA. 16 U.S.C. § 1533(a).

Under Section 4 of the ESA, once a species is listed as threatened or endangered, the Service has a mandatory duty ("shall") to designate critical habitat for that species. 16 U.S.C. § 1533(a)(3)(A). The Service does have discretion to remove an area from the designation if the benefits of exclusion outweigh the benefits of inclusion, but the Ninth Circuit has elsewhere largely rendered this provision a nullity by exempting such decisions from judicial review. *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1035 (9th Cir. 2015) ("[A]n agency's decision not to exclude critical habitat is unreviewable."), *cert. denied* (U.S. Oct. 11, 2016).

Once critical habitat is designated under ESA Section 4, Section 7 of the ESA provides substantive protections to protect and conserve that habitat. Specifically, ESA Section 7 requires every federal agency to "insure that any action authorized, funded, or carried out by such agency" will not "result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2).

2. The ESA Was Amended in 1978 to Provide an Express Definition of Critical Habitat.

As originally enacted in 1973, the ESA did not define the term "critical habitat," provide procedures for designating critical habitat, or even expressly require such designation.

In the absence of express guidance from Congress, the Service proceeded to expansively designate critical habitat on an *ad hoc* basis. In one early designation for a small fish in Tennessee (the snail darter), the Service concluded that "habitat" would "consist of a special environment in which a species lives," and that "'[c]ritical habitat' . . . could be the entire habitat or any portion thereof." 41 Fed. Reg. 13,926, 13,927 (Apr. 1, 1976). The Service finalized more formal regulations in early January 1978, defining critical habitat broadly as "any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species." 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978). That regulation further allowed that "[c]ritical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion." *Id*. at 875. By the middle of 1978, the Service (along with the Secretary of Commerce) had already desig-

nated critical habitat for 32 species, with 56 designations pending and an additional 140 species waitlisted for proposed designations.[1]

The ESA's critical habitat provisions quickly became a matter of controversy when a concerned citizen filed suit against the Tennessee Valley Authority alleging that the construction of the Tellico Dam on the Little Tennessee River would result in the destruction of critical habitat for the snail darter, a small fish living in the vicinity of the dam. *See Tenn. Valley*, 437 U.S. at 156. Although construction was "virtually complete[]," with nearly $100 million already expended on the major infrastructure project, the Supreme Court enjoined work on the dam. *Id*. at 172. As the Court explained in its June 15, 1978 opinion, the original language of Section 7 and its legislative history appeared to indicate a "plain intent . . . to halt and reverse the trend toward species extinction, whatever the cost." *Id*. at 184.

Congress immediately responded to this pronouncement by amending the ESA in November 1978. Pub. L. No. 95-632, 92 Stat. 3751 (1978). As one member of Congress explained, "[t]he Supreme Court decision may be good law, but it is very bad public policy." Legislative History at 822 (reprinting House Consideration and Passage of H.R. 14104, with Amendments). Instead, the Service needed to use "commonsense" in implementing the ESA and to better "balance environmental and developmental interest[s]

---

[1] *See* Staff of S. Comm. on Environment and Public Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980* (Comm. Print 1982) at 823 (hereinafter "Legislative History").

. . . [and] take into consideration more accurately the development needs of this Nation." *Id*. at 801, 837.

The "heart of the problem," as explained by Representative Duncan in proposing changes to the ESA, was the absence of a statutory definition for critical habitat, and the broad regulatory definition adopted by the Service. *Id*. at 880. The Service's broad regulatory definition "failed miserably" to address the problems associated with critical habitat (*id*.), and as a result, the Service's designations were going "too far in just designating territory as far as the eyes can see and the mind can conceive." *Id*. at 817. What was needed, instead, was "a showing that [habitat] is essential to the conservation of the species." *Id*. at 880. Members of Congress also raised particular concerns about the implications of critical habitat designations "when extremely large land areas are involved" and expressed a need to ensure that a listed species' "true critical habitat" was protected. *Id*. at 948 (reprinting S. Rep. No. 95-874 (1978)) (referring to the Service's proposal to designate over 15,000 square miles as grizzly bear critical habitat).

Members of Congress proposed to address these concerns by defining "critical habitat" to "narrow[] the scope of the term." *Id*. at 749 (reprinting H.R. Rep. No. 95-1625 (1978)). As proposed by Representative Duncan, the definition of critical habitat would include only "the specific areas within the geographic area[s] occupied by the species on which are found those physical or biological features which are essential to the conservation of the species and which require special management." *Id*. at 880 (reprinting House Consideration and Passage of H.R. 14104, with

Amendments).[2] The result of Representative Duncan's amendments, as incorporated in the conference bill, was an "extremely narrow definition of critical habitat." *Id*. at 1221 (reprinting Conf. Rep. on S. 2899).

The historical concerns identified in the legislative history are reflected in the language adopted in 1978. The definition rejects the Service's prior position that "'[c]ritical habitat' . . . could be the entire habitat or any portion thereof" (41 Fed. Reg. at 13,927), explaining that critical habitat ordinarily "shall not include the entire geographical area which can be occupied by the . . . species." 16 U.S.C. § 1532(5)(C).

The definition also divides potential habitat into two categories: (i) geographical areas that are "occupied by the species" at the time of listing, and (ii) geographical areas that are not occupied at the time of listing. 16 U.S.C. § 1532(5)(A). For areas that are "occupied" at the time of listing, critical habitat is limited to "specific areas . . . on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). For unoccupied areas, the area must

---

[2] Although H.R. 14104 was not enacted, the language from H.R. 14104 was inserted into the enacted bill (S. 2899). Legislative History at 904 (reprinting House Consideration and Passage of S.2899, With Amendment, In Lieu of H.R. 14104) (passing motion to amend S. 2899 to "insert . . . the provisions of HR. 14104"). The final statute (Pub. L. No. 95-632) included "virtually identical" language to the House bill. Legislative History at 1220-21 (reprinting Conf. Rep. on S. 2899) ("[T]he Senate and House bills were not really all that far apart . . . [and] with all frankness the guts of the House Bill have been retained in the conference report . . . [including] . . . [a]n *extremely narrow definition of critical habitat*, virtually identical to the definition passed by the House[.]") (emphasis added).

be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Only the conditions applicable to "occupied" habitat are at issue in this case.

B. The Service's Designation of Critical Habitat for the Polar Bear

The Service listed the polar bear as a threatened species on May 15, 2008. 73 Fed. Reg. 28,211 (May 15, 2008). Unlike most species that are listed because there have been significant population declines, the polar bear is "generally abundant throughout its range, . . . continue[s] to occupy the full extent of its historical range, and it ha[s] yet to experience precipitous population declines in any portion of its range." *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 76-77 (D.D.C. 2011), *aff'd*, 709 F.3d 1 (D.C. Cir. 2013).

"[T]he polar bear was the first species to be listed due to climate change." *Id*. at 87. Polar bears are "evolutionarily adapted to, and indeed completely reliant upon, sea ice for their survival," and the Service predicted that within 45 years "polar bear populations will be affected by substantial losses of sea ice" that are attributable to climate change. *Id*. at 72, 76. Thus, while polar bear populations are presently stable, climate change poses a threat to the bear in the foreseeable future.[3]

Following the listing decision, the Service proceeded, as required by the ESA, to designate critical

[3] The listing decision was challenged and upheld in *In re Polar Bear*, 794 F. Supp. 2d 65. Petitioner AOGA participated as an intervenor-defendant in support of the Service's listing decision against the ultimately unsuccessful claims that the polar bear should be listed as "endangered" instead of "threatened." *Id*. at 78.

habitat for the polar bear. The Service identified three habitat types: (1) sea ice habitat (Unit 1); (2) terrestrial denning habitat (Unit 2); and (3) barrier island habitat (Unit 3). 75 Fed. Reg. at 76,133. Polar bears spend the vast majority of their time in sea ice habitat (which is the largest area of designated habitat), and the bears maintain large ranges on the sea ice (as that ice fluctuates seasonally) in pursuit of the prey upon which they depend. *Id.* at 76,095; *id*. at 76,090 (polar bears "typically remain with the sea ice throughout the year"). Polar bears "do not wander aimlessly on the sea ice," but instead "show a strong fidelity to activity areas that are used over multiple years." *Id*. at 76,090, 76,095.

As for terrestrial denning sites, polar bears use these areas much less frequently (and only by maternal polar bears). Of the two populations of polar bears living in the waters off Alaska, the "primary denning areas" for one population (the Chukchi-Bering population) is in Russia, and is not part of the designation. *Id*. at 76,090. Only the Southern Beaufort population uses terrestrial areas in Alaska in significant numbers, but the confirmed number of den sites is still only 20-40 dens per year. *Id*. at 76,099.

Denning habitat has specific physical and biological features. These include (1) "[s]teep, stable slopes . . . with water or relatively level ground below the slope and relatively flat terrain above the slope," (2) "[u]nobstructed, undisturbed access between den sites and the coast," (3) proximity to sea ice in the fall, and (4) the "absence of disturbance from humans and human activities that might attract other polar bears." *Id*. at 76,133. As the Service explains, "[d]enning females typically seek secluded areas away from human activity," *id*. at 76,096, and are sensitive to

human activity within one mile of the denning site, *id*. at 76,115.

The denning habitat designation does not limit itself to the specific areas where those features are found. Rather, the Service selected the critical habitat area for denning by designating *all lands* within 20 miles of the coast from the Canadian border to the Kavik River, and all lands five miles in from the coast from the Kavik River to Barrow, collectively encompassing hundreds of miles of coastline.

Within these broad swaths of denning habitat are almost all of the existing oil and gas production facilities on Alaska's North Slope, including Prudhoe Bay (the largest production oil field in North America), nine other oil fields, and the industrial staging area of Deadhorse, Alaska. The Service excluded the physical "manmade structures" from the definition of critical habitat, but otherwise left the areas immediately adjacent to these industrial operations (including areas where bears are actively hazed away as authorized by the MMPA) as critical denning habitat. *Id*. at 76,133. So while the significant network of roads, buildings, pipelines, well pads, industrial gas compression plants and facilities, waste treatments plants, and even the Oxbow landfill are not themselves designated as critical denning habitat, the areas immediately adjacent to, between, and surrounding this network of industrial operations (from which bears are actively and lawfully hazed away) are designated as critical denning habitat. *Id*. at 76,098.

As for barrier island critical habitat, the Service employed a similar all-encompassing approach. The Service noted that bears use some barrier islands as migration corridors and to "avoid human disturbance." *Id*. at 76,120. Without identifying specific corridors,

the Service proceeded to include *every barrier island* in the range of the polar bear (and every spit on those islands) and *everything within one mile of those islands and spits* as a "no disturbance zone." *Id*. Included within the barrier island critical habitat designation (and the no disturbance zone) are 13 Native villages, including Wainwright, Point Lay, Point Hope, Kivalina, Shishmaref, Diomede, Wales, King Island, Teller, Solomon, Shaktoolik, St. Michael, and Nunam Iqua.[4]

C. The District Court Vacated the Designation for Lack of Evidence in the Record Demonstrating the Presence of Essential Features

The district court below reviewed the Service's decision against the ESA's statutory criteria for critical habitat. As the district court explained, "in order for an area to be designated as critical habitat, an agency must determine that the area actually contains physical or biological features essential for the conservation of the species." App. *infra* 83a (citing 16 U.S.C. § 1532(5)(A)(i)). The district court recognized the deference owed to the Service, but explained that "agencies must still show substantial evidence in the record and clearly explain their actions." *Id*. (Service "cannot simply speculate as to the existence of such features").

After carefully reviewing the record, the district court concluded that the required evidence of essential features in specific areas was plainly lacking to support such a broad designation. As the district court

---

[4] The Service excluded the villages of Barrow and Kaktovik, concluding (incorrectly) that "[o]nly the North Slope communities of Barrow and Kaktovik overlap with the proposed critical habitat designation." 75 Fed. Reg. at 76,097.

explained, "[b]ased *solely* on the location of the confirmed or probable den sites, the Service concluded that the whole of Unit 2 contained *all* of the physical or biological features" essential to polar bear denning. App. *infra* 85a. The record demonstrates that the known and probable den sites, as well as all other *potential* denning habitat ("[s]teep, stable slopes" for den building), are instead found *only* "in roughly one percent of the entire area designated." App. *infra* 86a. At the same time, the Service "fail[ed] to point to the location of any features in the remaining ninety-nine percent" of the designated denning habitat, thereby providing no evidentiary basis to conclude that 99 percent of the designated area met the statutory definition of critical habitat. *Id*. This failure is "especially stark concerning the inclusion of the areas around Deadhorse, Alaska, as such area is rife with humans, human structures, and human activity." *Id*.

Similarly, the district court found that the evidence of physical and biological features was lacking with respect to barrier island habitat. The district court found that the Service could not produce "even minimal evidence in the record showing *specifically* where all the physical or biological features are located within" the barrier island unit. App. *infra* 90a. Although the Service presented evidence that *some* of the islands were used for denning, the "explanation of the location of the other essential feature[s] is lacking." *Id*. As the district court explained, "each part of Unit 3 does not have to contain each of the three essential features," but "*every part* of the designation must have at least one." *Id*.

Because the Service failed to provide evidence or explanation in the record to show that "at least one" essential feature is "found" in all of the designated

areas, the district court vacated the designation. App. *infra* 90a.

D. The Ninth Circuit Reversed

The Ninth Circuit reversed the district court decision. The Ninth Circuit's decision starts from the erroneous premise that the "polar bear population has been declining for many years." App. *infra* 9a; *cf. In re Polar Bear,* 794 F. Supp. 2d at 76-77 (explaining Service findings that bear populations are currently stable and have not experienced significant declines). From there, the court decided "[a]t the outset" that the district court required too strict of a "standard of specificity." App. *infra* 21a. Although the ESA expressly requires critical habitat designations to be "based on the best scientific and commercial data available" (16 U.S.C. § 1533(b)(2)), the court held that the ESA instead "requires use of the best available technology, not perfection." App. *infra* 21a.[5] Based on that erroneous standard, the court concluded that the Service did the best that it could with telemetry studies (even though the Service disregarded detailed mapping of features available in the record), and therefore could designate 20-mile-wide and five-mile-wide swaths of land based on "administrative convenience." App. *infra* 27a.

As for the absence of evidence of essential features on 99 percent of the areas designated as denning

---

[5] The Ninth Circuit twice refers to the "best available technology" standard. App. *infra* 11a, 21a. The best available technology standard is employed in setting effluent limitations under the Clean Water Act, and plainly has no application in the ESA. *See* 33 U.S.C. § 1311(b)(2)(A). Nonetheless, at least one district court has already started applying the Ninth Circuit's newly crafted "best available technology" standard for the ESA. *Defs. of Wildlife v. Jewell*, No. 14-247-M-DLC, 2016 WL 1363865, at *19 (D. Mont. Apr. 4, 2016).

habitat, the Ninth Circuit chastised the district court for looking too narrowly at the locations where actual and probable den sites are located. App. *infra* 21a. Instead, the Ninth Circuit concluded that "[u]nderlying [the Service's] rejection of Plaintiffs' challenges is the unassailable fact that bears need room to roam," App. *infra* 28a, even though there was no evidence in the record that bears need to "room to roam" in denning habitat (and even on sea ice, where the bears have a large range, the record is clear that they do not "wander aimlessly"). 75 Fed. Reg. at 76,090.

Likewise, the Ninth Circuit made no meaningful effort to reconcile the readily apparent conflict between the Service's identified essential features such as "[u]nobstructed, undisturbed access between den sites and the coast," the "absence of disturbance from humans," or "refuge from human disturbance" (75 Fed. Reg. at 76,133) with the Service's inclusion of areas with pervasive human activity and disturbance such as the industrial areas of Prudhoe Bay and Deadhorse, or around Native villages. Pursuant to federal regulations, the people living and working on the North Slope use numerous hazing methods (under strict protocols) to deter bears from these areas including rubber bullets, cracker shells, and bean bags fired from shotguns[6], as well as "[a]coustic deterrent devices" like "sirens" or "air horns" in order to "move" polar bears away from those areas, and vehicles and boats to "block[] their approach." 50 C.F.R. § 18.34(b)(2). These areas plainly do not provide "refuge from human

[6] *See, e.g.*, Polar Bear and Walrus Interaction Plan for BPXA Areas of Operation, https://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Plans/BP%20PolarBear%20and%20Walrus%20Interaction%20Plan.pdf

disturbance" or "unobstructed, undisturbed access." The Ninth Circuit's decision conveniently avoids this issue, noting only that "'polar bears . . . are allowed to exist in the areas between the widely dispersed network of road, pipelines, well pads, and buildings.'" App. *infra* 30a.

This decision is plainly wrong, and therefore Plaintiffs seek review by this Court.

REASONS FOR GRANTING THE PETITION

The State of Alaska, Native Corporations, and Native groups have independently filed a petition for certiorari seeking review of the Ninth Circuit's decision. Petitioners AOGA and API support, endorse, and incorporate the reasons for granting certiorari put forth by those Petitioners. AOGA and API agree that Supreme Court review is needed because the Ninth Circuit's decision below is plainly wrong and creates an untenable situation in Alaska and in the Ninth Circuit that can only be corrected by Supreme Court review, and they agree that the issue is hugely important for states, Native, and environmental interests alike.

AOGA and API further agree that this case is the perfect vehicle for addressing the Service's backward practice and the Ninth Circuit's arbitrarily permissive standard. The stakes of a critical habitat designation will never be in starker relief than a designation the size of California that includes all the historic homeland of certain Native communities as well as the area most essential to a State's economic future. Likewise, the arbitrary nature of the Service's practice and the failure of the Ninth Circuit's overly deferential review will never be in sharper focus than it is here, with areas designated because they are supposedly free of "human

disturbance" when, in fact, pursuant to well-established federal law and regulation, bears are intentionally deterred away from these areas using approved hazing techniques to avoid lethal bear-human interactions.

Without repeating those arguments, AOGA and API have filed this separate petition for certiorari to emphasize additional reasons for granting certiorari in this case.

First, as detailed below, this case presents issues of exceptional importance regarding the future viability of oil and gas reserves that are absolutely essential to Alaska's economy and that are recognized as strategically important for the nation. The State of Alaska and private companies have invested billions of dollars in developing these important resources. The Service's cavalier designation of all of these developed areas as critical habitat, knowing that designation will have essentially no benefit for the bear, and the Ninth Circuit's refusal to meaningfully review that decision, places arbitrary and unnecessary burdens on the continued development of those essential resources. Only Supreme Court review can undo this nonsensical result.

Second, the Ninth Circuit's decision is the latest in a line of cases from that circuit that progressively undermine the critical habitat process. In the Ninth Circuit, decisions on critical habitat are not subject to environmental review or meaningful economic review, and the Service has unreviewable discretion to deny requests to exclude portions of a designation based on environmental or economic concerns. Now, as a result of the present decision, the Service in the Ninth Circuit can impose the burdens of critical habitat on staggeringly large geographic areas, with virtually no evidence that the vast majority of that

designation contains essential features and despite undisputed evidence that the species is actively and lawfully chased out of the area.

As detailed below, this permissive attitude by the Ninth Circuit at virtually all levels of the critical habitat process is both wrong and has created a situation where aggrieved parties seek to avoid the Ninth Circuit—and with good reason. Forum shopping and venue disputes are (and now increasingly will be) largely determinative of the outcome. Supreme Court review would end the need for parties to file California critical habitat cases in the District of D.C. or Washington critical habitat cases in Wyoming, and provide needed guidance for all the circuits.

I. THE NINTH CIRCUIT'S DECISION WILL SIGNIFICANTLY IMPAIR THE DEVELOPMENT OF STRATEGICALLY IMPORTANT STATE AND NATIONAL RESOURCES

Alaska entered statehood in 1959 on the promise and expectation that the State's natural resources, including the State's vast oil reserves, would provide the basis for the State's economy. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1065 (2016). To that end, Alaska's Statehood Act granted Alaska title to submerged lands and the resources therein, and over 100 million acres of land "to serve Alaska's overall economic and social well-being." *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968); Pub. L. No. 85-508, § 6(a)-(b), 72 Stat. 339, 340 (1958). Congress followed the Statehood Act with the Alaska Native Claims Settlement Act ("ANCSA") in 1971, setting aside 40 million acres to secure the economic well-being of Alaska Natives, and the Alaska National Interest Lands Conservation Act ("ANILCA") in 1980, in part, to halt the federalization of lands in Alaska and ensure

the "economic and social needs of the State of Alaska." *Sturgeon*, 136 S. Ct. at 1066 (internal quotation marks and citation omitted). Alaska was not to be the "'Polar Bear Garden,'" that some predicted, but a state whose economy was built on the development of the State's natural resources. *Id*. at 1064.

The development of Alaska's North Slope for oil and gas has been, and continues to be, a key component of the State's economic development. In reliance on the promises in the Statehood Act, ANCSA, and ANILCA, the State of Alaska and Native groups selected millions of acres of land for their economic development potential on the North Slope. The selection of those lands, and the 1968 discovery of oil in Prudhoe Bay, led to billions of dollars of investment in developing oil and gas on the North Slope and adjacent waters, including the construction of the 800-mile Trans-Alaska Pipeline. The Trans-Alaska Pipeline is one of the largest infrastructure projects in the world, and represents an investment of more than $8 billion. And the State and private companies contemplate investing another $45 billion to $65 billion in a new pipeline to transport natural gas from the North Slope.[7]

As expected, the North Slope has been a key driver of Alaska's economy. North Slope oil and gas operations currently produce 475,353 barrels of oil *per day* through the Trans-Alaska Pipeline, accounting for the largest single revenue stream for the State of Alaska and for 11,000 jobs on the North Slope alone. The importance of Prudhoe Bay cannot be overstated:

---

[7] Alaska Resource Development Council, Alaska's Oil & Gas Industry, http://www.akrdc.org/oil-and-gas (last visited Oct. 27, 2016).

"'One Prudhoe Bay is worth more in real dollars than everything that has been dug out, cut down, caught, or killed in Alaska since the beginning of time.'" Neal Fried, *Alaska Economic Trends*, Alaska's Oil and Gas Industry, June 2013, http:// laborstats.alaska.gov/ trends/jun13art1.pdf (quoting Alaska historian).

