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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CONSERVATION FORCE)
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Metairie, LA 70001)

INUVIALUIT GAME COUNCIL)
P.O. Box 2120)
Inuvik, NT X0E 0T0)

ARVIAT HUNTERS AND TRAPPERS)
ORGANIZATION)
P.O. Box 86)
Arviat, NU X0C 0E0)

RESOLUTE BAY HUNTERS AND)
TRAPPERS ORGANIZATION)
P.O. Box 61)
Resolute Bay, NU X0A 0V0)

LOUIE NIGIYOK d/b/a ARCTIC HILLS)
TOUR COMPANY)
P.O. Box 58)
Holman, NT X0E 0S0)

NANUK OUTFITTING, LTD.)
P.O. Box 98)
Resolute Bay, NU X0A 0V0)

CANADA NORTH OUTFITTING, INC.)
P.O. Box 340, 72 Mill Street)
Altamonte, ON K0A 1A0)

AMERI-CANA EXPEDITIONS, INC.)
6007 104th St. NW)
Edmonton, AB T6H 2K6)

Case: 1:09-cv-00245
Assigned To : Sullivan, Emmet G.
Assign. Date : 2/9/2009
Description: Admin. Agency Review

WEBB OUTFITTING NUNAVUT, LTD.)
P.O. Box 313)
Pritchard, BC V0E 2P0)
)
HENIK LAKE ADVENTURES, LTD.)
P.O. Box 420)
Arviat, NU X0C 0E0)
)
JOSEPH VERNI d/b/a NATURA SPORT)
667 Terrasse Garnier)
Montreal, QB H2C 1N1)
)
DALLAS SAFARI CLUB)
6390 LBJ Freeway #108)
Dallas, TX 75240)
)
HOUSTON SAFARI CLUB)
4615 Southwest Freeway #805)
Houston, TX 77027)
)
AFRICAN SAFARI CLUB OF)
FLORIDA, INC.)
6550 N. Federal Hwy, Ste. 330)
Ft. Lauderdale, FL 33308-1400)
)
MARK BEELER)
5585 Hwy. 167)
Hubertus, WI 53033)
)
TIMOTHY DECKER)
14989 Riverside Drive)
Apple Valley, CA 92307)
)
CHRIS HANKS)
1249 Fairway Drive)
Lawrenceburg, KY 40342)
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DON HERSHEY)
1449 Grassy Way)
Lancaster, PA 17601)
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5333 E. 21st St.)
Clovis, NM 88101)

LARRY STEINER)
P.O. Box 466)
Otego, NY 13825)

DARWIN J. VANDER ESCH)
P.O. Box 1403)
Riggins, ID 83549)

and)

TIM WALTERS)
701 South St.)
Cornell, WI 54732)

Plaintiffs,)

v.)

DIRK KEMPTHORNE, in his official)
capacity; H. DALE HALL, in his official)
capacity; U.S. FISH AND WILDLIFE)
SERVICE)
1849 C Street, NW)
Washington D.C. 20240)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. Introduction

1. This is a suit to set aside the “threatened” listing of the Canadian polar bear populations and the special regulations implementing the unlawful listing. *Final Rule 73 FR 28212; Special Rule 73 FR 76249.*
2. The plaintiffs are Conservation Force and other sportsmen’s wildlife conservation organizations on behalf of their own conservation interests and that of their members, various Canadian native conservation bodies, various Canadian hunting brokers and outfitters, and a representative number of U.S. citizens who sport-hunted polar bear but had not yet completed the lengthy trophy import permit application process before the effective date of the listing. Generally, the plaintiffs are the first and greatest conservationists of polar bear in the world. Some live with and manage the bear while the others give the bear its highest resource value.
3. The polar bear was listed over the formal objections of Canada, Nunavut, Inuvialuit and all of the plaintiffs. Moreover, Canada has chosen not to prematurely list the bear under its equivalent national endangered species law, the *Species at Risk Act*.
4. This is not an instance where the species was listed due to overharvest or where the here-and-now status of the species is of concern. This is a case where the revenue and economic benefits from the U.S. citizen sport hunting supports the conservation and management of the species, not competes with or threatens its existence. The financial incentives arising from the sport hunting by U.S. citizens is inextricably linked to the increase in the number of bear today.

5. Nothing threatens the polar bear more than its premature listing that has prematurely devalued the resource value of the bear and all but eliminated the means and incentives that have supported the increments of its conservation and population.
6. The thrust of the case is that the listing is irrational and illegal because it provides no benefit to the bear in Canada, yet prematurely obstructs Canada's bear conservation and management program, which is even more egregious since it is premature and is based upon untestable projections too far into the future to be reliable.
7. The defendants listed the Canadian population prematurely, i.e. before any actual population decline whatsoever in most of the Canadian range and decades before speculative projections of greater decline. The present range-wide decline is less than one-tenth of one percent, and plaintiffs strongly dispute that.
8. The USF&WS (hereafter FWS) recognized the benefits of the Canadian conservation infrastructure and funding arising from the U.S. citizen sport hunting, but wholly disregarded it in the decision-making process. *Id.* at 23236. Irrationally, it was not taken into consideration as a factor in making the listing determination.
9. The defendant FWS did not feel it could consider the conservation "efficacy of the listing" at all, much less "take into account" the harm the listing would have upon the Canadian management and conservation strategy.
10. In effect, the defendants have harmed the bear and penalized Canada's polar bear stewards and stakeholders.

II. Jurisdiction and Venue

11. Jurisdiction is based upon 28 U.S.C. 1540(g) (Endangered Species Act citizen suit provision), 5 U.S.C. 702, 706 (Administrative Procedure Act review of final agency action) and U.S. Constitution “due process” clause, 28 U.S.C. 1331 (federal question).

12. The required written 60-day notice of intent to sue was sent pursuant to 16 U.S.C. 1540(g).

13. Venue is proper in this court pursuant to 28 U.S.C. 1391 because this action is brought against officers of United States agencies in their official capacity and the FWS. The decision to list the polar bear and related decisions were made in the District of Columbia.

14. All related cases have been consolidated in this venue under U.S. case number Misc. Action No.08-764 (EGS), MDL Docket No.1993 entitled *In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*. The Court’s *Initial Practice Procedure Order* specifies that “all pleadings shall be filed on the Master Docket only.

15. Relief is based upon 28 U.S.C. 2201, 2202, 5 U.S.C. 701-706, 16 U.S.C. 1540(g) and the “due process” clause of the U.S. Constitution.

III. Parties

A. Plaintiffs

16. Conservation Force

Conservation Force files in its own capacity and as a representative of its many constituent U.S. polar bear hunters and its supporting conservation organizations and

Canadian conservation partners. It filed multiple substantive, comprehensive comments opposing the listing in issue which are incorporated herein by reference.

Conservation Force is a non-profit 501(c)(3) foundation formed for the purpose of wildlife conservation, related education and wildlife research. It is primarily a wildlife conservation organization that was formed to better direct hunting to be an even greater force for conservation than it has been. Its name stands for the fact that the sustainable use of wildlife, particularly in the form of recreational hunting, has been the foremost force for wildlife and habitat conservation in North America for over a century. No one contributes more than sportsmen and women for the conservation of wildlife and habitat, nor has anyone contributed more to the conservation of the polar bear that today is at or near record high numbers in large part due to the effects of U.S. hunters in Canada.

Conservation Force has wildlife conservation projects around the world to conserve, manage and protect game species including the polar bear. Its officers and leaders have been participants in the ESA and CITES process since the inception of the ESA and CITES. Most of its supporting organizations are committed to polar bear conservation and the proper implementation of the ESA and/or CITES regarding those polar bear, many of which organizations have invested heavily in polar bear conservation, but will no longer have the means of doing so because of the premature listing.

Conservation Force is committed to and is directly participating in the conservation of polar bear. Its officers pioneered the U.S. importation of polar bear hunting trophies which has served as one of the principle incentives and sources of funding for polar bear management and conservation incentive in the Northwest Territories and Nunavut of Canada. Its efforts have increased the value of the polar bear from \$400.00 to \$1,200.00

for its sale as a pelt to \$40,000.00 to \$50,000.00 as a trophy to U.S. hunters. The increase in value to the Inuit communities had led to co-management agreements and better conservation terms in co-management agreements. It has reduced the harvest of females and cubs. The years of work to develop U.S. hunting as a force for the conservation of the bear has been reversed by the listing. The listing has destroyed the conservation programs and the revenue for them. There is little remaining incentive for the native people to be selective in harvest, to perfect co-management agreements, or revenue for conservation and management.