In addition to Prudhoe Bay, 10 of the 50 largest discovered oil fields are located on the North Slope. *Id*. Moreover, the U.S. Geological Survey estimates that there are as many as 21 billion barrels of oil and 62 trillion cubic feet of natural gas yet to be discovered on the North Slope. *See* USGS, Economics of Undiscovered Oil and Gas in the North Slope of Alaska: Economic Update and Synthesis, Open-File Report No. 2009-1112 (2009), https://pubs.usgs.gov/of/2009/ 1112/pdf/ofr2009-1112.pdf. Likewise, there are billions of barrels of oil on the Outer Continental Shelf ("OCS") off the North Coast of Alaska that have yet to be proven and developed. *See Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 501 (9th Cir. 2014) (estimating between 12 billion and 29 billion barrels in the Chukchi Sea OCS alone).

These oil fields are not just important for the State of Alaska's economy, but they have strategic national importance. As Congress explained in providing legislation for the Trans-Alaska Pipeline:

> The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

43 U.S.C. § 1651(a). The pipeline continues to serve that expected function, transporting 17 billion barrels of oil since construction.

In addition, President Harding in 1923 established the National Petroleum Reserve - Alaska ("NPR-A") on the North Slope by executive order to serve as an oil reserve for national defense purposes, noting that the future supply of oil "is at all times a matter of national concern." *See N. Alaska Envtl. Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005) (internal quotation marks and citation omitted). The NPR-A is "the largest single unit of public land in the United States" at 37,000 square miles (but dwarfed in comparison to the 187,000-square-mile polar bear critical habitat designation). *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006). The NPR-A was opened by Congress and President Ford for development as part of the national response to the 1970 oil embargos, and continues to serve as an important strategic reserve. *N. Alaska Envtl. Ctr.,* 361 F. Supp. 2d at 1072.

The Service's sweeping designation of 187,000 square miles of critical habitat overlaps with all of these essential natural resource areas. The designation encompasses *all* lease and potential lease sites on the U.S. OCS in the Chukchi and Beaufort Seas, large portions of the Prudhoe Bay oil field (including planned and potential development areas), large and essential portions of the NPR-A, and huge tracts of lands selected by the State and Native groups for economic development. 75 Fed. Reg. at 76,097-98.

The Service's massive designation will seriously impair continued development of these essential and strategic energy reserves. It is undisputed in the record that the federal government has *never offered a*

lease sale on the OCS off Alaska under the Outer Continental Shelf Lands Act in an area that has been designated as habitat for any species. 75 Fed. Reg. at 76,106. Instead, the federal government has, in practice, deleted areas from leasing in the Alaska OCS once designated as critical habitat. *Id*. Indeed, groups opposed to oil and gas development see the critical habitat designation as grounds for a "moratorium on oil and gas activities" in the Arctic. 75 Fed. Reg. at 76,100.[8]

The critical habitat designation also threatens the continued viability of oil and gas development on the North Slope by unnecessarily imposing delays and costs. The logistics of exploring for oil and gas in one of the harshest environments in the world are extreme. Much of the North Slope is not connected by road to the rest of the world, and many of the local roads that are present on the North Slope are ephemeral ice roads that exist only in the winter. The construction window is exceedingly short, and many materials must be shipped in by air or sea. And many of the people employed by oil and gas companies on the North Slope do not live on the North Slope, but are flown in for shifts, rotating on and off the Slope.

The imposition of another regulatory hurdle in the form of a critical habitat designation (that by all accounts provides no benefit to the polar bear) can

---

[8] These kinds of closures are unfounded as oil and gas activities within the range of the polar bear, as successfully regulated under the MMPA, do not currently or foreseeably threaten the polar bear species and have had no more than a "negligible impact." 73 Fed. Reg. 28,212, 28,289 (May 15, 2008) ("[T]he actual history of oil and gas activities in the Beaufort and Chukchi Seas demonstrate that operations have been done safely and with a negligible effect on wildlife and the environment.")

have severe consequences. Even small delays can result in losing entire construction seasons, which, given the scale of oil and gas development, can result in hundreds of millions of dollars in losses. 75 Fed. Reg. at 76,106 (detailing losses associated with potential delays). Given the decline in oil prices in recent years, and the high cost of development in the Arctic, these delays and costs (and even the risk of these delays and costs) will seriously hamper continued development on the North Slope.

The Service has long taken the cynical view that critical habitat designations are a waste of time: "The root of the problem lies in the [Service's] long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001). Based on that view, the Service cavalierly designated 187,000 square miles of the Arctic and concluded that the *total* cost imposed by the designation over a period of *30 years* is between $677,000 and $1.21 million. 75 Fed. Reg. at 76,126-27

Reality, unsurprisingly, has disproven the Service's myopic view. The critical habitat designation was in place for a short time before being invalidated by the district court. In that short window actual costs *have already exceeded the Service's entire 30-year projection*. One example illustrates this problem. App. *infra* 98-101a. In 2009, ExxonMobil applied for permits for the construction of the Point Thomson project about 60 miles east of Prudhoe Bay in designated polar bear habitat. App. *infra* 99a. As part of that project, ExxonMobil needed to fill wetlands. Wetlands are virtually everywhere on the North Slope, but are a feature that is neither used nor needed by the polar bear. *Id*. But because the wetlands

are located in polar bear critical habitat, U.S. Army Corps policy required that ExxonMobil conduct *significantly greater amounts of mitigation*. App. *infra* 100a. As a result, "ExxonMobil's increased incremental mitigation costs alone for just this Project have already exceeded the Service's 30-year projection." App. *infra* 101a.

This example also fully discredits the Service's belief that the issues of over-designation can be resolved through subsequent Section 7 consultations. Over-designation "wrongfully shifts the burden of initiating designation decisions from the Service to future stakeholders." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 123 (D.D.C. 2004). The subsequent Section 7 consultation for Point Thomson did nothing to alleviate the imposition of unnecessary burdens associated with overly broad designation of critical habitat.

Absent Supreme Court review, this absurdity will repeat itself over and over again in consultations within the massive 187,000-square-mile designation. The sweeping designation includes all land and water within the contiguous block, including features that are not useful or needed by the bear like wetlands, and regulatory consequences automatically attach. This is plainly not what Congress intended when it carefully crafted an "extremely narrow definition of critical habitat." Legislative History at 1221.

These kinds of unnecessary costs ultimately threaten the continued viability of the Trans-Alaska Pipeline itself. The Trans-Alaska Pipeline has a capacity of 2 million barrels per day. At levels below 500,000 barrels per day (as is the case currently) the system is under increased stress from freezing and corrosion. Alyeska Pipeline Services Company, Low

Flow Impact Study, Final Report (June 15, 2011), http://www.alyeska-pipe.com/assets/uploads/pagestructure/TAPS_Operations_LowFlow/editor_uploads/LoFIS_Summary_Report_P6%2027_ExSum.pdf. Below 350,000 barrels per day, the system cannot operate safely. *Id*.

New projects must come online to keep the system viable. There is no shortage of recoverable oil on the North Slope. Just last month, one company announced the discovery of an oil field that could hold up to 6-billion barrels and that could provide 200,000 barrels per day to the pipeline.[9] But that field too is caught within the sweeping scope of the Service's polar bear critical habitat designation, and the expected $8 billion investment needed to develop that field will have to be made (or not) against the backdrop of the burdens and risks associated with constructing the project in polar bear critical habitat. And again, these regulatory burdens, according to the Service's own admission, *result in no conservation benefit to the polar bear species*.

Even a small designation of critical habitat "can impose significant costs on landowners." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011). The designation of 187,000 square miles of habitat, which overlaps the industrial areas at the core of Alaska's economy, will have significant and long-lasting economic impacts for the State's economy and the stability of the nation's energy supply. This is precisely the result Congress sought to avoid by amending the ESA in 1978 to provide an

---

[9] Nick Cunningham, *New Mega Oil Discovery In Alaska Could Reverse 3 Decades Of Decline*, Oilprice.com (Oct. 6, 2016), http://oilprice.com/Energy/Crude-Oil/New-Mega-Oil-Discovery-In-Alaska-Could-Reverse-3-Decades-Of-Decline.html.

"extremely narrow" definition of critical habitat intended to focus on what is truly essential to the species. Supreme Court review is urgently needed to avoid unnecessarily risking the continued vitality of these State and national oil and natural gas reserves.

II. SUPREME COURT REVIEW IS NEEDED TO CONFORM NINTH CIRCUIT LAW TO THE PLAIN LANGUAGE OF THE ESA

The Ninth Circuit's decision in this case is just the latest in a series of critical habitat decisions that have largely rendered meaningless the limitations set forth in the 1978 Amendments to the ESA.

1. In *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995), the Ninth Circuit held that the National Environmental Policy Act ("NEPA") "does not apply to the designation of a critical habitat." The Tenth Circuit expressly rejected that holding, explaining "Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure." *Catron Cty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1437 (10th Cir. 1996). Nonetheless, the Service refuses to comply with NEPA, when as here, the designation occurs only in the Ninth Circuit. 75 Fed. Reg. at 76,102.

2. In *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010), the Ninth Circuit held that the Service could limit its consideration of the economic impacts to only incremental costs (largely administrative) associated with the designation. The court rejected as "a matter of course" the concern that this methodology would allow the Service "to treat the economic analysis as a mere procedural formality." *Id*. at 1174. Yet procedural formality is

precisely what the Service continues to do, concluding that the designation of 187,000 square miles of critical habitat including the largest oil field in North America will have only "incremental administrative costs" of $677,000 and $1.21 million. 75 Fed. Reg. at 76,104. Here too, the Tenth Circuit has rejected such a constrained reading. *N.M. Cattle Growers Ass'n*, 248 F.3d at 1283-85 (rejecting incremental cost analysis).

3. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 989-90 (9th Cir. 2015), the Ninth Circuit held that the Secretary's refusal to exclude an area of critical habitat was *unreviewable*, even though the ESA expressly provides criteria for when the Service may exclude an area from designation. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"). Thus, even if a party presents an overwhelming and undisputed case that a designation will have no benefit and produce catastrophic economic or even environmental harms, the Ninth Circuit allows the Service to ignore the request for exclusion and makes the decision beyond judicial reproach. No other circuit is so permissive of arbitrary agency action. *See, e.g.*, *Wyo. State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv.*, 741 F. Supp. 2d 1245, 1267 (D. Wyo. 2010) (rejecting exclusion decision for relying on a faulty cost-benefit analysis).

Taken collectively, the Ninth Circuit's case law on critical habitat turns the designation process into a farce. Although Congress expressly limited the designation process to "specific areas" on which essential features "are found" (16 U.S.C. § 1532(5)(A)(i)), and

expressly requires the Service to "tak[e] into consideration, the economic impact" of that designation (*id*. § 1533(b)(2)), the Service can now designate an area (within the Ninth Circuit's jurisdiction) the size of California without considering whether that designation will have any environmental consequences, can limit consideration of economic impacts to "incremental administrative costs," and has unreviewable discretion to ignore requests to exclude areas where the designation indisputably does more harm than good.

The Ninth Circuit's decision in the polar bear case drives this absurdity over the cliff, effectively excusing the Service of the need to produce evidence showing the essential features were even *found* (as required by the statute) in the areas designated as critical habitat. The result is, as the district court explained, that the Service can now "designate a large swath of land in northern Alaska as 'critical habitat' based entirely on one essential feature that is located in approximately one percent of the entire area set aside." App. *infra* 88a.

The Ninth Circuit's decision paves the way for even more egregious designations. Whereas the D.C. Circuit would require "substantial evidence" to support any critical habitat decision, for the Ninth Circuit it is enough that the species "roams" through an area or is "allowed to exist" in that area. *Compare Otay Mesa*, 646 F.3d at 916 *with* App. *infra* 30a. Indeed, the Service need only pick a zone that somewhere includes one habitat feature and that is "appropriate" for "administrative convenience." App. *infra* 27a. This is not substantial evidence; it is "abdication." *Otay Mesa*, 646 F.3d at 916. And it is certainly does not conform to the "extremely narrow

definition of critical habitat" envisioned by Congress. Legislative History at 1221.

Even more absurdly, the Ninth Circuit allows the Service to designate areas immediately next to homes, businesses, and industrial areas where bears are actively hazed away for the safety of bears and people. In these areas, people can (and do) use sirens and commercial air horns to "startle a bear and disrupt its approach to property or people," and use trucks and snowmobiles to "block[] their approach." 50 C.F.R. § 18.34(b)(2), as well as more aggressive approved hazing techniques. In these areas, the "essential features" of freedom from human disturbance or human activity cannot possibly be "found." This arbitrarily slipshod designation is precisely the opposite of what Congress intended.

The threat of additional over-designations is not hypothetical. The National Marine Fisheries Service has proposed an *even larger designation* for the ringed seal in Alaska encompassing some 350,000 square miles of icy marine territory in the Beaufort Sea off northern Alaska, the Chukchi Sea off northwestern Alaska, and the northern Bering Sea off the State's western coast—*i.e.*, essentially all U.S. jurisdictional waters in the Arctic. *See* 79 Fed. Reg. 73,010 (Dec. 9, 2014). Under the Ninth Circuit's holding here, all that is required to uphold this designation (which will be bigger than Texas), is the unassailable fact that seals, too, "need room to roam." This cannot possibly be what Congress intended when it amended the ESA in 1978 to provide an extremely narrow definition of critical habitat.

The Ninth Circuit is so far out of step with the plain language of the ESA that even before its decision on the polar bear, litigants affected by critical habitat

decisions were *already* trying to avoid the Ninth Circuit. Critical habitat challenges involving habitat in Washington State have been filed in Wyoming (in the Tenth Circuit), *see, e.g.*, *Wyo. State Snowmobile Ass'n*, 741 F. Supp. 2d at 1267 (Washington State Association filing in Wyoming regarding lands in Washington), and challenges to habitat designation in California have been filed in the District of D.C., *Otay Mesa*, 646 F.3d at 914 (San Diego fairy shrimp critical habitat).

The issue of venue (and transfer of venue) is largely dispositive of the outcome, given the Ninth Circuit's radically lax critical habitat jurisprudence compared against other circuits' efforts to adhere to statute mandates. Courts in the D.C. District require decisions supported by "substantial evidence," *Otay Mesa*, 646 F.3d at 916, refuse to let the Service "cast a net over tracts of land" on "mere hope," and require evidence that features are "'found' on occupied land before that land can be eligible for critical habitat designation," *Cape Hatteras Access Pres. All.*, 344 F. Supp. 2d at 122 (citation omitted). The Ninth Circuit, by contrast, will uphold a designation as long as it is on a scale that serves "administrative convenience" including the designations of areas where essential features (such as freedom from human disturbance) cannot possibly be found because, due to the proximity to humans and human activity and the associated risk to humans and animals, the listed species is actively monitored and lawfully hazed away. App. *infra* 27a.

Only Supreme Court review can bring the Ninth Circuit's case law back into conformity with the plain language and history of the ESA. The Service is now plainly casting its critical habitat net "as far as the eyes can see and the mind can conceive." Legislative

History at 817. This is exactly the opposite of what Congress intended for critical habitat.

CONCLUSION

For the above reasons, the Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

JEFFREY W. LEPPO
Counsel of Record
JASON T. MORGAN
RYAN P. STEEN
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 624-0900
jeffrey.leppo@stoel.com

Counsel for Petitioners

November 4, 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 02/29/2016]

No. 13-35619

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs-Appellees,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellants,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

No. 13-35662

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

ALASKA OIL AND GAS ASSOCIATION;
AMERICAN PETROLEUM INSTITUTE,

Plaintiffs-Appellants,

and

STATE OF ALASKA; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

No. 13-35666

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs-Appellees,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants-Appellants.

No. 13-35667
D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

STATE OF ALASKA,

Plaintiff-Appellant,

and

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

No. 13-35669

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK OPINION CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs-Appellants,

and

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

Appeal from the United States
District Court for the District of Alaska

Ralph R. Beistline, Chief District Judge, Presiding

Argued and Submitted

August 11, 2015—Anchorage, Alaska

Filed February 29, 2016

Before: Mary M. Schroeder,
Johnnie B. Rawlinson, and
Mary H. Murguia, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY*

Endangered Species Act

The panel reversed the district court's judgment vacating the United States Fish & Wildlife Service ("FWS") designation of critical habitat in Alaska for the polar bear, a species listed as threatened under the Endangered Species Act; affirmed the district court's denial of cross-appeal claims; and remanded for entry of judgment in favor of FWS.

FWS proposed to designate an area of Alaska's coast and waters as critical habitat for the polar bear: Unit 1, the sea ice habitat; Unit 2, the terrestrial denning;

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and Unit 3, the barrier island habitat. Oil and gas associations, several Alaska Native corporations and villages, and the State of Alaska ("plaintiffs") challenged the designation under the Endangered Species Act and the Administrative Procedure Act. The district court denied the majority of the claims, but granted summary judgment to plaintiffs on two grounds. FWS and intervenor environmental groups appealed, and plaintiffs cross-appealed.

The panel held that the FWS's designation of polar bear habitat was not arbitrary, capricious or otherwise in contravention of applicable law. The panel held that the district court held the FWS to a standard of specificity that the Endangered Species Act did not require. The panel held that the standard that FWS followed, looking to areas that contained constituent elements required for sustained preservation of polar bears, was in accordance with statutory purpose.

The panel held that FWS's designation of Unit 2 as critical denning habitat was not arbitrary and capricious where Unit 2 contained areas requiring protection for both birthing and acclimation of cubs, and FWS adequately explained its treatment of the relatively few areas of known human habitation. The panel also held that FWS drew rational conclusions from the best available scientific date, as required by the Endangered Species Act, in its designation of both Unit 2 and Unit 3 as critical habitat for the polar bear.

The panel held that FWS provided adequate justification to Alaska pursuant to Endangered Species Act Section 4(i).

Concerning plaintiffs' cross-appeal claims, the panel held that the district court correctly upheld the "no-disturbance zone" around the barrier islands in Unit 3

because it provided refuge from human disturbance. The panel also held that FWS's assessment of the potential economic impacts was not arbitrary and capricious. Finally, the panel held that Section 7 of the Endangered Species Act did not create an additional duty for FWS to consult with states on critical habitat designations.

COUNSEL

Jeffrey W. Leppo (argued), Ryan P. Steen, Stoel Rives LLP, Seattle, Washington for Plaintiffs-Appellees/ Cross-Appellants Alaska Oil and Gas Association and the American Petroleum Institute.

Matthew A. Love (argued), Van Ness Feldman LLP, Seattle, Washington; Tyson C. Kade, Van Ness Feldman LLP, Washington, D.C. for Plaintiff-Appellee/Cross-Appellant North Slope Borough.

Bradley E. Meyen (argued), Senior Assistant Attorney General, Andrew Naylor, Assistant Attorney General, Alaska Department of Law, Anchorage, Alaska; Murray D. Feldman, Holland & Hart LLP, Boise, Idaho; Christina F. Gomez, Holland & Hart LLP, Denver, Colorado for Plaintiff-Appellee/Cross-Appellant State of Alaska.

Kevin M. Cuddy (argued), Stoel Rives LLP, Anchorage, Alaska for Plaintiffs-Appellees/Cross-Appellants Arctic Slope Regional Corporation, NANA Regional Corporation, Bering Straits Native Corporation, Calista Corporation, Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeagvik Iñupiat Corporation, Kuukpik Corporation, Kaktovik Iñupiat Corporation, and The Iñupiat Community of the Arctic Slope.

Sam Hirsch, Acting Assistant Attorney General, Andrew C. Mergen, Jennifer Scheller Neumann,

Clifford E. Stevens, Jr., Meredith L. Flax, David C. Shilton, Robert P. Stockman (argued), Environment & Natural Resources Division, U.S. Department of Justice; Kenneth M. Lord, Of Counsel, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Defendants/Appellants/Cross-Appellees Sally Jewell, Secretary of the Interior, Daniel M. Ashe, Director, U.S. Fish & Wildlife Service, U.S. Fish & Wildlife Service.

Rebecca Noblin, Center for Biological Diversity, Anchorage, Alaska for Intervenor-Defendants/ Appellants Center for Biological Diversity, Defenders of Wildlife, Greenpeace, Inc.

OPINION

SCHROEDER, Circuit Judge:

INTRODUCTION

This case is about polar bear habitat in Alaska. The polar bear population has been declining for many years, and in 2008, the United States Fish & Wildlife Service ("FWS") listed the species as threatened under the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. §§ 1531 *et seq*. After challenges from all sides, the D.C. Circuit upheld the designation. *In re Polar Bear ESA Listing & Section 4(d) Rule Litig.*, 709 F.3d 1, 2–3 (D.C. Cir. 2013).

Within a year of listing a threatened species, the Act requires FWS to designate habitat critical to the conservation of the species. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C). In 2009, FWS proposed to designate an area of Alaska's coast and waters as critical habitat for the polar bear. The designation contained three "units." Unit 1, the sea ice habitat, comprised 95.9% of the total designation, while Units 2 and 3, the terrestrial

denning and barrier island habitats, made up the final 4.1%. Only the designations of Units 2 and 3 are disputed here.

The proposal drew fire from oil and gas trade associations, several Alaska Native corporations and villages, and the State of Alaska ("Plaintiffs"), all of which seek to utilize the natural resources in Alaska's waters and North Slope that make up much of the designated habitat. After FWS granted final approval to the proposed designation, the objecting parties filed this action challenging the designation under the ESA and the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 706 *et seq*. They principally argued that the habitat designation was unjustifiably large, and also claimed that FWS had failed to follow ESA procedure.

The district court denied the majority of the claims, but granted summary judgment to Plaintiffs on two grounds. *Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974 (D. Alaska 2013). Substantively, the district court faulted FWS for failing to identify specifically where and how existing polar bears utilize the relatively small portion of critical habitat designated as Units 2 and 3. *Id.* at 999–1003. Procedurally, the district court faulted FWS for failing to provide the State of Alaska with adequate justification for adopting a final rule not fully consistent with the State's submitted comments. *Id.* at 1003–04. The district court vacated the entire designation. *Id.* at 1004. FWS, joined by several defendant-intervenor environmental groups, appeals, and Plaintiffs cross-appeal.

In its appeal, FWS contends that the district court misconstrued the ESA's requirements by holding FWS to proof that existing polar bears actually use the designated area, rather than to proof that the area is critical to the future recovery and conservation of the

species. FWS stresses that it utilized the best available technology as statutorily required. *See* 16 U.S.C. § 1533(b)(2). FWS also contends that there was no meaningful deficiency in the manner in which it provided written justification to the State for its final action. We conclude that these contentions have merit, and reverse the district court's judgment vacating the designation.

Plaintiffs' cross-appeal revives the arguments that the district court rejected. We affirm the district court's denial of these claims. We therefore hold that the designation was not arbitrary, capricious or otherwise in contravention of applicable law. *See* 5 U.S.C. § 706(2)(A). That is the standard we must apply to decisions involving listings under the ESA. *See In re Polar Bear*, 709 F.3d at 8.

I. BACKGROUND

A. The Endangered Species Act

The purpose of the ESA is to ensure the recovery of endangered and threatened species, not merely the survival of their existing numbers. *See* 16 U.S.C. §§ 1531(b), 1532(3) (emphasizing species and habitat conservation, and the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary"). The Supreme Court has recognized that the goal of species recovery is paramount. The Court said in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978): "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."

To accomplish this goal, the Act directs the Secretaries of Interior and Commerce to list endangered and threatened species for federal protection. 16 U.S.C. § 1533(a)(1), (2). The Secretary of Interior must also designate the habitat that is critical to each species's conservation. *Id.* § 1533(a)(3)(A)(i). The Secretary of Interior has delegated to FWS the authority to administer the ESA. 50 C.F.R. § 402.01(b).

Critical habitat is defined in the statute as the specific areas "within the geographical area occupied by the species" that the species needs for recovery and that therefore should be protected. 16 U.S.C. § 1532(5)(A)(i). The statute describes the areas to be protected as those areas containing the physical and biological features (1) essential for the species's success, such as space for growth and normal behavior, food, breeding sites, and habitats protected from disturbance, and (2) which may require special management or protection. *Id.*; 50 C.F.R. § 424.12(b). The Secretary designates critical habitat "on the basis of the best scientific data available" after taking into consideration the probable economic, national security, and other relevant impacts. 16 U.S.C. § 1533(b)(2).

During this process, the Secretary must provide notice of any proposed designation of critical habitat to impacted states and solicit their feedback. *Id.* § 1533(b)(5)(A)(ii). If the approved final designation conflicts with the state's comments, the Secretary must provide the state with written justification for its action. *Id.* § 1533(i). Once an area is designated as critical habitat, federal agencies are required to consult with the Secretary before taking any action

that may negatively impact the habitat. *Id.* § 1536(a)(2).

B. Polar Bear Listing and Critical Habitat Designation

Polar bears (Ursus maritimus) are scattered throughout the ice-covered waters of the Arctic Circle. Two relatively distinct polar bear populations occur within the United States: the southern Beaufort Sea population, which extends into Canada, and the Chukchi-Bering Seas population, which extends into Russia.

The bears spend the majority of their lives on sea ice, which provides a platform for essential life functions such as hunting, seasonal movements, resting, and mating. Female polar bears, however, particularly on Alaska's northern coast, will come ashore to den and to acclimate their cubs before returning to the sea ice.

Because of global climate change, the extent and quality of Arctic sea ice is declining, and the polar bear population is declining with it. On May 15, 2008, FWS listed the polar bear as a threatened species under the ESA. FWS highlighted concerns over climate change and discussed the major negative impacts that declines in sea ice would have on the species, including nutritional stress caused by diminished numbers of ice-dependent prey, decreased access to the prey that remain, shorter hunting seasons and longer periods of fasting onshore, higher energetic demands for travel and obtaining food, and more negative interactions with humans. *See In re Polar Bear*, 709 F.3d at 4–6. FWS found that such factors would likely result in the decline in the physical condition and reproductive success of polar bears, which would ultimately lead to population level declines. *Id*.

FWS did not designate polar bear critical habitat at the same time it listed the species as threatened, citing the difficulty of determining at that time which areas within the polar bear's extraordinarily large and dynamic range were essential for conservation. Instead, FWS undertook a thorough evaluation of the available science and consulted with polar bear experts. FWS issued a proposed rule on October 29, 2009, designating polar bear critical habitat, and on May 5, 2010, the agency issued a draft analysis of the probable economic impacts of the designation. This was within the one-year period permitted for designation of the areas containing features termed "primary constituent elements" necessary for a threatened species' conservation. 16 U.S.C. § 1533(b)(6)(A); 50 C.F.R. § 424.12(b).

FWS held two comment periods and multiple public hearings to solicit feedback on the proposed rule and economic analysis. During this time, FWS received over 100,000 comments, ranging from suggestions for dramatically expanding the habitat designation, to assertions that no designation was necessary at all.

On December 7, 2010, FWS published the Final Rule designating critical habitat for the polar bear. The Final Rule designated an area of approximately 187,000 square miles as critical polar bear habitat, broken down into three parts. Unit 1, the sea ice habitat, included the sea ice that polar bears use as a platform for hunting, resting, short- and long-distance movements, and denning. Unit 1 comprised 95.9% of the total area designated as critical habitat, reflecting both the polar bears' large range and the primacy of sea ice to the species' success.

The remaining 4.1% of the critical habitat designation consisted of Unit 2, the terrestrial denning

habitat, and Unit 3, the barrier island habitat. FWS, in the Final Rule, described the terrestrial denning habitat as areas with steep, stable slopes, access to the coast, proximity to sea ice, and freedom from human disturbance. It went on to explain that this habitat contains essential physical or biological features, and that the habitat requires protection, given the polar bears' slow reproductive rate and sensitivity to human disturbance during denning. Relying on radio-telemetry data collected on certain denning female bears over several years, FWS defined Unit 2 as covering approximately 95% of known and potential den sites on Alaska's northern coast.

FWS similarly explained that it considered Alaska's coastal barrier islands and their surrounding waters to have the essential physical and biological features for polar bears, because the bears regularly use the islands as places to feed, den, rest, and migrate along the coast without undue human disturbance. Accordingly, FWS designated the barrier islands, and the spits and waters within one mile of them (the "no-disturbance zone"), as Unit 3.

The ESA requires designation as critical habitat of areas that may require special management or protection. 16 U.S.C. § 1532(5)(A)(i)(II). FWS found that both Units 2 and 3 may require special management considerations or protection because of the potential negative impacts on the designated areas caused by climate change, oil and gas operations, human disturbance, and commercial shipping.

After identifying the essential physical and biological features of polar bear habitat that may need special management or protection, the Final Rule considered the probable economic and other relevant impacts of designating those areas as critical habitat.

Under the ESA, FWS must use the best scientific data available and take into consideration the economic, national security, and other relevant impacts of designating a particular area as critical habitat before making its final designation. 16 U.S.C. § 1533(b)(2). FWS may then exclude an area from the final designation if it determines that the benefits of excluding the area outweigh the benefits of including it, unless excluding such area would result in the extinction of the concerned species. *Id.*

After weighing the costs and benefits of inclusion versus exclusion in accordance with Section 4(b)(2), FWS decided to exclude the Native villages of Barrow and Kaktovik from the critical habitat designation, along with all man-made structures within the critical habitat, because they did not contain the physical and biological features essential to the polar bear. FWS chose not to exclude any other areas of the original designation on the basis of the probable economic impact, *see id.*, finding that the probable economic impact was negligible.

Following issuance of the Final Rule in December of 2010, three groups filed complaints in district court in 2011 pursuant to the APA, 5 U.S.C. §§ 706 *et seq.*, challenging the Final Rule: (1) the Alaska Oil & Gas Association and the American Petroleum Institute, trade associations representing the Alaska oil and gas industry; (2) the State of Alaska; and (3) a coalition of Alaska Native corporations, an Alaska Native tribal government, and the North Slope Borough, a local native government with jurisdiction over a large swath of territory in northern Alaska. Defendant FWS was joined by three intervenor environmental groups (Center for Biological Diversity, Defenders of Wildlife, Inc., and Greenpeace, Inc.) defending the designation.

The district court consolidated the three cases for summary judgment proceedings.

Plaintiffs charged FWS with numerous errors in the critical habitat designation, both substantive and procedural. They argued that the entire designation was substantively improper, contending the designation was unsupported by the administrative record because FWS arbitrarily designated large land and sea ice masses, but did not identify specific areas containing the physical and biological features essential for polar bears. Plaintiffs also claimed several procedural errors in FWS's rulemaking, including a contention that FWS did not adequately consult with the State of Alaska, and that FWS violated ESA Section 4(i) by failing to give Alaska adequate justification for not incorporating the State's comments into the Final Rule.

The district court rejected all of Plaintiffs' claims except two. The district court found that while the record supported the designation of Unit 1, the largest unit, the sea ice habitat, it did not support the designation of Units 2 and 3. The district court said those designations were unsupported because "[FWS] has not shown, and the record does not contain," evidence that Units 2 and 3 contain all of the required features of terrestrial denning and barrier island habitats. The district court also held that FWS failed to follow the ESA Section 4(i) procedure because the agency provided an inadequate justification for why it did not incorporate all of the State's comments into the Final Rule. The district court vacated and remanded the Final Rule in its entirety, notwithstanding its determination that the designation of Unit 1 was proper. FWS now appeals and Plaintiffs cross-appeal from the district court's summary judgment order.

FWS's principal contention on appeal is that the district court erred in holding that the record contained insufficient evidence of the essential physical or biological features in Units 2 and 3. FWS says it reasonably relied on the best scientific data available in making the designation. *See* 16 U.S.C. § 1533(b)(2). It urges that the ESA does not require more specific information. FWS also contends that it complied with the procedural requirements of ESA Section 4(i) by sending a letter to the State of Alaska, which fully addressed the State's comments on the proposed rule. Finally, FWS contends that even if Plaintiffs' arguments had some merit, the district court erred by vacating the entire Final Rule despite finding no substantive error with more than 95% of the designation.

In their cross-appeal, Plaintiffs contend that the district court erred by rejecting their other claims. Plaintiffs principally challenge the holdings that FWS's designation of the "no-disturbance zone" in Unit 3 was reasonable; that FWS sufficiently explained its finding that the essential features of the critical habitat may require special management; that FWS adequately considered the economic impacts of designation under ESA Section 4(b)(2); and that under ESA Section 7(a)(2), FWS had an additional duty to consult with the State of Alaska.

II. ANALYSIS

A. The Purpose of Habitat Designation and the Applicable Standard

We review the district court's grant of summary judgment de novo to determine whether FWS's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.

§ 706(2)(A); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). The Supreme Court has described in general terms how the standard operates:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

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

This court has been careful to adhere to a narrow application of the standard, while ensuring that the agency's action is considered and rational. We have described the arbitrary and capricious standard as deferential and narrow, establishing a "high threshold" for setting aside agency action. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1067, 1070 (9th Cir. 2010). A court must not substitute its judgment for that of the agency, but also must not "rubber-stamp" administrative decisions. *Ariz. Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1236 (9th Cir. 2001). Instead, the action is presumed valid and is upheld if a reasonable basis exists for the decision. *Nw. Ecosystem All. v. FWS*, 475 F.3d 1136, 1140 (9th Cir. 2007). We have explained that so long as the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made," the court should defer to the agency's expertise and uphold the action. *Id.* (citation omitted).

FWS's designation of Units 2 and 3 more than satisfies that standard.

Under the ESA, once it had designated the species as "threatened," FWS had to determine where, within the polar bears' occupied range, the physical or biological features essential to polar bear conservation are found, and it was required to designate these areas as critical habitat. *See* 16 U.S.C. § 1532(5)(A)(i); *id.* § 1533(a)(3)(A)(i). The ESA guidelines explain that these physical and biological elements essential to the species, known as "primary constituent elements" or PCEs, are at the heart of the critical habitat designation:

> When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

50 C.F.R. § 424.12(b)(5). FWS identified three areas containing PCEs essential to polar bear conservation: sea ice habitat, found in Unit 1; terrestrial denning habitat, found in Unit 2; and barrier island habitat, found in Unit 3.

The district court concluded that, although FWS properly identified the PCEs, it had failed to show

specifically where within Units 2 and 3 those PCEs were located, as required by the ESA. FWS argues on appeal that the district court erred because the ESA does not require the level of specificity that the district court insisted upon. In addition, FWS argues it reasonably designated Units 2 and 3 as areas containing PCEs based on the best scientific data available as required by the Act.

At the outset, we agree with FWS that the district court held it to a standard of specificity that the ESA does not require. The district court asked FWS to identify where each component part of each PCE was located within Units 2 and 3, and to do so, with accurate scientific data, by establishing current use by existing polar bears. For illustration, with respect to terrestrial denning habitat, the court suggested that FWS could designate only areas containing actual den sites, as opposed to designating areas containing habitat suitable for denning. No such limitation to existing use appears in the ESA, and such a narrow construction of critical habitat runs directly counter to the Act's conservation purposes. The Act is concerned with protecting the future of the species, not merely the preservation of existing bears. And it requires use of the best available technology, not perfection. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (explaining that the best scientific data available does not mean the best scientific data possible); *see also Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246–47 (D.C. Cir. 2001) (same). The D.C. Circuit stressed that while the agency "may not base its listings on speculation or surmise" where there is no superior data, "occasional imperfections do not violate [the ESA]." *Bldg. Indus. Ass'n of Superior Cal.*, 247 F.3d at 1247 (internal citations omitted).

The ESA thus requires FWS, when designating critical habitat, to focus on the PCEs essential to protecting the polar bear. *See* 50 C.F.R. § 424.12(b). By requiring proof of existing polar bear activity, the district court impermissibly shifted the focus of the critical habitat designation away from the PCEs. *See id.* Since the point of the ESA is to ensure the species' recovery, it makes little sense to limit its protections to the habitat that the existing, threatened population currently uses. The district court's construction of the critical habitat requirements thus contravenes the ESA's conservation purposes by excluding habitat necessary to species recovery. The Act contemplates the inclusion of areas that contain PCEs essential for occupation by the polar bear, even if there is no available evidence documenting current activity.

The issue of whether habitat may be designated without proof of a species' activity has been recognized before. In *Alliance for the Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126 (D. Mont. 2010), the court explained that FWS could rationally conclude that areas with evidence of a species' reproduction contain essential PCEs, but could not designate only those areas where there was evidence of reproduction as critical habitat. *Id*. at 1134–35. We agree with the court when it said that "[w]hile it is rational to conclude areas with evidence of reproduction contain the primary constituent elements and should be designated as critical habitat, the Service could not flip that logic so it means critical habitat only exists where there is evidence of reproduction. Such a proposition alleviates the need to further consider the actual physical and biological features of the occupied area." *Id.*

The district court also criticized the designation as an attempt to designate "potential" habitat. We have

rejected a similar criticism by pointing out that the agency must look beyond evidence of actual presence to where the species is likely to be found. *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1165–67. The focus must be on PCEs, not the current existence of a species in an area. The standard FWS followed, looking to areas that contained the constituent elements required for sustained preservation of polar bears, was in accordance with statutory purpose and hence could not have been arbitrary, capricious, or contrary to law.

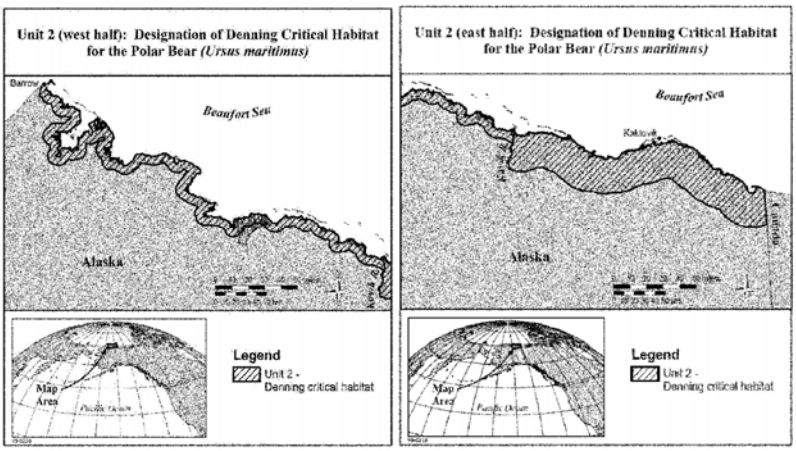
We therefore turn to FWS's application of that standard to the specific Units that are challenged here.

B. Unit 2: The Terrestrial Denning Habitat

The Final Rule identified terrestrial denning habitat as a PCE for the polar bear, and it described topographic features to include coastal bluffs and riverbanks with: (1) steep, stable slopes for the den sites themselves; (2) access between den sites and the coast; (3) sea ice in proximity to the denning habitat prior to the onset of denning season in the fall; and (4) freedom from human disturbance. FWS harnessed technology to identify possible denning sites. Using radio-telemetry data collected on female polar bears between 1982 and 2009, FWS identified the areas east of the coastal town of Barrow where 95% of all confirmed and probable polar bear dens had occurred.

Some of the sites were along the coast, some farther inland, and a few as far as 18 miles inland. To capture most of the sites, FWS designated as critical habitat an area extending 5 to 20 miles inland from the coast east of Barrow, and designated this area as Unit 2.

Two images in the record illustrate the scope of the denning habitat designation.



The left image shows the west area of Unit 2, from Barrow to the Kavik River. The right image shows the east area of Unit 2, from the Kavik River to the Canadian border.

Land west of the town of Barrow was not included within the designation, although it contains some features suitable for den sites. FWS chose not to include it within the designation because studies indicated that polar bears rarely den that far west, likely on account of a lack of access to sea ice in the fall.

The district court nevertheless held that the designation of Unit 2 was arbitrary and capricious. The court faulted FWS for failing to show that the entire Unit 2 area contained all the requisite physical and biological features. In particular, the district court found that the denning studies cited by FWS supported inclusion of the first macrohabitat feature of steep, stable slopes, but also showed that this feature occurred in only 1% of Unit 2. The court also found

that the studies inadequately established the existence of the second (access between dens and the coast) and fourth feature (absence of human disturbance) in Unit 2, and the court strongly questioned whether FWS had sufficiently supported the existence of the third feature (sea ice in proximity of denning habitat to provide access). The court thus demanded scientific evidence of the existence of all of the characteristics of denning habitat in all of Unit 2.

The district court did not make reference to the radio-telemetry data tracking female bear movements. The court also did not appear to take into account the need for denning habitat to include not only the dens themselves, but also undisturbed access to and from the sea ice. The statute calls for the best available scientific data, and this FWS utilized.

On appeal Plaintiffs defend the district court's rejection of the designation of Unit 2, but on somewhat different grounds. Plaintiffs contend that FWS acted arbitrarily and capriciously by mapping Unit 2 using a 5-mile incremental inland measurement, without identifying specifically where, within that area, all four elements of the terrestrial denning habitat PCE were located.

To the extent that Plaintiffs demand greater scientific specificity than available data could provide, Plaintiffs echo the district court's error in demanding too high a standard of scientific proof. Plaintiffs on appeal concentrate more heavily on FWS's choice of a 5-mile increment measurement inland from the coast to define the area of designation, essentially claiming it is arbitrary.

FWS, however, provided a rational explanation for using the mapping methodology that it did. In the

Final Rule, FWS explained that it viewed the method developed jointly with the United States Geological Survey (that did the actual mapping), as the best available choice. The method is designed to capture a "robust" estimation of the inland extent of the den use. Polar bears typically den close to the coast, but some have denned as far as 50 miles inland. The 5-mile demarcation provides a straightforward, unbiased method for estimating the inland area in which 95% of the maternal dens are located. In addition, the demarcation accurately represents current polar bear denning concentrations in the zones from Barrow to the Kavik River, and from the Kavik River to the Canadian border, while allowing FWS to account for potential changes likely to occur due to coastal erosion from climate change.

FWS further explained that it rejected restricting designation to an area covering known denning activity in favor of the "robust" 5-mile increment because of several serious data limitations: (1) the uncertainties associated with fine-scale mapping of potential den site areas; (2) the limited size of the denning studies, which involved only 20-40 dens a year, when the total number of females denning in any one year is approximately 240; and (3) the fact that only a portion of the North Slope, which contains ample potential denning habitat, has been mapped. All of the reasons FWS has provided for use of the 5-mile increment are supported by the record.

Plaintiffs on appeal attempt unsuccessfully to poke holes in the analysis. They claim the 5-mile increment does not accurately represent polar bear denning concentrations, pointing out that 95% of dens from Barrow to the Kavik River occur within 2.8 miles of the coast. This argument, however, ignores the fact

that in the eastern zone of Unit 2 (from the Kavik River to the Canadian border) 95% of dens occurred within 18.6 miles of the coast, not 2.8 miles. The area designated as Unit 2 is therefore an appropriate zone for purposes of site inclusion and administrative convenience and is not arbitrary or capricious.

Plaintiffs also assert that future climate change is not an appropriate consideration under the ESA. Plaintiffs contend FWS can only designate habitat that contains essential features at the time the species is listed, not habitat that may become critical in the future because of climate change or other potential factors. Plaintiffs argue there is no record evidence to explain how the proposed critical habitat is currently eroding due to climate change. They also argue that FWS failed sufficiently to connect evidence of climate change to its decision to use a 5-mile increment. Plaintiffs instead suggest FWS relied on mere speculation that climate change would cause land with PCEs to erode in the future.