17. Inuvialuit Game Council

The Inuvialuit Game Council is an incorporated society that, under the *Inuvialuit Final Agreement* (16C), represents the collective Inuvialuit interest in all matters pertaining to the management of wildlife and wildlife habitat in the Inuvialuit Settlement Region (ISR). That includes the polar bear co-management agreements and harvest for the entire Western Canadian Arctic. This responsibility gives the IGC authority for matters related to harvest rights, renewable resource management, and conservation. Their legal duties include advising government agencies on renewable resource policy, legislation, regulation, and on any proposed Canadian position for international purposes that affects wildlife in the ISR. The IGC also allocates Inuvialuit quotas among the ISR communities and appoints members for any co-management body dealing with Inuvialuit fish and wildlife harvesting and environment. The Council and those they represent are the foremost and most active stewards of the polar bear, polar bear prey, and polar bear habitat in the Canadian western Arctic.

The IGC represents the communities of Aklavik, Ulukhaktok (Holman), Inuvik, Paulatuk, Tuktoyaktuk and Sachs Harbour. It appears on behalf of itself and in its representative capacity. It has implemented an Inuvialuit-Inupiat Polar Bear Management Agreement for harvest of polar bear in the Southern Beaufort Sea. *Id.* at 28242, 28282. The Inuvialuit-Inupiat Polar Bear Management Agreement has been in effect for over 20 years and received a 1989 Regional Director's Commendation Award from the Defendant, FWS. The Inuvialuit Game Council and the Wildlife Management Advisory Council (NWT), one of the co-management boards established under the Inuvialuit Final Agreement, also filed opposition to the FWS listing.

The FWS undermined the IGC management authority by listing the polar bear. Their ability to implement the polar bear management conservation plans in the region is irreparably damaged by the listing that has devalued that resource, deprived them of the badly needed revenue for its conservation and management, and the means and incentive to maintain their stewardship level. The listing has devalued the polar bear resource, eliminated the U.S. hunting market, and reduced the conservation and management revenue and incentive for conservation of the bear. The bear has been listed over their objections. The bear will still be taken per the annual quota by native people, but not by U.S. clients that paid \$30,000.00 to \$50,000.00 per bear and supported local polar bear conservation efforts. Due to the listing, the bear harvest is the same in number, but the harvest has shifted back to native people and far fewer foreign hunters from Europe who wish to pay less. Most hunt clients were U.S. hunters. Those hunters have cancelled their hunts for 2009 and 2010 and are no longer booking. The premature listing has

deprived this plaintiff and those it represents of the single highest value asset and largest source of revenue. It has harmed, not benefited the bear.

18. Arviat Hunters and Trappers Organization

The Arviat Hunters and Trappers Organization is a community-based organization in Nunavut that represents the hunters and trappers in the Arviat area of Nunavut, Canada. They are the foremost stakeholders in the conservation and management of the polar bear in that polar bear population area. The community's economy is perpetuated by American polar bear sport hunters. The listing jeopardizes the organization's future. The tourist hunting of polar bear is their greatest source of income as U.S. hunters have paid the most for the hunts. The listing has made it particularly impossible to book U.S. citizen hunters who will no longer bear the costs because they can no longer take their trophies home. They opposed the premature listing of an abundant bear population that they can plainly see and believe is growing and healthy.

19. Resolute Bay Hunters and Trappers Association

Resolute Bay Hunters and Trappers Association is a community-based organization that represents the hunting and trapping interests of the 300 residents of Resolute Bay, Nunavut, Canada. They are the foremost stakeholders in the conservation and management of the polar bear in that polar bear population area. They have executed polar bear management agreements and by operation of law are the recognized co-managers of polar bear in their area of Nunavut. The community's economy is perpetuated by American polar bear sport hunters. The community, including children's

safety, is in danger due to the abundance of polar bears. The polar bear listing jeopardizes the Association's future due to the economic and safety impact on the community. The tourist hunting of polar bear was their greatest source of income and U.S. hunters have paid the most for the hunts and/or caused this resource to be more valuable. The listing has made it practically impossible to book U.S. sport hunters. The hunters for 2009 and 2010 have cancelled. Most foreign hunters were U.S. hunters and those hunts were the highest and best use of the bear. The listing has harmed the people of Resolute and the bear itself. The people have been deprived of their largest source of revenue by the listing as well as their greatest incentive to protect and conserve the bear. It is the responsibility of the Resolute Bay Hunters and Trappers Association to help manage and conserve the polar bear in its area and that obligation exists by law and the *Polar Bear Management Memorandum of Understanding (MOU)* between Ikajutit HTO, Iviq HTO, Resolute Bay HTA, Qikiqtaaluk Wildlife Board and the Department of Environment. Their role and rights over polar bear conservation, including harvest by tourists, is recognized and insured in the *Nunavut Settlement Agreement* and the Nunavut Wildlife Management Board. They opposed the listing to no avail. Their conservation and economic interests were said not to be a factor to be considered. The listing has deprived the Resolute people of their greatest means and incentive to follow best management practices. The listing is the greatest threat to the bear today and the revenue and incentives it has destroyed are irreplaceable and necessary for its conservation. Nothing is more threatening to the bear today than the listings.