The record belies these contentions, as the D.C. Circuit has recognized. The very climatic factors that Plaintiffs now criticize are those that the D.C. Circuit took into account in approving the listing of polar bears as threatened. *See In re Polar Bear*, 709 F.3d at 4–6. That court reviewed the bases for listing the polar bear and found that in collecting data on climate change and sea ice, FWS relied on numerous published studies and reports describing the effects of climate change. *See id*. at 6. FWS explained that the rapid retreat of sea ice in the summer and the overall erosion of sea ice throughout the year in the Arctic is "unequivocal and extensively documented in scientific literature." *Id*. FWS further explained that a majority of state-of-the-art climate models predict sea ice will

continue to recede substantially and that the Arctic will be seasonally ice-free by the middle of the 21st century. *Id*. FWS also noted that the observational record of current sea ice losses indicates that losses seem to be about 30 years ahead of the modeled values, which suggests a seasonally ice-free Arctic may come a lot sooner than expected. *Id*. FWS properly took all of this information into account in designating critical polar bear habitat.

Underlying FWS's rejection of Plaintiffs' challenges is the unassailable fact that bears need room to roam. Dens are widely dispersed across the North Slope in a non-concentrated manner. FWS established that polar bears are highly mobile and spend most of their time on sea ice. In the North Slope of Alaska, polar bears routinely den on the coastal plain, which they reach by walking across the relatively flat topography of that area. The record also establishes that polar bears are faithful to particular denning areas, but not to particular den sites. Accordingly, the data supports FWS's position that it is difficult (if not impossible) to predict precisely where they will move within denning habitat in the future.

Additional studies tracked polar bear activity and showed that polar bears move through all of Unit 2. For example, a study that tracked the activity of three polar bears in different years showed that all three bears moved through large swaths of Unit 2. The study documented that annually, the active range of a female polar bear is an average of 92,584 square miles. The habitat designation of a total of approximately 187,000 miles cannot be legitimately characterized as "excessive."

The remaining dispute about Unit 2 concerns areas adjacent to Alaska Native villages, industrial facilities, and other human structures and activities. Plaintiffs argue that FWS failed to provide a reasonable explanation for including areas near some human activity in the designation, while excluding the Native communities of Barrow and Kaktovik from its final critical habitat designation, as well as all man-made structures such as buildings and paved roads. Plaintiffs point particularly to the designation's inclusion of the industrialized area of Deadhorse, which is where the North Slope's principal airport is located. The district court described Deadhorse as rife with structures and human activity.

The record reflects, however, that Deadhorse is primarily an industrial staging area for oil and gas operations, and has no legally defined boundaries and almost no permanent residents. Further, the record shows that polar bears routinely move through Deadhorse, and have been known to den near there. Thus, it was reasonable for FWS to conclude that despite some human activity, polar bears could still move through the Deadhorse area to access and locate den sites free from disturbance. As the Final Rule explained, FWS retained areas around Deadhorse because, among other reasons, "polar bears . . . are allowed to exist in the areas between the widely dispersed network of roads, pipelines, well pads, and buildings."

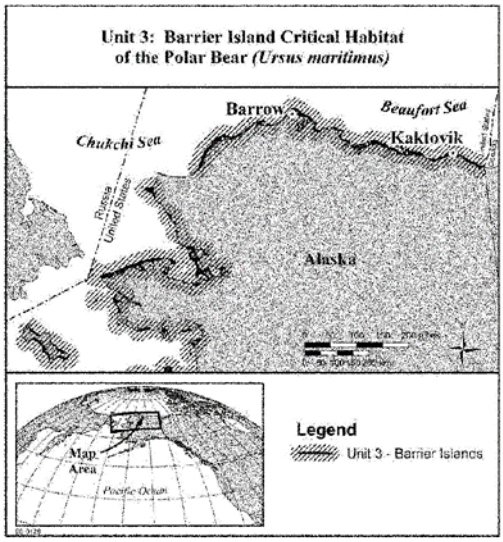
FWS also sufficiently explained why it did not include areas in and near the communities of Barrow and Kaktovic. FWS carefully distinguished between the towns themselves and other land just outside their boundaries. FWS, for instance, decided not to exclude an additional one-mile radius around Kaktovic from

the designation because (1) polar bears routinely pass through that area; (2) the developed communities make up only a small part of the legally defined boundaries of Kaktovic, so a buffer zone essentially already existed; and (3) the exclusion of the legally defined boundaries already eliminated some potential polar bear denning habitat. Polar bears similarly pass near Barrow. FWS explained that the legal boundaries of Barrow themselves provided a buffer because they are well outside the developed area of the village. Therefore, FWS did not include a "buffer zone" around Barrow and several other native communities west of Barrow; those communities were already outside of the designated area.

Accordingly, FWS's designation of Unit 2 as critical denning habitat was not arbitrary and capricious. Unit 2 contains areas requiring protection for both birthing and acclimation of cubs, and FWS adequately explained its treatment of the relatively few areas of known human habitation.

C. Unit 3: The Barrier Island Habitat

FWS's Final Rule identified the third PCE for the polar bear as "barrier island habitat," consisting of the barrier islands off the coast and a buffer zone, "used for denning, refuge from human disturbance, and movements along the coast to access maternal den and optimal feeding habitat." The Rule defined the area to include "all barrier islands along the Alaska coast and their associated spits . . . and the water, ice, and terrestrial habitat within 1.6 km (1 mi) of these islands (no-disturbance zone)." Thus the entire barrier island PCE was designated as Unit 3. An image in the record illustrates the scope of the barrier island habitat designation.



In criticizing the designation, the district court failed to take the entirety of the designation into account. As it did with respect to the terrestrial denning habitat of Unit 2, the district court faulted FWS for the lack of evidence in the record showing specifically where on the barrier islands the uses take place, i.e., where bears move to seek den sites, refuge, and feeding habitat. The district court held, in effect, that only such specific areas, which the bears could be shown to utilize at the present time, could be designated as critical habitat.

Given the statutory requirements, FWS appropriately looked to the specific features of the islands that meet the bears' critical needs and to the area in which they occur. The Final Rule defines the barrier island habitat PCE in broad terms to be the barrier islands and associated spits, and the water, ice, and any other terrestrial habitat within 1 mile of the islands. The Final Rule explained the reason for such a designation is that bears use the barrier islands, associated spits, and surrounding water in ways that are essential to

their existence and conservation. The district court erroneously focused on the areas existing polar bears have been shown to utilize rather than the features necessary for future species protection. *See* 50 C.F.R. § 424.12(b)(5) ("When considering the designation of critical habitat, the Secretary shall focus on the [PCEs] within the defined area that are essential to the conservation of the species."); *see also Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1167; *Alliance for Wild Rockies*, 728 F. Supp. 2d at 1134.

We understand that the record contains a confusing use of the key term "denning habitat," and this contributed to the district court's misdirected focus with respect to both Units 2 and 3. For example, in expressing a general dissatisfaction with the Unit 2 designation, the district court found that the record did not support inclusion of more than a tiny fraction of Unit 2 as "denning habitat." The district court was looking at denning studies cited by FWS that indicated that only 1% of Unit 2 is suitable as "denning habitat." Those studies used the term, however, to refer to the habitat suitable for the building of the actual den itself. Because the average den is about 20 feet wide (6.4 m), it is unsurprising that actual den sites themselves would encompass less than 1% of Unit 2. FWS identified the habitat necessary for birthing as well as the post natal care and feeding essential to survival.

In its designation of Units 2 and 3, FWS defined denning habitat more broadly to include not only the denning site itself, but also the area necessary for access to the ice from the den. It considered the denning habitat essential for protection to encompass the areas where polar bears could not only successfully build a den, but also travel, feed, and acclimate cubs.

This was in accord with the statutory purposes, and thus it was not arbitrary or capricious for FWS to include areas necessary for such related denning needs.

The administrative record supports the existence throughout the barrier islands of the features suitable for denning. As the district court conceded, the record shows that many barrier islands provide denning habitat, as historically evidenced by denning polar bears. The record also demonstrates that the islands and the surrounding spits and marine environment provide refuge from human disturbance, and FWS cited evidence showing that polar bears regularly move across the barrier islands in search of denning, food, and rest.

In addition, the Final Rule explains that polar bears use barrier islands as migration corridors, moving between them by swimming or walking on ice or shallow sand bars. There are reports in the record of polar bears denning and feeding on the various barrier islands, and Native Alaskan hunters reporting polar bears regularly moving along coastal islands. The entire barrier island unit thus provides access along the coast to inland maternal den sites and optimal feeding habitat.

In the final analysis, with respect to both Units 2 and 3, Plaintiffs disagree with the scope of FWS's designation of critical habitat, but Plaintiffs cannot point to evidence that FWS failed to consider, or demonstrate that FWS's stated reasons are irrational or unsupported by the record. FWS drew rational conclusions from the best available scientific data, which is what the statute requires. 16 U.S.C. § 1533(b)(2).

D. FWS Provided Adequate Justification to Alaska Pursuant to Section 4(i)

FWS is statutorily required to give certain state agencies notice of any proposed regulation to list species or designate critical habitat. *Id.* § 1533(b)(5)(A)(ii). This is to enable the state to provide input. If a state agency files comments disagreeing with all or part of the proposed regulation and FWS then issues a final rule which is in conflict with those comments, FWS must provide the state with an explanation: "[A] written justification for [its] failure to adopt regulations consistent with the [state's] comments or petition." 16 U.S.C. § 1533(i). In this case, FWS gave the required notice and Alaska responded. The issue is whether FWS provided an adequate justification to the State after adopting a final rule that was not consistent with all of the State's comments.

FWS accepted written comments from the public during two different comment periods and held a number of public hearings. FWS contacted appropriate Federal, State, and local agencies; Alaska Native organizations; and other interested parties and invited them to comment on the proposed rule to designate critical habitat for the polar bear in Alaska. During the first comment period, FWS requested comments on the proposed rule. After considering those comments, FWS reopened the public comment period and requested additional comments on the revised proposed rule.

The Alaska Department of Fish and Game ("ADFG") submitted detailed comments. After adopting the Final Rule, FWS responded with a letter to Alaska's Governor Sean Parnell, addressing the State's concerns that were not addressed in the final designation. FWS also cited to those sections of the Final Rule

which addressed the State's comments. Alaska now contends FWS's written justification was insufficient to comply with Section 4(i) on the grounds that FWS failed to comply with the section's procedural requirements, and failed to consider and provide reasoned responses to several of Alaska's substantive comments.

As a threshold matter, we address whether the written justification called for by Section 4(i) is subject to judicial review. FWS claims it is not, and our circuit has not yet addressed this question. But the D.C. Circuit has. In *In re Polar Bear*, the D.C. Circuit construed Section 4(i) to be a part of the process that is reviewable when the court reviews the final agency action. 709 F.3d at 17–19. The court explained that it is a review only of whether FWS satisfied the procedural requirements of Section 4(i). *Id.* The court said it may not assess the substantive adequacy of the agency's responses to the comments because the ESA does not specify what the substance of a written justification must be. *Id* at 18–19. The court analyzed whether FWS was fully aware of and took into account the commenting parties' interests and concerns, because that is what is required by the ESA in requiring a written justification. *Id*. We now follow this approach.

The district court found fault with FWS's justification because it incorporated by reference its responses to Alaska's comments contained in the Final Rule rather than including all of those responses verbatim in the letter to the Governor. The district court held, in effect, that FWS's justification for not adopting a final rule wholly consistent with the Alaska's comments had to be self contained. Second, the district court found FWS violated Section 4(i) by sending its

response letter to the Governor rather than ADFG, which had submitted the comments to FWS.

We disagree with the district court's conclusion that the response was inadequate. There is nothing that we can perceive in the text of Section 4(i), or its purpose, that prevents FWS from referencing other publicly-available documents in support of its justifications. The Supreme Court recently declined to read a similar "one document" requirement into a statute that required government entities to provide reasons for a denial "in writing and supported by substantial evidence contained in a written record." *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 811 (2015) (quoting 47 U.S.C. § 332(c)(7)(B)(iii)). In *T-Mobile South*, the telecommunications company had argued that a city must give its reasons for denying permission to build a cell phone tower in a denial letter itself, and not by referencing a separate document. *Id*. at 815–18. In rejecting this approach, the Supreme Court explained that Congress could have written such a rule into the statute if it had wanted, but it chose not to. *Id*. at 818. Like the statute in *T-Mobile South*, the only requirement for the justification in Section 4(i) is that it be in writing. It does not foreclose cross-referencing other publicly available documents. The district court therefore should not have imposed a "one document" requirement.

Nor was it improper for FWS to mail the response to Alaska's Governor instead of ADFG. The comment letters from Alaska and ADFG specified that they "represent[ed] the consolidated comments for the State of Alaska based on input from [ADFG and other departments]." Both letters also noted that Section 4(i) required FWS to provide written justification "to the State." Because the letters appear to be speaking for

the State rather than any of the agencies listed, FWS's action was warranted.

Even assuming FWS should have sent its letter to ADFG instead of the Governor, the mistake would have been inconsequential. *See* 5 U.S.C. § 706 (requiring a court reviewing agency decisions to take "due account . . . of the rule of prejudicial error"). It is undisputed that ADFG received the letter. Moreover, Alaska had previously accepted Section 4(i) letters from FWS in exactly this format—a letter sent to the Governor containing responses to ADFG comments and referencing responses in other documents—without issue. *See In re Polar Bear ESA Listing*, 794 F. Supp. 2d 65, 114 (D.D.C. 2011), *aff'd* 709 F.3d 1 (D.C. Cir. 2013).

Finally, we reject Alaska's claim that FWS's letter failed to offer reasoned responses to each of ADFG's substantive comments. FWS's letter highlighted the basis for its positions on the contested issues and therefore, effectively addressed ADFG's comments. *See In re Polar Bear*, 709 F.3d at 19. It is clear FWS responded, in some way, to each of ADFG's substantive comments. Alaska seems to disagree with the substantive content of those responses. Yet Section 4(i) does not guarantee that the State will be satisfied with FWS's response. *See id.* Because Section 4(i) creates a procedural requirement, a court will not analyze the sufficiency of FWS's responses. *Id*. FWS provided written justification showing that it considered ADFG and the State's interests and concerns and, thus, satisfied its duties under Section 4(i). *See id.*

E. Plaintiffs' Cross-Appeal

In their cross-appeal, Plaintiffs seek to resurrect the claims that the district court rejected. We deal with

them summarily because the district court correctly denied them.

Plaintiffs argue that the "no-disturbance zone" around the barrier islands in Unit 3 does not contain an essential physical or biological feature, and that the evidence does not support the necessity or purpose of including the zone. The district court correctly upheld the no-disturbance zone as a part of Unit 3 because it provides refuge from human disturbance. *See* 50 C.F.R. § 424.12(b)(5) (requirements essential to conservation may include "[h]abitats that are protected from disturbance").

Plaintiffs argue that FWS failed to harmonize inconsistent findings when it determined that the PCEs essential to the polar bear may require special management considerations or protection, while also stating that the designation of critical habitat would not result in changes to polar bear conservation requirements. The latter statement is from FWS's economic impact assessment, and means only that in light of existing regulatory measures, FWS could not foresee any additional expense for affected parties. *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1172. In the context of the special management or protection analysis, the existence of alternative protections or programs does not excuse FWS from designating critical habitat. *NRDC v. U.S. Dep't of Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997) (explaining that "the existence of such an alternative would not justify [FWS's] failure to designate critical habitat"). To the contrary, the notion that polar bears are already protected by some regulatory measures in designated areas is an indication that the habitat is critical. *See Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1099 (D. Ariz. 2003). There is no conflict.

Moreover, even if the designation of critical habitat would not currently result in changes to polar bear conservation requirements, it is reasonable for FWS to identify special management considerations or protections that may be required in the future. Nothing in the ESA requires that FWS determine all possible conditions or protections at the time of critical habitat designation. *See* 16 U.S.C. §§ 1532–1533.

Plaintiffs next contend that FWS's assessment of the potential economic impacts was arbitrary and capricious because it grossly underestimated and excluded the indirect costs that would result from designation. Specifically, Plaintiffs maintain that FWS's economic assessment failed to fully account for administrative costs, delay costs, and uncertainty and risk likely to result from critical habitat designation.

The district court found that FWS did consider all such impacts, and we agree. The ESA requires FWS to take into consideration the economic, national security, and other relevant impacts of specifying an area as critical habitat before making its final designation. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19(b). With this information, FWS determines whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. 16 U.S.C. § 1533(b)(2). FWS is required only to consider the potential economic impacts of critical habitat designation and has discretion to exclude such costs from its final estimate. *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

Here, FWS undertook a formal economic impact assessment of the proposed critical habitat designation as required by Section 4(b)(2). FWS considered potential indirect costs of the designation arising from delay, litigation, uncertainty and risk, and more. FWS

chose to address these impacts qualitatively rather than quantitatively because they were too uncertain to include in the final calculation.

The Final Economic Analysis thus provided a quantitative assessment of the likely direct costs of the designation, as well as a qualitative assessment of the more uncertain and speculative potential indirect costs. FWS's decision not to include those costs deemed too uncertain or speculative in the total potential incremental cost of the designation was within its discretion. FWS's economic impact assessment, therefore, was not arbitrary and capricious.

Alaska lastly argues that Section 7(a)(2) creates an independent duty, beyond the requirements of Section 4, for FWS to engage in consultation with any affected states before designating critical habitat.

Section 7 outlines the process by which federal agencies consult with FWS when those agencies take, fund, or authorize actions that might jeopardize a protected species or harm critical habitat. 16 U.S.C. § 1536. Section 7 provides detailed instruction and procedures for conducting these consultations, including substantive requirements, deadlines, and specific procedures. *See id.* § 1536(a)(2). The district court concluded that Section 7(a)(2) did create a duty to consult, but not one that applied in this case. The district court noted that Section 7 governs the federal interagency consultation process, which applies only after an area has already been designated as critical habitat. It accordingly held that the statute did not require FWS to consult with the State during the initial critical habitat designation, but that it did require consultation with the State when later evaluating whether federal agency action would be likely to destroy or harm the designated habitat.

The district court was correct in denying Alaska's claim, although we do not agree with the district court to the extent that it held that Section 7 creates any independent duty to consult apart from the requirements of Section 4. In 1982, Congress added the specific procedures for designating critical habitat to Section 4, including FWS's duty to consult with affected states. Pub. L. No. 97-304, 96 Stat. 1411 (Oct. 13, 1982). If such a duty already existed under Section 7, Congress would not have had to mandate coordination with the states under Section 4. Furthermore, Section 4 does not mention any additional duty to consult with affected states or reference Section 7 to imply that additional procedural duties can be found there. *See* 16 U.S.C. § 1533.

Finally, even if Section 7(a)(2) contained additional processes regarding critical habitat designation, the plain text of the section indicates that consultation with states is discretionary, not mandatory. *See* 16 U.S.C. § 1536(a)(2). Congress's use of "as appropriate" language indicates that consultation with states under Section 7(a)(2) is discretionary and not a separately enforceable obligation. *See, e.g.*, *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) (holding that "as appropriate" language indicates discretionary authority). We therefore hold that Section 7 does not create an additional duty for FWS to consult with states on critical habitat designations.

III. CONCLUSION

The judgment of the district court is REVERSED and the case REMANDED for entry of judgment in favor of the governmental appellants.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: 06/08/2016]

No. 13-35619

D.C.Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

District of Alaska, Anchorage

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs-Appellees,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, US Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellants,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

No. 13-35662

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

District of Alaska, Anchorage

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE,

Plaintiffs-Appellants,

and

STATE OF ALASKA; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, US Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

No. 13-35666

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

District of Alaska, Anchorage

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs-Appellees,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, US Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants-Appellants.

No. 13-35667

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

District of Alaska, Anchorage

STATE OF ALASKA,

Plaintiff-Appellant,

and

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, US Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

No. 13-35669

D.C. Nos. 3:11-cv-00025-RRB
3:11-cv-00036-RRB
3:11-cv-00106-RRB

District of Alaska, Anchorage

ARCTIC SLOPE REGIONAL CORPORATION; THE NORTH SLOPE BOROUGH; NANA REGIONAL CORPORATION, INC.; BERING STRAITS NATIVE CORPORATION; CALISTA CORPORATION; TIKIGAQ CORPORATION; OLGOONIK CORPORATION, INC.; UKPEAGVIK INUPIAT CORPORATION; KUUKPIK CORPORATION; KAKTOVIK INUPIAT CORPORATION; THE INUPIAT COMMUNITY OF THE ARCTIC SLOPE,

Plaintiffs-Appellants,

and

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; DANIEL M. ASHE, Director, US Fish and Wildlife Service; U.S. FISH & WILDLIFE SERVICE,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; GREENPEACE, INC.,

Intervenor-Defendants.

ORDER

Before: SCHROEDER, RAWLINSON, and MURGUIA, Circuit Judges.

Judges Rawlinson and Murguia have voted to deny Appellees' petition for rehearing en banc, and Judge Schroeder has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for rehearing en banc is denied. Further petitions for rehearing and rehearing en banc shall not be entertained.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed: 01/11/13]

Case No. 3:11-cv-0025-RRB

ALASKA OIL AND GAS ASSOCIATION, *et al.*,
Plaintiffs,
v.
KENNETH L. SALAZAR, *et al.*,
Defendants.

Case No. 3:11-cv-0036-RRB

STATE OF ALASKA,
Plaintiff,
v.
KENNETH L. SALAZAR, *et al.*,
Defendants.

Case No. 3:11-cv-0106-RRB

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,
Plaintiffs,
v.
KENNETH L. SALAZAR, *et al.*,
Defendants.

Order Granting Plaintiffs' Motions
For Summary Judgment

I. INTRODUCTION

Before the Court are Plaintiffs Alaska Oil and Gas Association, the American Petroleum Institute, Arctic Slope Regional Corporation, the North Slope Borough, NANA Regional Corporation, Inc., Bering Straits Native Corporation, Calista Corporation, Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeagvik Inupiat Corporation, Kuukpik Corporation, Cully Corporation, Kaktovik, Inupiat Corporation, the Inupiat Community of the Arctic Slope, and State of Alaska with three motions for summary judgment, at Docket Numbers 50, 55, and 57, challenging the United States Department of the Interior, Fish and Wildlife Service's ("Service") final rule designating critical habitat for the polar bear ("Final Rule") under the Endangered Species Act ("ESA"). As the present litigation involves three separate but closely related summary judgment motions from three partially consolidated cases, the Court will treat all three motions as a single motion.