20. Louie Nigiyok d/b/a Arctic Hills Tour Company

Louie Nigiyok is a master guide and owner of Arctic Hills Tour Company in Ulukhaktok (Holman), Northwest Territory, Canada. For the past 23 years Louie has been an operator and guide for polar bear hunts. His livelihood relies solely on U.S. hunters. The polar bear had been the single most valuable resource to him and his business. He is irreparably harmed by the polar bear listing as it has eliminated the U.S. hunting market and pricing of all his clients. He opposed the listing to no avail. The bear are abundant in his hunting area. They continue to be harvested, but now only for their meat and pelts. There is little or no incentive to spare females and cubs or to refrain from self-defense killing of the bear. There is far less incentive for elaborate co-management agreements and no revenue to monitor and manage the bear as a good steward.

21. Nanuk Outfitting, LTD.

Nanuk Outfitting, LTD. in Resolute Bay, Nunavut, Canada is owned and operated by the Kalluk Family. It is operated by Nathaniel and Martha Kalluk who outfit and guide big game sport hunting such as polar bear. Most of their clients have been U.S. hunters and the price for U.S. hunters has more than doubled over the past decade. Due to the listing of the polar bear, American hunters can no longer import their trophies, therefore they have stopped patronizing the Kalluk's business. Without U.S. polar bear hunters, the value of the polar bear is decreased and their business is jeopardized. Most of their clients were U.S. hunters and U.S. hunters pay the most for the hunts. Now the polar bear has reverted to native harvest rather than U.S. hunters and U.S. prices to hunt.

22. Canada North Outfitting, Inc.

Canada North Outfitting, Inc., owned and operated by Jerome and Halina Knap, has been conducting hunts for Arctic game since 1980. It helped pioneer the reform of the MMPA in 1994 that authorized the import of polar bear trophies into the U.S. Its main office is in Almonte, Ontario, Canada in conjunction with the Hunters & Trappers Organizations in over 10 communities in Nunavut. Its area of expertise is traditional polar bear hunts with sled dogs. American polar bear clients are the most numerous and lucrative patrons to Canada North so that conservation of the polar bear as a valued resource is essential to their business. Their polar bear hunts were sold out till 2010, which they had to refund due to the listing. Its president is a degreed biologist committed to polar bear conservation and management. The listing has eliminated American clientele and devalued the resource, irreparably harming their business and the polar bear itself. Most foreign polar bear hunters were U.S. hunters before the listing. Although the quota and bear harvest will not change, the bear will be taken by native hunters rather than clients of Canada North Outfitting, Inc. The listing has changed the bear from the greatest asset of the Inuit communities to a liability and dangerous nuisance.

23. Ameri-Cana Expeditions, Inc.

Ameri-Cana Expeditions, Inc. is a family owned and operated outfitting business located in Edmonton, Alberta, Canada. Since 1985, Pat Frederick and his two sons Nick and Dan have specialized in U.S. tourist hunting of polar bears in the Canadian Arctic. The Frederick family and their business have a direct interest in the conservation of the polar bear because it is their most economically valuable resource. They personally filed

comments opposing the listing in issue. They are irreparably harmed by the polar bear listing because revenue from American polar bear hunters is lost and the whole base of the Canadian conservation program that is dependent and related to that revenue has been eliminated. Although the polar bear are still being taken on quota, most of the clients have been U.S. hunters and U.S. hunters have been willing and able to pay the most for the hunts. The harvest has reverted to the native people rather than U.S. clients. The bear has lost its highest and best value as a resource, as has plaintiff.

24. Webb Outfitting Nunavut, LTD.

Webb Outfitting Nunavut, LTD. is a licensed and insured outfitting service that owns its own property on the Arctic Ocean in Kugluktuk, Canada. The Webb family, now in the fourth generation of guiding polar bear hunters, has experience in the Arctic going back to the 1950s. They work with Inuit (Eskimo) guides from the Coppermine coastal area. These guides combine the ancient skills of their hunting culture with good training and years of experience in hosting southern visitors in their northern environment. The Webb family, their business, and the Inuit guides they employ depend on U.S. polar bear hunters for economic and culture sustenance. The polar bear listing eliminated their most valued resource, irreparably harming their livelihood and compromising the bear as well. They had to suspend the booking of all polar bear hunters because of the listing and had to return the deposits for future hunts. They have had to discharge native employees because of the listing, one of which took his own life. The most valuable resource of the company and local people has been taken from them by the listing even though they did

nothing wrong. The bear will still be taken per the annual quota by natives, not U.S. clients.

25. Henik Lake Adventures, LTD.

Henik Lake Adventures, LTD. is family owned and operated by the St. John Family of Arviat, Nunavut, Canada. The family has 30 years of tourist polar bear hunting experience in the Northwest Territories and Nunavut. Their business and family is deprived of the significant resources provided by American polar bear hunters due to the polar bear listing. Ryan St. John is a polar bear outfitter and guide who has lived in Nunavut Territory his whole life. He conducts hunts in Western Hudson Bay where he has observed hundreds of healthy bears in great abundance in the most recent seasons. He personally filed a comment opposing the listing and pointing out the importance of the hunting to the conservation program, which is incorporated herein by reference. His comment documented the hundreds of bears he sees within the short span of two to three weeks during his hunts. Cabela's books their hunters through him and they normally fill out within two to three days. He can no longer obtain American hunters and had to refund those he had booked years into the future. The polar bear resource that he feels is his and his people's has been devalued by the listing. The bear are still taken per the annual quota but not as \$50,000.00 trophies. The harvest is shifting to more females and cubs and the bear have been devalued by the listing to the price of their untanned pelts or less.

26. Joseph Verni d/b/a Natura Sport

Joseph Verni is the owner of a Montreal based polar bear hunt booking agency, Natura Sport, who built his business and reputation largely around polar bear hunting expeditions in several Arctic communities including Clyde River, Pond Inlet, Coral Harbor and Arctic Bay. His business and those similarly situated are irreparably harmed by the polar bear listing. He can no longer book U.S. hunters and has had to refund the deposits of those that were booked. He cares deeply about the polar bear resource that has been greatly harmed by the listing. He has lost his single largest source of income and the bear he cares so deeply for has been devalued to the price of its pelt instead of a \$50,000.00 trophy. The listing has destroyed the primary means and incentive for the bear's conservation. Nothing could have hurt the bear more than its premature listing..

27. Dallas Safari Club

Dallas Safari Club is a nonprofit volunteer corporation in Dallas, Texas that works to preserve hunters' rights and to conserve wildlife, including polar bear. The mission of the Dallas Safari Club includes the conservation of wildlife and to promote and protect the rights and interests of hunters worldwide. DSC appears in behalf of itself and as the representative of its members that have taken polar bear and/or had planned to take a polar bear. DSC filed multiple substantive comments opposing the polar bear listing and is greatly concerned that the listing has severely harmed, not helped the bear as it expressed in detail in its comments that are incorporated herein by reference. Plaintiff also cares deeply as a sportsman and conservationist organization about the polar bear and the people of the Canadian Arctic North. They were deeply committed to protecting

the polar bear conservation/management system that has been the best in the world. The listing has destroyed their means and ability to contribute to the conservation of the bear.

28. Houston Safari Club

Houston Safari Club is a non-profit volunteer organization that preserves the sport of hunting, supports wildlife conservation and educates the public on hunting and conservation issues. Over the course of three and a half decades, HSC has grown into a large and influential group of hunters and outdoor enthusiasts, enjoying fun and fellowship and spending over 1.7 million dollars toward protecting hunters' rights and furthering the agenda of outdoors enthusiasts in Texas and throughout the country. It has partnered on polar bear conservation and its members have taken polar bear, some of which can no longer be imported, and others wish to take hunts if they can import polar bear. It appears in both its representative capacity and on its own standing. HSC filed multiple substantive comments opposing the polar bear listing and is greatly concerned that the premature listing has harmed, not helped the bear, which comments are incorporated herein by reference. Plaintiff also cares deeply as a sportsman and conservationist organization about the polar bear and the people of the Canadian Arctic North. It is deeply committed to protecting the polar bear conservation/management system that has been the best in the world. Nevertheless, the listing has made it all but impossible to continue the organization's participation, influence and contributions to polar bear conservation.