Plaintiffs contend that the Service proceeded with an unprecedented critical habitat designation despite the Service's finding that such designation "*will not result in any present or anticipated future conservation bene fit to the polar bear species*" and is not "'essential' to the conservation of the species."[1] Plaintiffs further opine that: (1) such designation will "have significant adverse ramifications for the people who live and work on the North Slope, for Alaska's oil and gas industry, and for the State of Alaska";[2] (2) the designation will "leave the species worse off because it is impairing the cooperative relationship that the . . . [Service] has

---

[1] Docket 51 at 9 (emphasis in original).

[2] *Id.*

sought to build with the Alaska Natives";[3] (3) the Service's failure to exclude "native-owned lands and rural communities" will "disproportionately harm Alaska Natives and other North Slope Borough residents";[4] (4) the Service failed "to engage in meaningful consultation with [the State of Alaska and with] Alaska Natives early in the rulemaking process";[5] (5) the Service's inclusion of "a one-mile no disturbance zone as part of the barrier island habitat unit of the designation . . . exceeds its authority under the ESA";[6] (6) "[t]he Service failed to adequately consider and include in the calculation of the total economic impacts of the designation the substantial indirect incremental economic impacts";[7] (7) "[t]he Service failed to provide Alaska with an adequate written justification as required by the ESA . . . for promulgating a . . . designation that conflicts with the comments submitted to the" Service;[8] (8) the Service failed to address the area exclusion requests by Alaska "and failed to adequately consider whether the benefits of excluding those areas were outweighed by the benefits of including them";[9] (9) "[t]he Service improperly included areas that it concedes were not occupied by polar bears at the time of the designation";[10] and (10) "[t]he Service improperly included areas as critical habitat without determining

---

[3] Docket 56 at 5.

[4] *Id.*

[5] *Id.* at 6.

[6] *Id.*

[7] Docket 58 at 9.

[8] *Id.*

[9] *Id.* at 10.

[10] *Id.*

that those areas contained the physical or biological features essential to the conservation of the polar bear."[11] Plaintiffs seek the invalidation of the Final Rule and request that the Court vacate and remand the Rule.

Defendants Kenneth L. Salazar, Secretary of the Interior, Rowan W. Gould, Acting Director of the Service, and the Service (collectively, "Government") and Defendant-Intervenors Center for Biological Diversity, Defenders of Wildlife, Inc., and Greenpeace, Inc. (collectively, "Intervenors") oppose and cross-move for summary judgment at Docket Numbers 64 and 68 respectively.[12] The Government argues that Plaintiffs insert requirements into the ESA that simply do not appear in the Act, ignore or disagree with much of the case law that interprets the critical habitat provisions of the ESA, and ask the Court to review technical and scientific matters that Congress explicitly left to the discretion and expertise of the Service.[13] The Government further claims that the designation "provides many important conservation benefits for the species . . . ."[14] Additionally, the Government contends that because the polar bear and its habitat are highly threatened by climate change, the designation of critical habitat for the species can help mitigate any further habitat degradation.[15] Intervenors agree with the Government and state that

---

[11] *Id.*

[12] The Court will treat the Government's and Intervenors' Oppositions/Cross-Motions as oppositions to Plaintiffs' Summary Judgment Motions.

[13] Docket 64 at 15-16.

[14] *Id.* at 15.

[15] *Id.*

the Final Rule "complies with the letter and intent of the ESA."[16]

Inasmuch as the Court concludes that the Final Rule, while valid in many respects, falls short of the APA's arbitrary and capricious standard and because the Service failed to follow the procedural requirements of the ESA, the Court vacates the Final Rule and remands it to the Service.

II. FACTS

These partially consolidated cases present Plaintiffs' collective challenges to the Service's ESA rulemaking designation of critical habitat for the polar bear. The cases are subject to administrative record review under the Administrative Procedure Act ("APA").[17] There are no contested issues of fact, and all parties agree that the cases will be decided by summary judgment based on the administrative record.[18]

III. STANDARD OF REVIEW

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.[19] A court may grant summary judgment

---

[16] Docket 68 at 6.

[17] 5 U.S.C. § 706(2) (1966).

[18] Docket 32 at 2-4.

[19] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

if the motion and supporting materials show that the movant is so entitled.[20] The sufficiency of the evidence shown must be such that a judge or jury is required "'to resolve the parties' differing versions of the truth at trial'"[21] because the facts could reasonably be resolved in favor of either party.[22]

B. Administrative Procedure Act

Under the APA, "final agency action for which there is no other adequate remedy in a court is subject to judicial review."[23] "[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[24] After a court has finished reviewing the action, the "court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law . . . ."[25]

Judicial review of agency action is limited to those actions required by law.[26] A court cannot review agency action that Congress has left to agency

---

[20] FED. R. CIV. P. 56(e)(2), (3).

[21] *Anderson*, 477 U.S. at 249 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)).

[22] *Id.* at 250.

[23] 5 U.S.C. § 704 (1966).

[24] 5 U.S.C. § 706 (1966).

[25] 5 U.S.C. § 706(2)(A), (C), (D).

[26] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64-65 (2004).

discretion.[27] Once a court is "satisfied that an agency's exercise of discretion is truly informed," a court "'must defer to th[at] informed discretion.'"[28] Although an agency "cannot act on pure speculation or contrary to the evidence, the ESA accepts agency decisions in the face of uncertainty."[29] Yet, "an agency must cogently explain why it has exercised its discretion in a given manner . . . ."[30] Additionally, even if agency decision making is discretionary, the required procedures of such decision making may not be. [31]

"Summary judgment is an appropriate mechanism for" resolving disputes over agency action.[32] "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."[33] However, the agency is the fact finder, not the district court.[34]

When reviewing "under the arbitrary and capricious standard[,]" a court is deferential to the agency

---

[27] *Id.*

[28] *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331-32 (9th Cir. 1992) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)).

[29] *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163-64 (9th Cir. 2010).

[30] *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983).

[31] *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

[32] *City & Cnty. of S. F. v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985)).

[33] *Id.* (quoting *Occidental Eng'g Co.*, 753 F.2d at 769).

[34] *Occidental Eng'g Co.*, 753 F.2d at 769.

involved.[35] The agency's action is to be "presum[ed] . . . valid."[36] A court should

> not vacate an agency's decision unless it 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'[37]

If an agency has not committed one of the these errors, and "'a reasonable basis exists for its decision[,]'" the action should be affirmed.[38] But, in considering whether there is a reasonable basis for the action, a "reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"[39] A court's consideration of agency action must be "'thorough, probing, [and] in-depth . . . .'"[40]

---

[35] *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

[36] *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011) (quoting *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)).

[37] *Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc.*, 463 U.S. at 43).

[38] *Cal. Wilderness Coal.*, 631 F.3d at 1084 (quoting *Nw. Ecosystem Alliance*, 475 F.3d at 1140).

[39] *Marsh*, 490 U.S. at 377-78 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971))

[40] *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 840-41 (9th Cir. 2003) (quoting *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1098 (D.C. Cir.1996)).

A reviewing court "'must not rubber-stamp . . . administrative decisions that [a court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'"[41] An agency must have taken "a 'hard look' at the potential . . . impacts at issue."[42] Moreover, if the agency does not satisfactorily explain its decision, a court should not attempt itself to make up for any deficiencies: A court may not supply a reasoned basis for the agency's action that the agency itself has not given.[43] In other words, an "agency must set forth clearly the grounds on which it acted."[44] Additionally, "an agency must account for evidence in the record that may dispute the agency's findings."[45]

A court must inquire whether "the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[46] "This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a

---

[41] *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005) (quoting *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001)).

[42] *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1126 (9th Cir. 2012) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999)).

[43] *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 42-43.

[44] *Atchison T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973).

[45] *Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1035 (9th Cir. 2007) (citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)).

[46] *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

narrow one.'"[47] "[A] court is not to substitute its judgment for that of the agency."[48] "The APA does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions . . . ."[49] Rather, a court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[50] A court "is not to second guess the agency's action[, but] . . . must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'"[51] The agency's action "'need only be a reasonable, not the best or most reasonable, decision.'"[52]

Deference to an agency's factual conclusions is important when the subject matter involves an agency's experts' complex scientific and technical opinions: "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."[53] However, "[t]he deference accorded an agency's scientific or technical expertise is

---

[47] *Marsh*, 490 U.S. at 377-78 (quoting *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 416).

[48] *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 42-43.

[49] *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978)).

[50] *Nat'l Ass'n of Home Builders*, 551 U.S. at 658 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc.*, 463 U.S. at 43).

[51] *Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1036 (9th Cir. 2010) (quoting *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009)).

[52] *River Runners for Wilderness*, 593 F.3d at 1070 (quoting *Nat'l Wildlife Fed. v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989)).

[53] *Marsh*, 490 U.S. at 377-78.

not unlimited."[54] "The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned.[55]" A court "defer[s] to agency expertise on methodology issues, 'unless the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision.'"[56]

"Unlike substantive challenges [under the arbitrary and capricious standard, a court's] review of an agency's *procedural compliance* is exacting, yet limited."[57] A court is limited to ensuring that statutorily prescribed procedures have been followed, including determining the adequacy of the agency's notice and comment procedure, without deferring to an agency's own opinion of the opportunities it provided.[58] Indeed, "'regulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum found in that Act.'"[59]

---

[54] *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (citing *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 679 (D. D.C. 1997)).

[55] *Id.* (citing *Defenders of Wildlife*, 958 F.Supp. at 679).

[56] *Id.* (quoting *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir.1993)).

[57] *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1075-76 (9th Cir. 2006) (emphasis added) (quoting *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045, 1048-49 (D.C. Cir. 1979)).

[58] *Id.* (quoting *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002)).

[59] *Western Oil & Gas Ass'n v. U.S. EPA*, 633 F.2d 803, 812-13 (9th Cir. 1980) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979)).

IV. DISCUSSION

A. The Service's designation is not overbroad.

Plaintiffs argue that the Service acted contrary to congressional intent when the Service designated "virtually all of the U.S. range of the polar bear."[60] "[W]hen the statutory language is plain, we must enforce it according to its terms"[61] Under 16 U.S.C. § 1532(5)(C), "critical habitat shall not include the *entire* geographical area which can be occupied by the" species.[62] Congress's intent is clear. The Service did not designate the *entire* area that could be occupied by the polar bear. The Service left out "those U.S. waters north of the 300-meter depth boundary in the Beaufort Sea[,][63] . . . [some] areas on the North Slope of Alaska that polar bears use for denning[, and] . . . any denning habitat on the West coast of Alaska or west of the town of Barrow . . . ."[64] "Entire" does not mean virtually all; it means *all*. The Service did not designate all of the potential polar bear geographical area. Thus, the Service's action did not violate the APA.

B. The Service's labeling the entire designation as "occupied" is lawful.

Plaintiffs contend that "[t]he Service violated the ESA by concluding that certain geographic areas were occupied by the polar bear at the time of listing without *sufficient* evidence of polar bear occurrence in

---

[60] Docket 51 at 23.

[61] *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009).

[62] Emphasis added.

[63] Administrative Record Index ("ARI") PBCH004587, PBCH0045491.

[64] ARI PBCH0045514-16, PBCH0047384, PBCH0047392, PBCH0045489.

these areas to show the species is likely to be present during any reasonable span of time."[65] The Court disagrees.

Under the ESA, critical habitat can be composed of areas either occupied or unoccupied by the listed species.[66] Designation of unoccupied areas requires a more rigorous justification from the Service than does the designation of occupied areas.[67] However, the word "occupied" has not been defined by Congress.[68] When ambiguity arises in applying the ESA, the Supreme Court has determined that the Service's "'reasonable interpretation' of the statutory scheme" is owed a degree of deference.[69] Still, "such deference is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text."[70] Thus, where Congress has not addressed statutory ambiguity, a court must establish "whether the agency's answer is based on a permissible construction of the statute."[71]

Here, the Service defined "occupied" regions "as 'areas that the [species] uses with sufficient regularity that it is likely to be present during any reasonable

---

[65] Docket 58 at 42.

[66] *Ariz. Cattle Growers'Ass'n*, 606 F.3d at 1163-64.

[67] *Id.*

[68] *Id.* at 1164.

[69] *Nat'l Ass'n of Home Builders*, 551 U.S. at 665-66 (quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 703 (1995)).

[70] *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

[71] *Id.* (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 843).

span of time."[72] The Ninth Circuit has held that such definition is reasonable.[73] In light of the Ninth Circuit's acceptance and after the Court's independent review, the Service's definition of the term "occupied" is a permissible construction of the ESA.

With the Service's definition of "occupied," the Court turns to the sufficiency of the evidence to establish that polar bears occupied the areas in question at the time of listing. The Service shall make determinations required by the ESA "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species."[74] Determining a species' frequency of use of an area "is a highly contextual and fact-dependent inquiry [that is] . . . within the purview of the agency's unique expertise and [is] entitled to the standard deference afforded such agency determinations."[75] Additionally, in those areas "where habitat is used on a sporadic basis, allowing the . . . [Service] to designate as 'occupied' habitat where the species is *likely to be found* promotes the ESA's conservation goals and comports with the ESA's policy of 'institutionalized caution.'"[76] Yet, "there is no evidence that Congress intended to allow the . . . Service to regulate any parcel of land that is *merely capable* of supporting a protected species."[77] An "agency may not determine that areas

---

[72] ARI PBCH0035658-59.

[73] *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1165.

[74] 16 U.S.C. § 1533(b)(1)(A) (2003).

[75] *Id.* at 1165.

[76] *Id.* at 1167 (emphasis added).

[77] *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1244 (emphasis added).

unused by [a species] are occupied merely because those areas are suitable for future occupancy."[78]

Here, Plaintiffs attack the Service's evidence of "occupied" areas as old, sporadic sightings that do not show that polar bears existed in the areas at the time of listing in 2008.[79] The Service's justification for categorizing as "occupied" those areas "south and east of St. Lawrence Island, including Norton Sound down to Hooper Bay" is based on a myriad of information that, although antiquated, shows that polar bears resided in those areas in the past and were *likely to be found* there in 2008, thus, falling within the accepted definition of "occupied."[80] Deciding whether such areas were occupied or not at the time of listing falls under the Service's unique expertise and deserves this Court's deference. With the presumption of validity that is attached to all agency actions, and in light of the dearth of opposing or unconsidered record evidence presented by Plaintiffs, the Court must respect the Service's contention that it used the best scientific and commercial data available. The Service must rely only on *available* data, and Plaintiffs have not shown that any more recent or concrete data exists that disputes that polar bears were likely to be found in the areas in question at the time of listing. Therefore, the Service's categorization as "occupied" of such areas is reasonable under the APA.

---

[78] *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1167.

[79] Docket 79 at 25-26.

[80] ARI PBCH0045556, PBCH0047389-90, PBCH0047544, PBCH0049037, PBCH0049039, PBCH0049554, PBCH0045483.

C. Inclusion of the sea ice primary constituent element is rational.

Plaintiffs argue that because "[t]he Service failed to adequately explain and substantiate its reasoning" defining the sea ice primary constituent element ("PCE"), the inclusion of the sea ice area, Unit 1, in the designation is unlawful.[81] Plaintiffs misinterpret the record evidence.

It is clear from even a cursory reading of the record that the Service has established a rational connection between the facts supporting the inclusion of the sea ice area in the designation and the Final Rule. Where Plaintiffs contend that polar bears select their sea ice habitat based on *three* characteristics, the record lists only *two*:

> (1) sea-ice concentrations approximately 50 percent or greater that are adjacent to open water areas, leads, polynyas, and that are over the shallower, more productive waters over the continental shelf (waters 300 m (984.2 ft) or less in depth); and (2) flaw zones that are over the shallower, more productive waters over the continental shelf (waters 300 m (984.2 ft) or less in depth).[82]

Furthermore, whereas the Final Rule defined the other two PCEs as being comprised of multiple components or features, the sea ice PCE has merely one feature: Sea ice over waters 300 m (984.2 ft) or less in depth that occurs over the continental shelf with adequate prey resources to support polar bears.[83]

---

[81] Docket 58 at 50.

[82] ARI PBCH0045506.

[83] ARI PBCH0045510.

Plaintiffs claim that the single feature definition of the sea ice PCE cannot be reconciled with the multiple-characteristic explanation in the record.[84] However, "by defining the sea-ice PCE as . . . 'sea ice over waters 300 m (984.2 ft) or less in depth that occurs over the continental shelf . . .[,]' the Service captured *both* of the characteristics" defined by the record.[85] Therefore, due to the rational connection between the facts in the record and the Service's action, and in light of the deference provided to the Service's scientific and technical expertise, the Court finds the Service's inclusion of the sea ice PCE, found in Unit 1, to be valid and not in violation of the APA.

D. The Service shows special management considerations or protection may be required.

Plaintiffs argue that: (1) "[t]he Service has not demonstrated that any special measures may be required";[86] and (2) "[t]he Service unlawfully failed to reconcile its directly contradictory findings."[87] The ease with which the special-management-considerations-or-protection requirement can be satisfied almost renders such requirement nonexistent. Nonetheless, the Service satisfies the low legal standard.[86]

---

[84] Docket 58 at 50.

[85] Docket 64 at 53 (quoting PBCH0045506) (emphasis added).

[86] Docket 51 at 33.

[87] Docket 77 at 23.

[86] Because the Court has determined that the Service failed to adequately show the existence of physical or biological features in Units 2 and 3, the Court will focus solely on Unit 1 in analyzing the fulfilment of the special-management-considerations-or-protection requirement.

In addition to establishing that areas designated as a critical habitat contain physical or biological features essential to the conservation of the species, the Service must also show that such features "*may require special management considerations or protection*."[87] "'Special management considerations or protection' means any methods or procedures *useful* in protecting physical and biological features of the environment for the conservation of listed species."[88]

The word "may" connotes possibility.[89] Areas that satisfy the ESA's critical habitat requirements are lands "for which special management or protection *is possible*."[91] "So long as they are useful in protecting a listed species' habitat, any and every method or procedure qualifies as a special management consideration or protection."[92] Moreover, an agency can "look to past activities to determine the likelihood of future events."[93]

---

[87] 16 U.S.C. § 1532(5)(A)(i) (emphasis added).

[88] 50 C.F.R. § 424.02(j) (1980) (emphasis added) (internal quotation marks in original).

[89] *Ctr. for Biological Diversity v. Norton*, 240 F.Supp.2d 1090, 1098-99 (D. Ariz. 2003) (quoting *The Concise Oxford Dictionary of Current English* (9th ed. 1995)).

[91] *Id.* (emphasis added).

[92] *Id.* at 1099.

[93] *Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F.Supp.2d 1013, 1031(D. Ariz. 2008).

The Service devotes approximately three pages of the Final Rule to explaining the potential special management considerations or protection for the PCEs.[94] Specifically, the Service lists the following as "[p]otential impacts that could harm the identified essential physical and biological features": reductions in the extent of the arctic sea ice due to climate change; oil and gas exploration, development, and production; human disturbance; and commercial shipping.[95] After examining the Service's evidence in support of the possible threats to the PCEs, the Court is satisfied that the Service has made a rational connection between the facts found in the record and the choices made by the Service in establishing that special considerations or protection *may* be required to fend off such threats.

Because the emphasis in the requirement is on the word "may," the evidence shown by the Service supports the reasonable conclusion that *some* special management considerations or protection may be needed in the future to protect the sea ice habitat PCE. However, neither the Service nor the ESA have to be the vehicles by which the procedures or actions involved in the considerations or protection are accomplished. The Service has shown that some day, not necessarily at this time, such considerations or protection *may* be required. In other words, the Service has shown that it is within the realm of possibility that such considerations or protection may be needed now or in the future. Furthermore, the Service does not have to identify the source of such considerations or protection, merely that the

---

[94] ARI PBCH0045510-14.

[95] ARI PBCH0045510.

considerations or protection may be necessary in the future. For example, the evidence in the record showing that sea ice is melting and that it will continue to melt in the future, perhaps at an accelerated rate, is more than enough proof that protection *may* be needed at some point.

Additionally, the Service did not fail to address any contradictory findings, as argued by the Plaintiffs, because there were none. Plaintiffs contend that because there are currently no regulations that effectively address global warming, the Service cannot determine that the sea ice habitat PCE *may* require special considerations or protection at some point in the future.[96] Such evidence of a lack of effective global warming regulation now or in the future does not foreclose the potential future *need* of such regulations to protect the melting sea ice. Science is forever changing, and today's scientific methods and procedures could change tomorrow. Just because global warming seems to be unanswerable now does not remove a potential solution to the problem from the vast space of possibility within which lies the special-management-considerations-or-protection requirement. Therefore, the Service successfully shows that the sea ice habitat PCE *may* require special management considerations or protection now or in the future and does not violate the APA.

E. The Service considered all potential economic impacts.

Plaintiffs claim that the Service failed to correctly consider all of the economic impacts of the critical habitat designation as required by 16 U.S.C.

---

[96] Docket 77 at 22-23.

§ 1533(b)(2).[97] Yet, the record clearly shows that the Service did *consider* all such impacts.

Under 16 U.S.C. § 1533(b)(2), the Service shall 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. The Service "shall identify any significant activities that would either affect an area considered for designation . . . or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the *probable* economic and other impacts of the designation upon *proposed* or o*ngoing activities*."[98] Although Congress has turned over the analysis of the impacts cutting in favor or against critical habitat designation to the discretion of the Service, the Service is still required to show that in arriving at its decision, it took into consideration the economic and other relevant impacts.[99] Specifically, the Service must consider "economic impact[s] *before* the designation of critical habitat."[100] However, "'[a]gencies must consider only those indirect effects that are reasonably foreseeable. They need not consider potential effects that are highly speculative or indefinite.'"[101]

---

[97] Docket 58 at 16.

[98] 50 CFR § 424.19 (2005) (emphasis added).

[99] *Bennett*, 520 U.S. at 172 (quoting 16 U.S.C. § 1533(b)(2) (2003)).

[100] *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991-92 (9th Cir. 2010) (citing 16 U.S.C. § 1533(b)(2)).