29. African Safari Club of Florida, Inc.

African Safari Club of Florida, Inc. is a nonprofit membership organization devoted to hunting by sportsmen, wildlife conservation and education of present and future hunters. Their mission is to insure the protection of animal resources throughout the world, including the polar bear. It has been a partner in polar bear conservation measures for decades. It has members that have taken bear they can't import due to the listing and others that wish to take them if and only if they can again be imported. It filed multiple substantive comments opposing the listing and is greatly concerned by the fact that the listing has harmed, not helped the bear, which are incorporated herein by reference. Plaintiff also cares deeply as a sportsman and conservationist organization about the polar bear and the people of the Canadian Arctic North. It is deeply committed to protecting the polar bear conservation/management system that has been the best in the world.

30. Mark Beeler

Mark Beeler is a U.S. citizen from Hubertus, Wisconsin. He lawfully participated in a licensed, regulated polar bear hunting in April of 2008 in Resolute Bay. He is unable to import his trophy taken in an area pre-approved in Canada by the FWS for trophy import. The FWS mailed back his pending trophy import application after the listing. He expended \$45,100.00 on his hunt and would not have done so except for his expectation of getting his trophy. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in

the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

31. Timothy Decker

Timothy Decker is a U.S. citizen from Apple Valley, California. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 in Resolute Bay. He is irreparably harmed by listing Canadian polar bear because he is unable to import his trophy and would not have taken the expensive hunt (in excess of \$45,000.00) except for his expectation of importing the trophy. The area was pre-approved by the FWS for trophy import. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world.

32. Chris Hanks

Chris Hanks is a U.S. citizen from Lawrenceburg, Kentucky who supports the polar bear conservation activities of Conservation Force. He went polar bear hunting in April, 2008 at a cost exceeding \$45,000.00 and took a bear out of Resolute Bay. That area was pre-approved by the FWS for trophy importation. Due to the effect of the listing, he is unable to import the trophy that has cost him so much and means so very much to him. He has been deprived of his lawfully acquired property by Canadian bear's premature listing. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the

conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

33. Don Hershey

Don Hershey from Lancaster, Pennsylvania lawfully participated in a licensed, regulated polar bear hunt in April, 2008 at a cost exceeding \$30,000.00 in an area pre-approved for trophy import by the FWS. Due to the premature listing of the Canadian polar bear, he is unable to import the trophy that has cost him so much and means so very much to him. His pending trophy import application with the FWS was returned to him due to the listing of the bear. He is deprived of his lawfully acquired property by the premature listing of the bear. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

34. Steve Hornady

Steve Hornady is a U.S. citizen from Grand Island, Nebraska. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 in an area pre-approved by the FWS for trophy import. He is harmed by the premature listing of the polar bear because he is unable to import his trophy and he is greatly concerned about the polar bear conservation and management regime that is threatened by that listing. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting

people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

35. William Keene

William Keene is a U.S. citizen from St. Petersburg, Florida. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 in Lancaster Sound, an area in Canada pre-approved for import by the FWS at a cost exceeding \$45,000.00. The FWS returned his trophy import permit application to him immediately upon the listing. He is irreparably harmed by listing the polar bear because he is unable to import his trophy.

Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

36. Ron Kreider

Ron Kreider from Manheim, Pennsylvania lawfully participated in a licensed, regulated polar bear hunt in April, 2008 at a cost exceeding \$30,000.00. Due to the premature listing of the Canadian polar bear, he is unable to import the trophy that has cost him so much and means so very much to him. His pending trophy import application with the FWS was returned to him due to the listing of the bear. He is deprived of his lawfully acquired property by the premature listing of the bear. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the

Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

37. Allyn Ladd

Allyn Ladd is a U.S. citizen from Unalakleet, Alaska. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 in Resolute Bay, an area in Canada pre-approved by the FWS. His hunt cost more than \$40,000.00. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy. When the bear was listed, the FWS mailed back his pending import permit application. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

38. Ethel Leedy

Ethel Leedy is an 80 year-old grandmother from Delta Junction, Alaska. She lawfully participated in a licensed, regulated polar bear hunt on Mother's Day of 2008 at a cost exceeding \$50,000.00. She booked her hunt a year in advance and took the bear in Resolute Bay, Canada, which is pre-approved by the FWS. The FWS returned her the trophy import application upon listing the bear. She is irreparably harmed by the premature listing of the polar bear because she is unable to import her trophy. Plaintiff

also cares deeply as a sportswoman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. She is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