[101] *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 768 (1st Cir. 1992)).

The Service determined that, under the baseline approach, the total incremental economic impacts of the critical habitat designation were limited to direct administrative costs of new and reinitiated Section 7 consultations.[102] The Service concluded that the total potential incremental economic impact from the designation over the next thirty years would range from $677,000.00 ($54,000.00 annualized) to $1,210,000.00 ($97,500.00 annualized) in present value terms using a seven percent discount rate.[103] If a three percent discount rate is used, the amounts range from $1,080,000.00 ($55,100.00 annualized) to $1,960,000.00 ($100,000.00 annualized).[104] Like the standard required for establishing that PCEs may necessitate special management considerations or protection, the legal hurdle regarding the Service's analysis of the economic impacts of designation is fairly low. The Service must show only that it

---

[102] ARI PBCH0041546. The parties recognize that Ninth Circuit precedent has established that the economic impacts of the critical habitat designation should be determined according to the baseline approach. Under this approach, any economic impacts of protecting the species that will occur regardless of the critical habitat designation are treated as part of the regulatory "baseline" and are not factored into the economic analysis of the effects of the critical habitat designation. *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1172-74. Docket 77 at 27 n. 17 (Alaska Oil and Gas Association and The American Petroleum Institute, recognition); Docket 79 at 11, 13-14 (State of Alaska, recognition of controlling law, but preservation of the issue for appropriate resolution to address the split in authority); Docket 64 at 77 (United States, recognition). Intervenors and the Alaska Native corporations, villages, and communities are silent on the matter.

[103] ARI PBCH0045521-22.

[104] ARI PBCH0041504.

considered all potential economic impacts of the designation.[105]

Here, it is clear that the Service considered all of the potential economic impacts of the designation. The Service took all of the direct and indirect incremental cost analysis provided by the parties affected by the designation and, in conjunction with the cost analysis provided by its own experts, broke down the costs into those that were reasonably likely to occur and those that were uncertain or speculative.[106] Those costs that were likely to occur were included in the Final Economic Analysis and later incorporated into the Economic Analysis section of the Final Rule, which culminated in the total potential incremental economic impact in the areas included within the designation.[107] However, those costs that were uncertain or speculative, although still considered, were not included in the total potential incremental economic impact.[108] The uncertain costs were deemed unquantifiable by the Service and were dealt with on a qualitative level in the Draft Economic Analysis ("DEA"), included by reference throughout the Final Rule.

Plaintiffs primarily take issue with the non-inclusion of the indirect incremental costs that the Service deemed too uncertain to include in the total-economic-impact calculation.[109] While it is arguably misleading for the Service to represent that the *total*

---

[105] 50 C.F.R. § 424.19.

[106] *See* ARI PBCH0045498-502.

[107] ARI PBCH0045521-22.

[108] *Id.*; ARI PBCE0045498-502.

[109] Docket 79 at 11-12.

potential incremental cost of the designation actually includes a complete picture of *all* the costs that could be incurred as a result of the designation, the statute and regulation merely state that the Service must solely *consider* all such costs.[110] The Service then has complete discretion over the application of such analysis vis-à-vis critical habitat designation.[111] It is evident from reading the record that the Service at least generally, if not specifically, considered all the incremental costs presented to it by the various parties. The ESA does not require, and this Court cannot force, the Service to use such incremental cost analysis in a specific manner even when, as here, the way in which the analysis was used is far from ideal or even the most reasonable. With regard to future direct administrative costs to be incurred through Section 7 consultation, the Court will defer to the Service's technical expertise in its cost projections.

Because the Service must only *consider* the economic data provided to it by the parties, Plaintiffs' best-available-scientific-data argument falls short. The Service considered all the economic evidence provided by Plaintiffs and other sources. Thus, the Service *considered all* possible data.

Therefore, the Service's non-inclusion of those costs deemed too uncertain or speculative in the total potential incremental cost of the designation and the method used in determining future Section 7 costs are in accordance with the ESA and do not violate the APA.

---

[110] *Bennett*, 520 U.S. at 172 (quoting 16 U.S.C. § 1533(b)(2)).

[111] *Id.*

F. The Service lawfully acted within its discretion in not excluding areas.

Plaintiffs argue that the Service acted arbitrarily and capriciously when it failed to exclude *all* Alaska Native communities and did not adequately balance the benefits and disadvantages of including areas that Plaintiffs requested be excluded.[112] This Court disagrees.

Under 16 U.S.C. § 1533(b)(2), the Service *may exclude* any area from critical habitat if it determines that the benefits of such exclusion outweigh the benefits of the area's inclusion. "[T]he Service has *wide discretion* in determining whether to exclude particular areas."[113] Yet, such determination "can be a delicate balancing act."[114] Furthermore, like economic impacts, the Service must *only consider* other impacts when deciding whether or not to include an area in the critical habitat designation.[115]

Here, Plaintiffs misread the statute. The need to balance the benefits of exclusion versus inclusion arises only when the Service decides to exclude an area, not include one. The ESA leaves the decision to include areas in the designation to the discretion of the Service as long as such areas meet the other requirements of the ESA. The Service merely needs to show that it considered all of the impacts of the potential designation prior to creating it. Thus, the Service is not required to show in the record that it

---

[112] Docket 56 at 18-20.

[113] *Ariz. Cattle Growers' Ass'n*, 534 F.Supp.2d at 1032 (emphasis added).

[114] *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1172.

[115] 16 U.S.C § 1533(b)(2)

carried out a benefits-balancing exercise for each and every potential impact to the areas to be designated. Moreover, the record shows that the Service considered all of the impacts involving the requested exclusions.[116] Specifically, the Service thoroughly considered the effect of the designation on the relationship between the Alaska Natives and the Service.[117] Therefore, despite the seemingly unreasonableness of the Service's actions, the Court must be deferential to the weight given by the Service to the impacts of designation.

Plaintiffs point out the Service's incongruity in excluding the Alaska Native villages of Barrow and Kaktovik while not mentioning in the Final Rule the other thirteen villages located within Unit 3.[118] Plaintiffs' argument is premised on a misunderstanding. The thirteen villages were never included in the designation in the first place. "[T]he Service did not include all areas on which there are existing 'manmade structures.'"[119] The only reason that Barrow and Kaktovik were excluded through discretion and not through textual definition, as were the thirteen villages, is because the North Slope Borough provided the Service with the village district boundaries and the legal descriptions necessary to exclude the two areas, as required by 50 C.F.R. § 424.12(c).[120] The Service's action in excluding Alaska Native villages from the designation appears to be uniform and not

---

[116] ARI PBCH0045491-95.

[117] ARI PBCH0045494-95.

[118] Docket 56 at 20.

[119] Docket 64 at 105 (quoting ARI PBCH0045492, PBCH0045514).

[120] ARI PBCH0045492.

arbitrary. Therefore, the Service passes statutory muster by showing record evidence that it at least *considered all* of the possible impacts of designation, thereby, showing that its actions regarding the requested exclusions are not arbitrary or capricious.

G. The No-Disturbance Zone contains a proper physical or biological feature.

Plaintiffs attack the evidence used to support the inclusion of a no-disturbance zone ("NDZ") in Unit 3 as well as call into question the necessity and purpose of such a zone as a feature in the barrier island habitat PCE.[121] However, the Court has determined that, as a part of Unit 3, the NDZ contains a valid feature of the barrier island habitat PCE.

The Service clearly states that the NDZ is one of the areas that comprises Unit 3 and does not stand alone.[122] Further, the Service explains that as a part of the barrier island habitat PCE, the NDZ contains the refuge-from-human-disturbance physical or biological feature.[123] According to 50 C.F.R. § 424.12(b), freedom from human disturbance is a permissible physical or biological feature. Because the NDZ is a part of Unit 3, it can remain in the designation as long as it contains at least one feature essential to the conservation of the polar bear, which it does. Additionally, it does not matter that other parts of Unit 3 also contain the refuge-from-human-disturbance feature. As long as each part of a unit contains at least one feature of a PCE, the entirety of the unit can be designated as

---

[121] Docket 77 at 18-21.

[122] Docket 64 at 61.

[123] *Id.*

critical habitat, and each part of a unit can possess *more than one feature*.

The Service set the width of the NDZ at one mile. Plaintiffs opine that the study used to determine the width of the NDZ was faulty and not applicable in Unit 3.[124] The record proves otherwise. When delving into the realm of an agency's expertise, a court "must defer to the agency's *interpretation* of complex scientific data."[125] Here, the Service adequately considered the contrary opinions of additional experts regarding the distance needed to not disturb the polar bear[126] and, through its own expertise, came to the conclusion that a one mile zone would be required.[127] The Court will defer to the Service's interpretation of the data concerning the correct no-disturbance distance for polar bears. The Court will also defer to the Service concerning the Plaintiffs' contention that the NDZ is only effective for female polar bears and their cubs. The Service considered many factors and reasonably concluded that the NDZ was still necessary for all polar bears in the area.[128] Therefore, the NDZ is a valid part of Unit 3 and the barrier island habitat PCE, and its inclusion is neither arbitrary nor capricious.

---

[124] Docket 51 at 54.

[125] *Nw. Ecosystem Alliance*, 475 F.3d at 1150.

[126] Docket 64 at 63-64.

[127] ARI PBCH0045488.

[128] The Service adequately supports its reasons for establishing the NDZ in light of the fact that different polar bears react differently to human disturbance. ARI PBCH0016561, PBCH0016566-68, PBCH0050212, PBCH0047392.

H. The Service's treatment of the Prudencv of the designation is lawful.

Plaintiffs argue that the Service failed to make a prudency finding prior to creating the designation.[129] Alternatively, Plaintiffs claim that if the Service *did* make a prudency finding, it was not based on the best available scientific data and did not appropriately weigh the benefits and disadvantages of designation.[130] The Court disagrees with both of Plaintiffs' contentions.

Under 16 U.S.C. § 1533(a)(3)(A)(i), the Service shall designate critical habitat "to the maximum extent *prudent* and determinable . . . ."[131] Critical habitat designation "is not prudent when . . . [s]uch designation of critical habitat *would not be beneficial* to the species."[132] The plain language of the statute and the regulation clearly show that the "prudent" factor in designating critical habitat merely sets the outer bounds in determining areas to designate. The Court cannot find a requirement in the ESA or in its enforcing regulations that obliges the Service to expressly find, and to so state in the Final Rule, that the designation was prudent from the outset. Generally, the Service's decision concerning the prudency of a designation is implied with the continuation and completion of such designation. In contrast, it *is* necessary for the Service to expressly justify its actions when it finds designation to *not be prudent*,

---

[129] Docket 56 at 37.

[130] *Id.* at 38.

[131] Emphasis added.

[132] 50 C.F.R. § 424.12(a)(1)(ii) (emphasis added).

which is not the case here.[133] Thus, Plaintiffs' contention that the Service had to show in the record that it expressly made a prudency finding is unfounded and unconvincing.

Next, Plaintiffs claim that if the Service made a prudency finding prior to the creation of the critical habitat, it did so based on outdated evidence from 2008.[134] Yet, Plaintiffs fail to show any alternative evidence that would constitute the best available scientific data concerning the prudency of the designation.[135]

Finally, Plaintiffs opine that the designation is not prudent because there will be no benefit to the polar bear from such designation and because the adverse consequences to the relationship between the Service and the Native Alaskans will be prohibitively severe.[136] The Court disagrees. The benefits of designation, although arguably generic and insubstantial, are clearly laid out in the Final Rule.[137] Such benefits are in addition to and exclusive of any protections currently offered by the Marine Mammal Protection Act or by any other state or federal regulations presently safeguarding the polar bear. When reviewing the potential benefits of designation, a court *cannot* consider the measures already in place for the

---

[133] 50 C.F.R. § 424.12(a).

[134] Docket 56 at 38.

[135] *Giford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir. 2004) (citing *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989)).

[136] *Id.* at 40.

[137] ARI PBCH0045488, PBCH0045520.

protection of the species.[138] Also, the Court has already addressed the designation's impact on the Service-Native relationship. *Supra* Discussion § F.

Therefore, in light of the absence of a duty on the part of the Service to expressly show its prudency finding, and with sufficient evidence in the record showing the benefits of designation, Plaintiffs' prudency argument fails.

I. The Service cooperated with the State to the maximum extent practicable.

Plaintiffs claim that the Service failed to fully comply with its statutory duty to cooperate with the State to the maximum extent practicable, including consulting with the State prior to designating critical habitat. However, Plaintiffs erroneously interpret the Service's cooperation obligations.

The ESA outlines the Service's duties concerning cooperation with states and state agencies in designating critical habitat. Generally, the Service must give notice of the proposed rule to all affected parties and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[139] However, when the interested party is a state, the Service must cooperate with the state "to the maximum extent practicable[,][140] "including "giv[ing] actual notice of the proposed regulation to the State agency in each State

---

[138] *See Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997).

[139] 5 U.S.C. § 553(c) (1966).

[140] 16 U.S.C. § 1535(a) (1988).

in which the species is believed to occur . . . and invite the comment of such agency . . . ."[141]

Here, the Service has defined the ambiguous phrase "maximum extent practicable" to mean using the expertise and soliciting the information of state agencies in preparing proposed and final rules to designate critical habitat.[142] As the Court owes deference to the Service's interpretation of its own regulations, the Court accepts the Service's definition.[143] Based on such definition, the Court finds ample support in the record that the Service fulfilled its statutory duty to cooperate with the State to the maximum extent practicable. For example, the Service: held public meetings at the behest of the State;[144] consulted with the State through the Service's contractor, Northern Economics;[145] and alerted the State to *every* opportunity to participate in the critical-habitat-designation process.[146] Although Plaintiffs may deem the Service's cooperation to be of little real significance in the final production of the designation, the Court does not find any instance in the record in which the Service does not comply with its relatively non-demanding maximum-extent-practicable interpretation.

Additionally, Plaintiffs raise the issue of whether or not the Service fulfilled its obligation to *consult* with the State. Plaintiffs cite 16 U.S.C. § 1536 and the

---

[141] 16 U.S.C. § 1533(b)(5)(A)(ii); *accord* 50 C.F.R. § 424.16 (2012).

[142] Docket 64 at 117 (internal quotations omitted).

[143] *Nat'l Ass'n of Home Builders*, 551 U.S. at 672 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

[144] ARI PBCH0032310, PBCH0032438.

[145] ARI PBCH0022882.

[146] ARI PBCH0045555.

latter half of 16 U.S.C. § 1533(b)(5)(A)(ii) in support of its contention that the Service failed to properly consult with the State prior to creating the Final Rule. However, the statutory language used by Plaintiffs is not applicable in this case. First, 16 U.S.C. § 1536 covers the ESA's Section 7 consultations, and the section of 16 U.S.C. § 1536 that requires consulting with states, refers to the duty of federal agencies to consult with affected states before taking any action on areas *already designated as critical habitat*. The consultation requirement in 16 U.S.C. § 1536 does not apply to the initial creation of the critical habitat designation and thus does not apply here. Likewise, the case cited by Plaintiffs, *California Wilderness Coalition v. United States Department of Energy*, is based on an action under 16 U.S.C. § 1536 and does not support Plaintiffs' claim that the Service was obligated to consult with the State.

Second, the latter part of 16 U.S.C. § 1533(b)(5)(A)(ii) applies *only* when the Service seeks to "acquir[e] any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species." As the Service is not attempting to *acquire* any land, water, or interest therein, the state consultation requirement of 16 U.S.C. § 1533(b)(5)(A)(ii) is not invoked.

Therefore, the Service fulfilled its statutory obligation to cooperate with the State in the designation of polar bear critical habitat, but was not specifically required to consult with the State during such process. The Service did not violate ESA procedural requirements and thus did not run afoul of the APA.

J. The Service had no duty to consult with Alaska Native Corporations.

Plaintiffs claim that the Service failed to sufficiently consult with the Alaska Natives during the process of developing the Final Rule, relying on the Consolidated Appropriations Act, Pub. L. No. 108-447, § 518, 118 Stat. 2809 (2004), in conjunction with Executive Order 13175, 65 Fed. Reg. 67,249, 67,252 (Nov. 6, 2000).[147] Plaintiffs argue that the Service has a duty to consult with the Alaska Natives, as the Service has with Indian Tribes, prior to the formal promulgation of a regulation that has tribal implications and imposes substantial direct compliance costs on Alaska Natives.[148]

Even though the executive order requires all federal agencies to consult with Alaska Natives prior to finalizing a regulation that would affect such people, the requirement only applies to regulations that are "*not required by statute*." Here, the Service has made it abundantly clear that the designation of critical habitat for a species that is listed as threatened or endangered under the ESA *is required by statute*.[149] Because the designation of critical habitat here is statutorily mandated, the consultation requirement of Executive Order 13175 does not apply. Thus, because the Service was not required to consult with Alaska Natives to a greater extent than any other interested party, it did not violate the procedural requirements of the ESA.

---

[147] Docket 56 at 28.

[148] *Id.*

[149] Docket 64 at 127 (quoting 16 U.S.C. § 1533(a)(3)(A)).

K. The Service's designation does not comply with 16 U.S.C. & 1532(5)(A)(i).

According to 16 U.S.C. § 1532(5)(A)(i), critical habitat for a threatened species comprises those "*specific areas* within the geographical area occupied by the species, at the time" the species is listed as threatened, "*on which are found those physical or biological features*" that are "essential to the conservation of the species and which may require special management considerations or protection." Such features may include, but are not limited to:

> (1) Space for individual and population growth, and for normal behavior; (2) Food, water, air, light, minerals, or other nutritional or physiological requirements; (3) Cover or shelter; (4) Sites for breeding, reproduction, rearing of offspring . . . ; and generally, (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. [The Service should] . . . focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: . . . feeding sites, seasonal wetland or dryland, water quality or quantity, . . . geological formation, vegetation type, [and] tide . . . .[150]

---

[150] 50 C.F.R. § 424.12(b) (2012).

"[A]reas outside of the geographical area occupied by the species at the time" of listing are to be included in a critical habitat upon the Service's determination "that such areas are essential for the conservation of the species."[151]

1. The record lacks evidence of physical or biological features in Unit 2.

The Service states that "the terrestrial denning habitat PCE includes not just the specific areas where polar bears literally create dens, but also necessarily includes access to and from those den sites, freedom from disturbance, and space for sows to acclimatize newly emerged cubs."[152] Despite having clearly defined the terrestrial denning habitat PCE, the Service has failed to show clear support in the record for all but one of the PCE features.

Although a reviewing court must be deferential to agencies and presume valid their actions, agencies must still show substantial evidence in the record[153] and clearly explain their actions.[154] Specifically, in order for an area to be designated as critical habitat, an agency must determine that the area actually contains physical or biological features essential for the conservation of the species.[155] An agency cannot simply speculate as to the existence of such features.[156]

---

[151] 16 U.S.C. § 1532(5)(A)(ii) (1988).

[152] Docket 64 at 54.

[153] *Universal Camera Corp.*, 340 U.S. at 488.

[154] *Atchison T. & S. F. Ry. Co.*, 412 U.S. at 807.

[155] 16 U.S.C. § 1532(5)(A)(i).

[156] *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163-64.

The Service specifically defined the terrestrial habitat PCE, found in Unit 2, as being comprised of the following component parts: (1) den sites, "[s]teep, stable slopes (range 15.5-50.0°), with heights ranging from 1.3 to 34 m (4.3 to 111.6 ft), and with water or relatively level ground below the slope and relatively flat terrain above the slope"; (2) "unobstructed, undisturbed access between den sites and the coast"; (3) "sea ice in proximity of terrestrial denning habitat prior to the onset of denning during the Fall to provide access to terrestrial den sites"; and (4) "the absence of disturbance from humans and human activities that might attract other polar bears."[157] The Service explained that each of these components is a physical or biological feature that had to be located, on a macro scale, within the whole of Unit 2 at the time of listing in order for the area to be designated as critical habitat.[158] For example, the Service *did not* include in Unit 2 the terrestrial denning habitat in western Alaska because the area "lack[ed] the 'access via sea-ice' component of the terrestrial denning habit PCE that is *necessary for including in critical habitat*."[159] The Service clarified, however, that "[t]he fact that any single area may be suitable for only one of these functions does not mean that the designated area does not [as a whole] contain the features essential to polar bear denning."[160] Thus, in order to be designated as critical habitat, the entirety of Unit 2 had to have located within it at least one of the above-mentioned features. The Service, however, fails to show, and the

---

[157] ARI PBCH0045510.

[158] *See* Docket 64 at 56.

[159] ARI PBCH0045509 (emphasis added).

[160] *Id.*

record does not contain, evidence of such features save the first and third (den sites and sea ice access), and support for the third feature is vague and confusing.

Unit 2 covers a section of northern Alaska that extends west from the United States-Canada border to the Kavik River and extends from the coast to 20 miles inland and then extends west from the Kavik River to the town of Barrow, Alaska and extends from the coast to five miles inland.[161] In order to define the dimensions for Unit 2, the Service relied on a United States Geological Survey Administrative Report titled *Polar Bear Habitat in Alaska: Inland Extent of Maternity Denning and Graphics Showing Observed and Predicted Changes in Offshore Optimal Habitat*.[162] The results of such report were that "[n]inety-five percent of polar bear dens that were observed on the mainland in the Canada to Kavik region occurred within 18.6 miles of the coast . . . [and] [i]n the Barrow to Kavik region, 95% of dens occurred 2.8 miles from the coast . . . ."[163] Relying on this information, the Service determined that Unit 2 covered ninety-five percent of all historical confirmed and probable dens east of Barrow.[164]

Based *solely* on the location of the confirmed or probable den sites, the Service concluded that the whole of Unit 2 contained *all* of the physical or biological features necessary for the terrestrial denning habitat PCE.[165] While the record evidence can

---

[161] Docket 64 at 26.

[162] ARI PBCH0007518-26.

[163] ARI PBCH0007522.

[164] ARI PBCH0045515.

[165] ARI PBCH004591 ("We . . . believe that the methods used, including the use of the 95 percent of maternal dens located by

be used to show the existence of the first and maybe third of the necessary features, the evidence is entirely lacking in support for the second and fourth features outlined by the Service, namely "unobstructed, undisturbed access between den sites and the coast" and "the absence of disturbance from humans and human activities that might attract other polar bears."[166]

The Service points to two other studies to show that all of the essential features were found in Unit 2, but such studies only confirm that the first feature is found in roughly one percent of the entire area designated.[167] Thus, the Service has identified physical or biological features in approximately one percent of Unit 2, but fails to point to the location of any features in the remaining ninety-nine percent.

The Service's lack of evidence and explanation concerning the second and fourth features is especially stark concerning the inclusion of the areas around Deadhorse, Alaska, as such area is rife with humans, human structures, and human activity.[168] The Service explains that while each portion of Unit 2 does not have to contain all of the four required features, "the Service *could* find that these areas adjacent to human activity provide access between den sites and the sea ice . . . ."[169] By conceding that the Service included the

---

telemetry and verified as confirmed or probable . . . , accurately capture the major denning areas *and, therefore, the features essential to polar bear denning habitat*." Emphasis added).

[166] ARI PBCH0045510.

[167] ARI PBCH0045508 (Service cites Durner 2001 and 2006 studies at PBCH0048587 and PBCH0048675, respectively).

[168] *See* Docket 51 at 22 n. 23.

[169] Docket 64 at 60.

areas around Deadhorse merely because the agency *could* find that such areas contained one of the four essential features, the Service suggests that it had not, at the time of listing or at the time of its briefing, established that *any* of the required features existed in such areas, thereby, violating the requirement that essential features be found in areas *before* designating them as critical habitat.

Even the support for the third feature is tenuous and in need of clarification: "The common feature[] in *many* of the dens in these areas w[as] the presence of sea ice within 16 km (10 mi) of the coast . . . ."[170] The Service and the record fail to explain *which* dens are within ten miles of the coast and how close to the coast are the dens *not* within ten miles. Furthermore, the Service contrarily states in its opposition brief "that it would *not be possible for a den site to also . . . provide access to the sea ice*."[171] The inclusion of such evidence in the Final Rule would be superfluous if not to show access between dens and sea ice; yet, the Service's own words belie such explanation and further add to the ambiguity already present in the record concerning the required access-to-sea-ice feature of the denning habitat PCE.

The Service attempts to explain its lack of specificity regarding essential features in Unit 2 by claiming that "the Service cannot define and is not required to define a patchwork matrix of denning habitat on a micro scale . . . ."[172] Regardless of the procedure used by the Service for its designation, the statute is clear: The *specific* areas designated as critical habitat must

---

[170] ARI PBCH0045515 (emphasis added).

[171] Docket 64 at 57 (emphasis added).

[172] Docket 64 at 55.

contain physical or biological features essential to the conservation of the species at the time of listing.[173] Here, there is no way to know if ninety-nine percent of Unit 2 contains the essential features because there is no evidence in the record or cited by the Service that shows where such features are located. Moreover, the question of whether or not the Service used the best scientific data available is premature as there is no clear scientific evidence to review regarding three of the four essential features or components of the terrestrial denning habitat PCE. The Service lists reasons why it does not have to specify the location of all four features, but such justifications do not make up for the lack of clear record evidence supporting even the existence of three of the four essential features in Unit 2.[174]

In short, the Service cannot designate a large swath of land in northern Alaska as "critical habitat" based entirely on one essential feature that is located in approximately one percent of the entire area set aside. The Service has not shown and the record does not contain evidence that Unit 2 contains all of the required physical or biological features of the terrestrial denning habitat PCE, and thus the Final Rule violates the APA's arbitrary and capricious standard.

---

[173] 16 U.S.C. § 1532(5)(A)(i).

[174] In the alternative, the Service argues that the proximity inclusion exception of 50 C.F.R. § 424.12(d) applies here to include all of the area designated in Unit 2. The Court finds that such regulation is not applicable.

2. The record lacks evidence of physical or biological features in Unit 3.

Unit 3 of the Service's critical habitat designation "includes all barrier islands along the Alaska coast and their associated spits, within the range of the polar bear in the United States, and the water, ice, and terrestrial habitat within 1.6 km (1 mi) of these islands (no disturbance zone)."[175] The barrier island habitat PCE, in Unit 3, is comprised of three features or components: (1) denning habitat; (2) refuge from human disturbance; and (3) access along the coast to maternal den sites and optimal feeding habitat.[176] Each of these components is a biological or physical feature essential to the conservation of the polar bear.[177] Like the individual areas of the terrestrial denning habitat PCE, each part of the barrier island habitat PCE does not have to contain all three of the required features, only one.[178] For example, the Service "recognize[s] that not all barrier islands have suitable denning habitat."[179]

The Final Rule clearly delineates the location of the first and second features in Unit 3.[180] "Barrier islands that have been used multiple times for denning include Flaxman Island, Pingok Island, Cottle Island, Thetis Island, and Cross Island . . . and the no-disturbance zone (area extending out 1.6 km (1 mi)

---

[175] ARI PBCH0045510.

[176] *Id.*; Docket 64 at 61.

[177] *See id.* at 61-62.

[178] *Id.* at 61.

[179] ARI PBCH0045494.

[180] ARI PBCH0045509-10.

from the barrier island mean high tide line)."[181] However, the explanation of the location of the other essential feature is lacking. "Polar bears regularly use barrier islands to move along the Alaska cost as they traverse across the open water, ice, and shallow sand bars between the islands . . . and to move along the coast to access den sites or preferred feeding locations."[182] The Service does not explain where on the islands and associated spits the polar bears move to access den sites and preferred feeding habits. Again, areas designated as critical habitat *must* contain physical or biological features essential to the conservation of the species at the time of listing.[183] Without even minimal evidence in the record showing *specifically* where all the physical or biological features are located within an area, the area cannot be designated as critical habitat. Although each part of Unit 3 does not have to contain each of the three essential features, *every part* of the designation must have at least one.[184] Despite the record showing where the first and second features are located, it is unclear to the Court whether the third feature is even found in the area. Without such feature, Unit 3 cannot be considered critical habitat within the definition of the barrier island habitat PCE.

Therefore, the Service has not shown, and the record does not contain, evidence that Unit 3 contains all of the required physical or biological features of the barrier island habitat PCE, and thus the Final Rule violates the APA's arbitrary and capricious standard.

---

[181] *Id.*

[182] *Id.*

[183] 16 U.S.C. § 1532(5)(A)(i).

[184] 16 U.S.C. § 1532(5)(A)(i).

L. The Service failed to provide the State with adequate justification.

The Service explains that its responses to the State of Alaska regarding the State's comments that were not adopted in the Final Rule complied with the procedural requirement set out in 16 U.S.C. § 1533(i) and 50 C.F.R. § 424.18(c).[185] This Court disagrees.

Because questions involving the Service's response to state agency comments are procedural issues, the Court's review differs from that under the arbitrary and capricious standard. A court is "limited to ensuring that 'statutorily prescribed procedures have been followed . . . .'"[186] Indeed, "'regulations subject to the APA cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum found in that Act.'"[187] The Court here does not analyze the sufficiency of the Service's justifications for its responses to Alaska State Fish and Wildlife Management Agency's ("ADF&G") comments, which is given over to Service discretion, only the procedure the Service followed in carrying out its responses.

On December 10, 2010, after the creation of the Final Rule, the Service sent a letter ("response letter") to Governor Sean Parnell outlining the Service's responses and explanations to the State's comments not adopted in the Final Rule.[188] Although the Service

---

[185] Docket 64 at 109.

[186] *Kern County Farm Bureau*, 450 F.3d at 1075-76 (quoting *Natural Res. Def. Council*, 279 F.3d at 1186).

[187] *Western Oil & Gas Ass'n*, 633 F.2d at 812-13 (quoting *Chrysler Corp.*, 441 U.S. at 313).

[188] ARI PBCH0045553-45562.

made an effort to comply with ESA response procedures regarding states, the Service fell short of full compliance.

According to 16 U.S.C. § 1533(i) and 50 C.F.R. § 424.18(c), when a state agency "submits comments disagreeing in whole or in part with a proposed rule, and the [Service] issues a final rule that is in conflict with such comments, . . . the [Service] *shall provide such agency with a written justification for the failure to adopt a rule consistent with the agency's comments* . . . ."[189]

First, it is clear from the fact that Congress established a *separate procedure* to respond to state agency comments, as opposed to comments from other affected parties, that Congress envisioned a *separate duty* on the part of the Service to specifically respond to those state comments not adopted in a final rule. Indeed, the statute clearly requires that *after* a final rule is issued, the Service must provide a *separate* written justification to the state agency responsible for the comments not used in the final rule.[190] Thus, the Service's statement that adequate responses to the State's unused comments could be found *in part in the Final Rule itself* is directly contrary to ESA procedure.[191] By not including in the response letter *all* its responses to the State's comments not ultimately included in the Final Rule, the Service did not fulfill its response obligations under the ESA.

Second, ADF&G submitted the comments concerning the proposed critical habitat designation, not

---

[189] Emphasis added.

[190] 16 U.S.C. § 1533(i); 50 C.F.R. § 424.18(c).

[191] Docket 64 at 111-13.

Governor Sean Parnell.[192] A correct response letter from the Service would have been sent to the Alaska state agency who submitted the comments to the designation as is required.

Accordingly, each of the Service's responses to the State's comments had to be contained in the response letter or in another written response sent specifically to the ADF&G.[193] Therefore, the Court finds that the Service deviated from proscribed procedure in responding to the State of Alaska's comments and ran afoul of the ESA.

In sum, the substantive errors that the Court finds to be arbitrary and capricious, in violation of the APA, are: (1) *the record lacks evidence of physical or biological features in Unit 2*; and (2) *the record lacks evidence of physical or biological features in Unit 3*. *Supra* Discussion § K. Additionally, *the Service failed to follow applicable ESA procedure by not providing the State with adequate justification for the State's comments not incorporated into the Final Rule*. *Supra* Discussion § L.

V. CONCLUSION

The Supreme Court has determined that agency actions found to be arbitrary and capricious are to be remanded to the originating agency.[194] Additionally,

---

[192] Docket 58 at 28.

[193] AK's comments to potentially be addressed by Service: ARI PBCH0026247-73; PBCH0032495-518; PBCH0044627-74; PBCH0032512-17; PBCH000032509-11; PBCH0054966-5033; and PBCH0032502-08.

[194] *Nat'l Ass'n of Home Builders*, 551 U.S. at 657-58.

those actions that fail to meet procedural requirements shall also be remanded.[195] Moreover, where agency action fails "to follow Congress's clear mandate the appropriate remedy is to vacate that action."[196] "[V]acatur of an unlawful agency rule normally accompanies a remand."[197]

After reviewing the voluminous pages of case law pertaining to the legally required consequence of an agency action found to be arbitrary, capricious, and procedurally errant, and in light of the seriousness of the Service's errors, the Court hereby sets aside the Final Rule.[198] The Court does not hand down this judgment lightly, but only after careful consideration of all the law and facts involved with this critical habitat designation. There is no question that the purpose behind the Service's designation is admirable, for it is important to protect the polar bear, but such protection must be done correctly. In its current form, the critical habitat designation presents a disconnect between the twin goals of protecting a cherished resource and allowing for growth and much needed economic development. The current designation went too far and was too extensive.

Therefore, Plaintiffs' Motions For Summary Judgement at Docket Numbers 50, 55, and 57 are hereby

---

[195] *F.C.C. v. NextWave Pers. Communic'ns Inc.*, 537 U.S. 293, 300 (2003) (quoting *Citizens to Pres. Overton Park, Inc.*, 401 U.S. at 413-14).

[196] *Cal. Wilderness Coal.*, 631 F.3d at 1095.

[197] *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1185-86 (9th Cir. 2004).

[198] Designation of Critical Habitat for the Polar Bear (Ursus maritimus) in the United States, 75 Fed. Reg. 76,086 (Dec. 7, 2010).

GRANTED, and the Final Rule shall be VACATED and REMANDED to the Service to correct the aforementioned substantive and procedural deficiencies.

ORDERED this 10th day of January, 2013.

S/ RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed 01/14/13]

———

Case No. 3:11-cv-00025-RRB

———

ALASKA OIL AND GAS ASSOCIATION, *et al.*,
Plaintiffs,
v.
KENNETH L. SALAZAR, *et al*.,
Defendants.

———

Case No. 3:11-cv-00036-RRB

———

STATE OF ALASKA,
Plaintiff,
v.
KENNETH L. SALAZAR, *et al*.,
Defendants.

———

Case No. 3:11-cv-00106-RRB

———

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,
Plaintiffs,
v.
KENNETH L. SALAZAR, *et al*.,
Defendants.

———

JUDGMENT IN A CIVIL CASE

__ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ DECISION BY COURT. This action came before the court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT the Final Rule shall be VACATED and REMANDED to the Service to correct the aforementioned substantive and procedural deficiencies.

APPROVED:

/s/ RALPH R. BEISTLINE
United States District Judge

Date: January 14, 2013

NOTE: Award of prejudgment interest, costs and attorney's fees are governed by D.Ak. LR 54.1, 54.3, and 58.1.

MARVEL HANSBRAUGH
Marvel Hansbraugh,
Clerk of Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed 02/25/13]

———

Case No. 3:11-cv-00025-RRB

———

ALASKA OIL AND GAS ASSOCIATION, *et al*.,
Plaintiffs,
v.
KENNETH L. SALAZAR, *et al*.,
Defendants.

———

Case No. 3:11-cv-00036-RRB

———

STATE OF ALASKA,
Plaintiff,
v.
KENNETH L. SALAZAR, *et al*.,
Defendants.

———

Case No. 3:11-cv-00106-RRB

———

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,
Plaintiffs,
v.
KENNETH L. SALAZAR, *et al*.,
Defendants.

———

DECLARATION OF STEPHEN G. CALDER III

1. My name is Stephen G. Calder III. I am an Environmental and Regulatory Advisor and Federal Permits Lead for ExxonMobil's Point Thomson Project ("Project"). My job duties include serving as the single point of contact ("SPOC") for the Project Environmental Impact Statement ("EIS") and United States Army Corps of Engineers, Alaska District ("Corps") Department of Army ("DA") permit to fill wetlands and waters of the United States under Section 404 of the Clean Water Act ("CWA"). As SPOC, I coordinated ExxonMobil's provision of technical information to the Corps, hosting of workshops on Project definition and execution, and other engagement with Federal and State agencies. As part of my job responsibilities, I also coordinated with the Corps concerning the development of the wetlands assessment and determination of compensatory mitigation for the Point Thomson Project required for issuance of the Corps DA permit. ExxonMobil is a member company of both plaintiffs Alaska Oil and Gas Association and American Petroleum Institute.

2. I make this declaration on the basis of personal knowledge and am competent to testify to the matters stated herein, which are true and correct to the best of my knowledge, information, and belief.

3. In October 2009, ExxonMobil submitted an application to the Corps for a DA permit to fill wetlands and waters of the United States under Section 404 of the Clean Water Act for the Point Thomson Project in Alaska. The Project is located approximately 60 miles east of Prudhoe Bay in an area that was designated as polar bear critical habitat under the final rule that has since been vacated by this

Court. The Corps issued the DA permit for the Project on October 26, 2012.

4. When issuing a DA permit, the Corps must consider the impacts of the proposed action on jurisdictional waters of the U.S., in particular including wetlands. Compensatory mitigation is ordinarily required for unavoidable impacts to wetlands. The Corps typically conducts an assessment to determine the functions performed by the impacted wetlands. The Corps assigns categories to specific areas of those wetlands to determine their aggregate functional value. Of a possible 4 categories (I through IV), Category I is the highest value category. The Corps then applies mitigation ratios appropriate to each category to determine the total impacted acreage for compensation. *See generally* 33 C.F.R. § 332.3.

5. Applying these requirements, the Corps has issued a Regulatory Guidance Letter ("RGL") that specifically identifies "areas of critical habitat" as those that "will require" compensatory mitigation. *See* Exhibit 1, page 8, table 2 (RGL No. 09-01). When evaluating ExxonMobil's application for a DA permit for the Project, the Corps applied the guidelines set forth in RGL No. 09-01. The Corps construed RGL No. 09-01 to require that all impacted Point Thomson wetlands, because of their location in polar bear critical habitat, automatically must be mitigated for as "Category I" wetlands (the highest value wetlands) regardless of the physical, chemical, and biological characteristics of the wetlands. *See* Exhibit 1, Appendix A (wetlands that provide a "life support function for threatened or endangered species that has been documented [i.e., designated as critical habitat]" are classified as "Category I" wetlands). As a result, the Corps required a significantly greater total acreage,

and therefore greater total cost, for compensatory mitigation.

6. The United States Department of the Interior, Fish and Wildlife Service's total projected impact of the polar bear critical habitat designation for the next 30 years was $677,000 to $1,210,000 in present value. In my best judgment, based upon all of the information available to me and my experience with the Corps' wetlands assessment process, because of the polar bear critical habitat designation in effect at the time the Corps issued the DA permit, ExxonMobil's increased incremental mitigation costs alone for just this Project have already exceeded the Service's 30-year projection.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my information and belief.

EXECUTED in Anchorage, Alaska this 25th February, 2013.

/s/ Stephen G. Calder III
Stephen G. Calder III

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed 05/15/13]

———

Case No. 3:11-cv-0025-RRB

———

ALASKA OIL AND GAS ASSOCIATION, *et al.*,
Plaintiffs,

v.

SALLY JEWELL, *et al.*,
Defendants.

———

Case No. 3:11-cv-0036-RRB

———

STATE OF ALASKA,
Plaintiff,

v.

SALLY JEWELL, *et al.*,
Defendants.

———

Case No. 3:11-cv-0106-RRB

———

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,
Plaintiffs,

v.

SALLY JEWELL, *et al.*,
Defendants.

———

Order Denying Defendants' and Defendant-Intervenors' Motions To Alter Or Amend Judgment

---

Before the Court are two motions to alter or amend the order entered on January 11, 2013, at Docket 96 wherein the Court vacated and remanded the final rule designating critical habitat for the polar bear ("Final Rule") which Final Rule was issued by the U.S. Fish and Wildlife Service ("Service") pursuant to the Endangered Species Act ("Act") and set forth in United Sates, 75 Fed Reg, 76,086 (Dec. 7, 2010).

The Federal Defendants ("Government") filed their motion at Docket 102. Defendant-Intervenors, Center for Biological Diversity, Defenders of Wildlife Inc., and Greenpeace, Inc. ("Intervenors") filed their motion at Docket 104. Plaintiffs, Alaska Oil and Gas Association, Arctic Slope Regional Corporation, ("ASRC"), and the State of Alaska, oppose at Dockets 108, 109, and 110 respectively. The Court will treat the Government's and the Intervenors' motions as a single motion and, when utilizing Docket Numbers, references the lead case herein, 3-11-cv-0025.

The Government argues that "the Court erred when it found – on a ground not advanced in Plaintiffs' briefs – that the administrative record lacked evidence that Unit 3 (the barrier islands unit) contains the required physical and biological features of the barrier island habitat primary constituent element ("PCE")."[1] Regarding Unit 2 (the denning unit), the Government opines that the Court "erred when it found – on grounds not advanced by Plaintiffs during notice and

---

[1] Docket No. 102 at 2; Docket No. 104 at 2.

comment – that designation of the unit was not supported by the record."[2]

The Government further claims that vacating the Final Rule (vacatur) is an unjust remedy because the Court found that Unit 1 (the sea-ice unit), which comprises ninety-six percent of the designation, did not violate the ESA or the Administrative Procedure Act ("APA"), and because vacatur "is unnecessary to address the legal errors identified by the Court in Units 2 and 3."[3] The Government additionally contends that "the Court erred in granting summary judgment to ASRC because it ruled against them on all issues briefed in their motion."[4] Intervenors agree with the Government and argue that the critical habitat designation should be left in place while the Service cures any deficiencies and republishes the Final Rule in order "to prevent 'undesirable consequences which we cannot now predict' when invalidating regulations during remand."[5]

Plaintiffs Alaska Oil and Gas Association, the American Petroleum Institute, ASRC, and the State of Alaska argue that they "plainly commented, alleged, and argued that 'The Final Rule Unlawfully Includes Areas That Do No Contain PCEs.'"[6] Plaintiffs assert that the Government's Motion fails the high reconsideration standard of Federal Rule of Civil Procedure 59(e) because the Government "seeks to reargue

---

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Docket No. 105 at 3-4 (quoting *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980)).

[6] Docket No. 108 at 3 (emphasis omitted) (quoting Docket No. 77 at 6).

matters previously briefed and lost, and to improperly introduce new arguments for the first time in post-judgment briefing."[7] Plaintiffs also claim that it was not error for the Court to grant summary judgment in favor of ASRC because the Court treated the three summary judgment motions filed by the Plaintiffs as a single motion, because Plaintiffs consolidated their cases and attempted to condense and simplify their respective presentations in order to avoid duplicative briefing, and because ASRC generally requested that the Court overturn the habitat designation as arbitrary and capricious.[8] Plaintiffs further argue that the Service's failure to provide written justification to the State of Alaska was not harmless[9] and that vacatur is the appropriate remedy for the Final Rule because "[m]ere disagreement with the Court's carefully considered and discretionary remedy choice does not come close to the type of clear error required" by Rule 59(e).[10]

Inasmuch as the Court concludes that the Government's and Intervenors' Motions To Alter Or Amend Judgment fall short of the requirements of Rule 59(e), and for the reasons set forth below, the two motions to alter or amend must be denied. The Final Rule is vacated and remanded.[11]

---

[7] *Id.*

[8] Docket No. 109 at 4-5.

[9] Docket No. 110 at 7.

[10] Docket No. 109 at 10 (internal quotations omitted).

[11] The Court adopts the background summery at Docket Number 96 at 5.

I. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 59(e), a party may move to have the court amend its judgment on four basic grounds:

> (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.[12]

"A court considering a Rule 59(e) motion is not limited merely to these four situations, however[,] . . . under unusual circumstances an amendment outside the listed situations may be appropriate."[13] A "motion to reconsider would be appropriate where, for example, the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension."[14] "'Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion.'"[15] "To

---

[12] *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111-12 (9th Cir. 2011) (citing *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc) (per curiam)).