39. Everett Madson

Everett Madson is a U.S. citizen from Omaha, Nebraska. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 costing more than \$43,000.00. He hunted in Resolute Bay, an area in Canada pre-approved by the FWS, and the bear were very abundant. He is irreparably harmed by the premature listing of that population of the polar bear because he is unable to import his trophy. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

40. Aaron Neilson

Aaron Neilson from Littleton, Colorado lawfully participated in a licensed, regulated polar bear hunt. He is irreparably harmed by the premature listing of the polar bear because he is unable to import his trophy. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been

the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

41. Major Roger Oerter

Major Roger Oerter is a U.S. citizen from Vail, Arizona. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 at a cost exceeding \$41,000.00. He booked his hunt years in advance and took the hunt in an area in Canada pre-approved by the FWS while home on leave from the Service in Iraq. He is irreparably harmed by the premature listing of the polar bear because he is unable to import his trophy. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

42. Bradley Pritz

Bradley Pritz is a U.S. citizen from York, Pennsylvania. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy that he expended \$44,000.00 to acquire from an area in Canada pre-approved by the FWS. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

43. Kevin Reid

Kevin Reid is a U.S. citizen from Uvalde, Texas. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 from Holsom, an area in Canada pre-approved by the FWS, at a cost exceeding \$68,000.00. He is irreparably harmed by the premature listing of the polar bear because he is unable to import his trophy. His pending trophy import permit application was returned to him by the FWS upon the listing of the bear. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

44. Robert Remillard

Robert Remillard is a U.S. citizen from Abington, Connecticut. He lawfully participated in a licensed, regulated Canadian polar bear hunt in the Spring of 2008. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

45. Jeff Sevor

Jeff Sevor is a U.S. citizen from Winter Park, Florida. He lawfully participated in a licensed, regulated polar bear hunt in Resolute Bay Canada, an area pre-approved by the FWS for importation of trophies, in the Spring of 2008. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy that he expended more than \$42,000.00 to acquire. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

46. Steve Smith

Steve Smith is a U.S. citizen from Montgomery, Texas. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy that he expended \$48,438.95 to acquire from an area in Canada pre-approved by the FWS. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

47. Ted Stallings

Ted Stallings is a U.S. citizen from Clovis, New Mexico. He lawfully participated in a licensed, regulated polar bear hunt in the Norwegian Bay area of Canada, which was pre-approved for trophy import, in the Spring of 2008. He saw lots of bear and took one of the oldest and largest polar bear ever taken. The FWS has returned his import permit application to him unapproved because of the listing. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy that he expended \$68,890.00 to acquire. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

48. Larry Steiner

Larry Steiner resides in Otego, New York. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008 in Lancaster Sound, an area in Canada pre-approved for trophy importation by the FWS at the time the bear was taken. He is irreparably harmed by prematurely listing the Canadian polar bear because he is unable to import his trophy. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

49. Darwin J. Vander Esch

Darwin J. Vander Esch is a U.S. citizen from Riggins, Idaho. He lawfully participated in a licensed, regulated polar bear hunt in an area pre-approved by FWS for importation of trophies, in the Spring of 2008. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy which he expended \$47,077.00 to acquire. His trophy import permit application has been returned to him by the FWS due to the listing. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

50. Tim Walters

Tim Walters is a U.S. citizen from Cornell, Wisconsin. He lawfully participated in a licensed, regulated polar bear hunt in the Spring of 2008. He is irreparably harmed by the premature listing of the Canadian polar bear because he is unable to import his trophy that he expended \$45,816.47 to acquire from an area in Canada pre-approved by the FWS. Plaintiff also cares deeply as a sportsman and conservationist about the polar bear and the hunting people of the Canadian Arctic North. He is deeply committed to protecting the conservation/management system that has been the best in the world, but it has been largely dependent upon U.S. hunters for revenue and conservation incentives.

B. Defendants

51. Dirk Kempthorne, United States Secretary of Interior

Secretary Kempthorne is the highest ranking official within the Department of Interior, hereafter "DOI", and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA and the MMPA with regard to the polar bear, and for compliance with all other federal laws applicable to the Department of the Interior. The Secretary signed and authorized the Final Rule. He also issued press releases and held press conferences that were misleading. In those, he suggested the bear would benefit from the listing and that trophy imports would continue. He is sued in his official capacity.

52. H. Dale Hall, Director of the Fish & Wildlife Service

H. Dale Hall is the Director of the U.S. Fish & Wildlife Service. He is responsible for the administration and implementation of the ESA and the MMPA, including the listing of the polar bear. He is sued in his official capacity.

53. United States Fish & Wildlife Service

The United States Fish & Wildlife Service, hereinafter FWS, is a federal agency within the Department of Interior authorized and required by law to protect and manage the fish, wildlife, and native plant resources of the United States, including enforcing the ESA. The Service has been delegated authority by the Secretary of Interior to implement the ESA for the polar bear, including responsibility for making decisions and promulgating regulations, including proposed and final listing and the processing of petitions for such

listings. It is the agency that listed the bear and has issued the related special rules prohibiting import of polar bear trophies.

IV. Legal Background

A. Endangered Species Act (ESA)

54. There are important distinctions between listing foreign and domestic species, both in considerations and in benefits.

55. The Endangered Species Act, 16 U.S.C. 1531-1544, provides for the listing of both domestic (USA) and foreign species. In the case of foreign species, the ESA does not provide the same level or kind of benefits it does for domestic species within U.S. jurisdiction, i.e. no critical habitat designation, (16 U.S.C. 1538, 1539 (2003)), no habitat conservation mechanisms, (16 U.S.C. 1534 (2003)), no cooperative mitigation programs, no recovery planning, (16 U.S.C. 1533(f) (2003)), no funding, (16 U.S.C. 1535(d) (2003)) or most Section 7 consultations and Section 6 grant-in-aid programs. "Most of the key conservation provisions of the ESA do not apply to foreign species." 68 FR 49512 at 49513.

56. The FWS has expressly recognized that importation of sport hunting trophies can have "potential conservation benefits...such as when such trade is part of the management plan of the country of origin. In such cases, listing under the Act...which prohibits such trade, may have potential conservation detriment for some species. Certainly the United States should endeavor, when possible, to recognize the conservation programs of foreign countries, when based on sound science." 63 FR 25502 May 8, 1998, *Final Listing Guidance*.

57. The ESA listing section mandates that the FWS has a nondiscretionary obligation to “take into account” the “efforts” and “conservation practices” of a foreign nation in making the listing determination, such as those of Nunavut and the Northwest Territories of Canada in this instance. 16 U.S.C. 1533(b)(1)(A)(2003).

58. The ESA mandates that the FWS “shall” not list a species until “after taking into account” the “efforts” and “other conservation practices” of the foreign range nations. *Id.* This is a mandatory threshold step in the “determination” process of listing foreign nations’ species that was skipped in this instance.

59. This “taking into account” is a separate and independent step from consideration of the “best available scientific and commercial data.” It “shall” be considered in the listing process before, not after, the other listing criteria. The listing process is complete only “after” the foreign nation’s conservation practices and programs are first considered.

60. Unlike domestic species, this “taking into account” provision includes foreign economic considerations which also are to be taken into account before reaching the five criteria for listing. (“The Service recognizes...that with regard to foreign game species, fees from trophy hunters can, in some cases, provide economic incentives for landowners to maintain healthy populations of game species.”) 63 FR at 25504 (May 8, 1998)

61. The “taking into account” requirement is intended to give full recognition to the importance of the “importation of lawfully taken sport trophies.” *Endangered Species Conservation Act of 1972*; Hearings before the Subcommittee on Fisheries and Wildlife Conservation and Environment, 93rd Congress, 1st Session, On S. 249, S. 3199, and S. 3818, August 4 and 10, 1972, Serial No. 92-81, p.69.

62. This consideration when listing foreign species is also carried in the *International Cooperation*, Section 8(b), *Encouragement of Foreign Programs* and is explicit in the Congressional history of the ESA. That section of the ESA states that the Secretary “shall encourage (1) foreign countries to provide for the conservation of...wildlife...including...threatened species...” and the Congressional history is clear that includes the revenue necessary to do so.

63. The ESA was “carefully drafted to encourage...foreign governments to develop healthy stocks of animals occurring naturally within their borders. If these animals are considered valuable as trophy animals...they should be regarded as a potential source of revenue...and they should be encouraged to develop to the maximum extent compatible with the ecosystem upon which they depend.” *Congressional Record*, Sept.18, 1993, pg. 30163. ESA Section 9(c)(2) recognizes the