[13] *Id.*

[14] *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995).

[15] *Allstate Ins. Co.*, 634 F.3d at 1111-12 (quoting *McDowell*, 197 F.3d at 1255 n. 1).

succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision."[16]

"But amending a judgement after its entry remains 'an extraordinary remedy which should be used sparingly.'"[17] "'[A] motion for reconsideration should not be granted, absent highly unusual circumstances . . . .'"[18] "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation."[19] Rule 59(e) also cannot be used to rehash arguments already made in parties' principal briefs.[20] "A party seeking reconsideration must show more than a disagreement with the Court's decision." [21] Reconsideration is not justified on the basis of new evidence which could have been discovered prior to the court's ruling, nor do "'after thoughts' or 'shifting of

---

[16] *Arteaga v. Asset Acceptance, LLC*, 733 F.Supp.2d 1218, 1236 (E.D. Cal. 2010) (citing *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).

[17] *Allstate Ins. Co.*, 634 F.3d at 1111-12 (quoting *McDowell*, 197 F.3d at 1255 n. 1).

[18] *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

[19] *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citing *Kona Enterprises, Inc.*, 229 F.3d at 890).

[20] *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

[21] *Arteaga*, 733 F.Supp.2d at 1236 (quoting *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001)).

ground' constitute an appropriate basis for reconsideration."[22] "A motion for reconsideration should not be used to ask a court 'to rethink what the court had already thought through—rightly or wrongly.'" [23] "Arguments that a court was in error on the issues it considered should be directed to the court of appeals."[24]

II. DISCUSSION

A. Not Error for Court to use absence of PCE features in Units 2 and 3 as basis for Final Rule vacatur.

The Government argues that it was error for the Court to vacate the Final Rule based on the novel argument that Units 2 and 3 do not contain the requisite PCE features when Plaintiffs never raised such argument in their comments or their briefing.[25] But under 16 U.S.C. § 1532(5)(A)(i)(I), critical habitat for a threatened species *must* contain *those physical or biological features* essential to the conservation of the species.[26] Thus, habitat that does not contain such features fails to meet the statutory minimum and cannot be designated as critical habitat under the ESA. Regardless of what arguments the parties make,

---

[22] *Westlands Water Dist.*, 134 F.Supp.2d at 1130 (quoting *United States v. Navarro*, 972 F.Supp. 1296, 1299 (E.D. Cal. 1997)).

[23] *Defenders of Wildlife*, 909 F.Supp. at 1351 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101. (E.D. Va. 1983)).

[24] *Id.*

[25] Docket No. 102 at 2.

[26] Emphasis added.

if a court determines that certain areas in a designation do not contain such features,[27] the court cannot allow such designation to stand.[28] It is the Service's primary responsibility to ensure that it complies with the *entirety* of the ESA, not just those parts mentioned by the parties.[29] Here, the Court reviewed the administrative record and found that it lacked evidence of PCE features in each specific area that comprises Units 2 and 3. The Service simply failed to comply with a legal duty under the ESA.

Furthermore, although it is the Court's obligation to evaluate the propriety of the Final Rule to ensure that each unit of the critical habitat designation contained its corresponding PCE features, the Court's decision was not premised on new grounds. Even assuming, *arguendo*, that the Court was restricted in its review of the Final Rule to relying solely on the issues raised by Plaintiffs, the lack of PCE features in Units 2 and 3 *was* raised by the Plaintiffs both in the comments and the briefing, and the Court reasonably relied upon the same. Moreover, parties do not have to "'incant

---

[27] *Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1035 (9th Cir. 2007) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (A court must inquire whether "the agency . . . examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

[28] 5 U.S.C. § 706(2)(A), (C), (D) (1966) (After a court has finished reviewing the action, the "court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law . . . .").

[29] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004).

[certain] magic words . . . in order to leave the courtroom door open to a challenge.'"[30] "Accordingly, alerting the agency in *general terms* will be enough if the agency has been given 'a chance to bring its expertise to bear to resolve [the] claim.'" [31] "If we required each participant in a notice-and-comment proceeding to raise every issue or be barred from seeking judicial review of the agency's action, we would be sanctioning the unnecessary multiplication of comments and proceedings before the administrative agency. That would serve neither the agency nor the parties."[32]

Furthermore, an agency's "flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."[33] "This court has interpreted the 'so obvious' standard as requiring that the agency have independent knowledge of the issues that concern petitioners."[34]

Here, one of Plaintiffs' chief arguments was that the Service designated areas that lacked the physical or biological features essential to the conservation of the polar bear.[35] Plaintiffs' arguments were adequate to

---

[30] *Id.* at 1133 (quoting *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002)).

[31] *Id.* (emphasis added) (quoting *Native Ecosystems Council*, 304 F.3d at 900).

[32] *Portland Gen. Elec. Co.*, 501 F.3d at 1024 n. 13.

[33] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004).

[34] *Barnes*, 655 F.3d at 1132 (citing *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006)).

[35] (1) AOGA Docket No. 19 at 11-12; Docket No. 51 at 28; Docket No. 58 at 10, 50; Docket No. 77 at 12-13;(2) ASRC Complaint at 26, Arctic Slope Reg'l Corp. v. Jewel, No. 3:11-CV-

put the Service on notice that the existence of PCE features in Units 2 and 3 was being challenged. Plaintiffs' comments also alerted the Service to the potential challenges.[36] Additionally, the Service had independent knowledge of the potential challenges through the Joint Status Report[37] and the Government's Response to Plaintiffs' Summary Judgment Motions.[38] Because all areas listed in the Final Rule *had to* contain PCE features in order to be so designated, the absence of such features should have been obvious to the Service.

The Service was on notice of the potential challenges to the PCE features of Units 2 and 3 and was neither surprised nor prejudiced by the Court invalidating the Final Rule because of a lack of evidence of such features in the record. Thus, it was not clear error or manifest injustice for the Court to find that the record lacked evidence of PCE features in each of the areas comprising Units 2 and 3.

B. Court's Unit 3 PCE component interpretation not error.

The Government alleges that "the Court appears to have misunderstood what physical features the Service found are essential to conservation for the barrier island unit."[39] The Government argues that the Barrier Island Habitat PCE features are the

---

00106-RRB (D. Alaska May 5, 2011), ECF No. 1; Docket No. 56 at 18; (3) Alaska Complaint at 23, State of Alaska v. Jewel, No. 3:11-CV-00036-RRB (D. Alaska March 9, 2011), ECF No. 1; and Docket No. 79 at 27-28, 30.

[36] *E.g.*, Administrative Record Index ("ARI") PBCH0054088.

[37] Docket No. 32 at 2-3.

[38] Docket No. 64 at 61-62.

[39] Docket No. 102 at 2.

barrier islands themselves, the associated spits, and the no-disturbance zone, not the features used by the Court: denning, refuge from human disturbance, and movements along the coast to access maternal den and optimal feeding habitat.[40] However, the Government's *post hoc* explanation is incongruent with the Service's prior explanation and use of the Unit 3 PCE features and with the Final Rule's unambiguous definition of such features. Thus, the Court did not err in relying on the Final Rule during its review of the Barrier Island Habitat PCE.

A court must "defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[41] However, "deference is warranted only when the language of the regulation is ambiguous."[42] Where a regulation is unambiguous, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation."[43]

Here, the portion of the Final Rule that outlines the Unit 3 PCE features is not ambiguous. The Final Rule clearly describes the three units of the critical habitat designation and their corresponding features or components.[44] For example, the Barrier Island Habitat PCE is defined as "Barrier island habitat used for denning, refuge from human disturbance, and movements along the coast to access maternal den and

---

[40] *Id.* at 3.

[41] *Chase Bank USA, N.A. v. McCoy*, _ U.S. _, 131 S.Ct. 871, 880 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

[42] *Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000).

[43] *Id.*

[44] ARI PBCH0045510.

optimal feeding habitat."[45] The Final Rule goes on to explain where these features can *generally* be found within Unit 3: the barrier islands themselves, the associated spits, and the no-disturbance zone.[46] However, the Final Rule fails to establish the *specific area* in Unit 3 where the third feature is located.[47]

> The Government reiterated the Final Rule's PCE components definition:
>
> Each of the three PCEs is composed of a number of components. For example, the terrestrial denning habitat is composed of four components: areas with specific topographic features for constructing dens; unobstructed, undisturbed access between den sites and the coast; proximity to sea ice; and absence of disturbance from humans and human activities.[48]

The Government went on to explain that

> each area within the designation *does not have to include all components of the PCE*. Just as not all of the *terrestrial denning habitat* contains the appropriate topographic features needed for *creating a den, but instead provides access to dens, or freedom from disturbance*, not all of the *barrier island habitat* contains areas for *creating dens, but*

---

[45] *Id.*

[46] *Id.*

[47] Docket No. 96 at 44-45 (third feature is access along the coast to maternal den sites and optimal feeding habitat).

[48] Docket No. 64 at 51 (quoting ARI PBCH0045510).

> *instead provides refuge from human disturbance or access to feeding habitat*.[49]

Thus, in its Opposition at Docket Number 64, the Government understood the Barrier Island Habitat PCE to contain the three features outlined in the Final Rule: den creation, refuge from human disturbance, and access to feeding habitat. The Government cannot now contend that the Court was mistaken when it employed the same Unit 3 PCE definition in the Final Rule review, especially when the Government explicitly listed "refuge from human disturbance" as one of the features of the Barrier Island Habitat PCE.[50]

The Court's Unit 3 PCE component definition was also used by the State of Alaska in its Summary Judgment Motion; yet, it is only after the Court found that the record was lacking concerning Unit 3 PCE evidence that the Government challenged the definition.[51] Furthermore, the Service conceded that some portions of Unit 3 are unsuitable for denning, but may provide refuge from human disturbance or access to feeding habitat.[52] Thus, by describing the features of the Barrier Island Habitat PCE that are used by the polar bears, the Service described the Unit's PCE features. However, by defining the areas comprising Unit 3 as the PCE features themselves, the Government is attempting to change its interpretation and avoid specifying which essential parts of Unit 3 actually serve polar bear conservation. The Government's newly crafted interpretation is illogical and plainly erroneous. The Court's Final Rule review involving the

---

[49] *Id.* at 61 (emphasis added) (citing ARI PBCH0045494).

[50] *Id.* at 62.

[51] Docket No. 58 at 50.

[52] ARI PBCH0045494.

Barrier Island Habitat PCE components was not error.

C. Arguments and previously known and available evidence cannot be raised for the first time in post-judgment briefing.

The Government, throughout its Rule 59(e) Motion, attempts to introduce arguments that it failed to make in its principal briefing based on previously-available evidence. In reviewing agency action under the APA, a court "shall review the whole record or *those parts of it cited by a party*."[53] "A motion for reconsideration 'may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'"[54] In the present motion, the Government's grounds-not-raised-in-comments-and-briefing arguments regarding Units 2 and 3 are raised for the first time on reconsideration. Additionally, the exhibits attached to the Government's current briefing could have been brought to the Court's attention during summary judgment briefing, but they were not.[55] Out of the hundreds of pages contained within the administrative record, the Court

---

[53] 5 U.S.C. § 706 (emphasis added).

[54] *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 880 (quoting *Kona Enters., Inc.*, 229 F.3d at 890).

[55] The maps presented by the Government still do not specify the location of PCE features in the Units. Exhibit 1 does not show the location of the polar bear access along the coast. Exhibits 2 and 3 only show some of the barrier islands and Unit 2 (eastern portion), but not west of the Colville River and no specific locations of Unit 2 and 3 PCE components. Exhibits 4, 5, and 6 are general descriptions of *possible* polar bear movements and habitats, but fail to provide specific locations of PCE features. Exhibit 7 contains den date previously cited by the Government at Docket No. 64 at 59 and by the Service at ARI PBCH0007523.

focused its efforts on those many parts cited by the parties. The Court declines to consider new arguments based on previously-available evidence.

D. Parties cannot rehash arguments made in their principal briefs.

The Government alleges that all of Unit 2 (Denning Habitat PCE) contains the PCE component for movement from sea ice to den sites, and that the Service cannot predict the precise path that the polar bears take from their dens to the sea.[56] The Government also opines that the Court was mistaken when it found absent the freedom-from-human-activity component in Unit 2 because "all land in this unit that is more than one mile away from human activity contains this PCE component."[57] Both of the Government's contentions go to the merits of the summary judgment briefing and were previously addressed in the Court's Order at Docket Number 96.

Reconsideration is not "to be used to ask the court to rethink what it has already thought."[58] Nevertheless, even if the Unit 2 terrain is suitable for possible den sites, areas in the designation must contain *actual* den sites. Critical habitat includes areas essential for a threatened species, not just the lands that *potentially* could serve as habitat.[59] With respect to the freedom-from-human-activity component, the areas must be designated specifically, not set aside generally in a large swath of land. Regarding the areas around

---

[56] Docket No. 102 at 6.

[57] *Id.* at 7.

[58] *Arteaga*, 733 F.Supp.2d at 1236.

[59] *See* 16 U.S.C. § 1532(5)(A)(i) (1988).

Deadhorse, the Government's claims still do not specify which of the features are found there. Reconsideration is denied.

E. Summary judgment in favor of ASRC was appropriate.

The Government claims that because the Court ruled against ASRC on all the points ASRC made in its Summary Judgment Motion, granting such motion was error.[60] The Court disagrees.

All of Plaintiffs' Summary Judgment Motions were closely related and treated by the Court as a single motion. Thus, granting one of Plaintiffs' Motions meant granting all of them. The Court instructed the parties at Docket Number 38 to condense their respective presentations in the consolidated cases, and Plaintiffs, including ASRC, coordinated their briefing in order to avoid duplicative briefing on the same issues. The Court will not penalize ASRC for complying with the Court's directive and relying on fellow plaintiffs to bring issues before the Court.[61] It was not error for the Court to grant ASRC's Motion For Summary Judgment.

F. Vacatur and remand are proper remedy for the failings of the Final Rule.

The Government and Intervenors opine that the Court's vacatur and remand of the Final Rule is manifestly unjust.[62] Both parties contend that vacating the entire designation when the Court found nothing

---

[60] Docket No. 102 at 8.

[61] Examples of Plaintiff briefing coordination: Docket No. 56 at 7; Docket No. 58 at 9; and Docket No. 51 at 22 n. 23.

[62] Docket No. 102 at 8 (Government); Docket No. 105 at 3 (Intervenors).

wrong with Unit 1, comprising ninety-six percent of the designation, is a waste of resources and that vacatur removes all habitat protections provided to the polar bear.[63]

Intervenors state that the Court failed to properly apply the two-part vacatur-appropriateness test found in *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012).[64] Next, Intervenors argue that equities tip in favor of (and the ESA's purpose requires) no vacatur because the protection of the polar bear depends on the preservation of its habitat.[65] Then, Intervenors explain that Plaintiffs will not be prejudiced by leaving the designation in place because Plaintiffs have not suffered any injury during the two years of designation, and because the nature and magnitude of the Service's errors are not that bad.[66] Finally, Intervenors allege that the Unit 2 and Unit 3 errors that the Court found are only failures to explain and support the basis for designation, so the Final Rule should stay in place because the Service could remedy the errors through further explanation.[67] Additionally, the Government and Intervenors argue for partial vacatur, leaving Unit 1 in place while vacating Units 2 and 3.[68] Although many of the Government's and Intervenors' arguments restate previous arguments from their

---

[63] Docket No. 102 at 8-9; Docket No. 105 at 3-9.

[64] Docket No. 105 at 4.

[65] *Id.* at 4-6.

[66] *Id.* at 6-9.

[67] *Id.* at 8-9.

[68] Docket No. 102 at 10; Docket No. 105 at 3-9.

summary judgment briefing, the Court will address them briefly.

"[F]ederal courts should aim to ensure 'the framing of relief no broader than required by the precise facts.'"[69] "A flawed rule need not be vacated. Indeed, 'when equity demands, the regulation can be left in place while the agency follows the necessary procedures' to correct its action."[70] "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"[71] Yet, "we have only ordered remand without vacatur in limited circumstances . . . ."[72] When a court determines that an agency's action failed to follow Congress's clear mandate or where a regulation is promulgated in violation of the APA and the violation is not harmless, the appropriate remedy is to vacate that action.[73]

In its determination of a proper remedy for the Service's errors in the Final Rule, the Court applied the framework from *California Communities Against Toxics*, and balanced the seriousness of the Service's mistakes with the disruptive consequences of a change in the designation.[74] Concerning the consequences to

---

[69] *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 193 (2000).

[70] *Cal. Comtys. Against Toxics*, 688 F.3d at 992 (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

[71] *Id.* (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 51 (D.C. Cir. 1993)).

[72] *Id.* at 994.

[73] *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011).

[74] Docket No. 96 at 49.

the polar bear from vacating the Final Rule, the scale tips in favor of vacatur. Polar bears are presently abundant, continue to occupy the entirety of their historical range and face no immediate or precipitous decline.[75] The primary threat to the polar bear and its habitat is climate change, which is beyond the scope of the ESA and not reached by the critical habitat designation.[76] Finally, it appears unlikely that polar bears are highly imperiled or that polar bears will lose all of their protections until the designation is reinstated because "[g]iven the current conservation measures under section 7 of the Act and the Marine Mammal Protection Act (MMPA)" the Service is unable to foresee a scenario in which the designation of critical habitat results in changes to polar bear conservation requirements.[77] In sum, there exist no circumstances that militate in favor of keeping the Final Rule in place.

Although Plaintiffs were not required to, they have shown that they would be prejudiced or injured by leaving the designation in place.[78] Furthermore, equity cuts in favor of vacatur. Plaintiffs represent the broad spectrum of individuals that will be affected by the polar bear critical habitat designation: those who own, live on, and work on the property within the designation. It is these individuals who will have to comply with the federal laws that mandate special procedures and considerations concerning actions

---

[75] Docket No. 110-3 at 3-4.

[76] ARI PBCH0045510-11.

[77] ARI PBCH0045488; *accord* ARI PBCH0021814; ARI PBCH0025642; ARI PBCH0041501; ARI PBCH0041627; ARI PBCH0046244.

[78] *E.g.,* ARI PBCH0044661-62; ARI PBCH0041549-58; ARI PBCH0045502; ARI PBCH0045516.

within the critical habitat designation.[79] Public and private interests are at stake.

Contrary to the Government's and Intervenors arguments, the Service's errors cannot be cured by further explanation or justification from the record. The Service needs to redraft its decision and thus vacatur will serve the goals of the ESA by requiring the Service to designate only those areas essential to the polar bear.[80] The Final Rule's flaws go to the very heart of the ESA and will take time and resources to correct. In addition, the Service will have another opportunity to foster a positive relationship with Alaska Native villages and corporations, and the future designation will be improved through renewed input from Plaintiffs. Therefore, vacating and remanding the Final Rule is not manifestly unjust.

The Government and Intervenors further claim that vacatur is improper because the only mistake that applies to the entire designation is the minor and harmless procedural error concerning notifying the State of Alaska of the comments and suggestions not incorporated into the Final Rule.[81]

However, the Service's notification failure was not harmless. Violation of ESA procedure by failing to report to or involve the State of Alaska prevented

---

[79] *See Natural Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F.Supp.2d 1136, 1154 n. 36 (C.D. Cal. 2002) ("If these critical habitat designations add no meaningful species protections yet impose a cost on land owners and society, then there is no point in designating the critical habitats for these species beyond blind compliance with the statutory dictates.").

[80] *See* 16 U.S.C. § 1532(5)(A)(I).

[81] Docket No. 102 at 11; Docket No. 105 at 8.

necessary and affected state agencies from participating in the decision-making process. Because there is no way to know what the Service decision would have been had it followed ESA procedure, the Court cannot in good conscience conclude that the Service's procedure failure had no bearing on the ultimate decision.

G. Remand deadline is not necessary.

Intervenors opine, for the first time here, that a time line is necessary for the re-designation of the polar bear critical habitat. [82] The Court disagrees, and concludes that the Service should have as much time as is reasonably necessary to ensure that the polar bear critical habitat designation comports with every facet of both the ESA and APA; something that the Service previously lacked.[83] Moreover, there has been no showing of special urgency that would warrant a re-designation deadline. Timing for the re-designation will be left to the discretion of the Service. Given the protections currently in place and the need for careful and thorough consideration of the issues raised, the Court will not place a time constraint on the Service.

III. CONCLUSION

The issues before the Court, both substantive and procedural, are complex and technical. However, the Court wishes to be clear. There is no dispute regarding the need to protect the polar bear. And, importantly, there is no question that the polar bear will be protected under current laws regardless of the critical habitat designation. The concern expressed by

---

[82] Docket No. 105 at 10.

[83] *See*, *e.g.,* ARI PBCH000661; ARI PBCH0008824; ARI PBCH0008905; ARI PBCH0009486; ARI PBCH0032562.

Plaintiffs in this litigation is that the vast expanse of land designated as critical habitat by the Government is far greater than reasonably necessary to protect the polar bear. Plaintiffs contend that the land designated as critical habitat is excessive and is unsupported by the record. They contend that this designation is unduly burdensome on the people of the region, on the State of Alaska, and on other interested parties. These concerns are legitimate. While great effort was expended to study the relevant issues, the final decision to designate a land mass larger than many states does appear excessive and is not justified by the record before the Court. The Court has, therefore, vacated the designation as unsupported by the record. Moreover, the Court concludes that vacatur should apply to all units involved. A second look and serious consideration of input from the state of Alaska may impact all of the Units.

For the foregoing reasons, the Motions To Alter Or Amend Judgment at Docket Numbers 102 and 104 are hereby DENIED. Furthermore, because oral argument is not needed, the Government's request for oral argument at Docket Number 113 is hereby DENIED, and the scheduled argument is VACATED. Additionally, because the Court finds the Government's Motion at Docket Number 107 to be moot, it is hereby DENIED.

It is so ordered.

Dated this 15th day of May, 2013.

S/ RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE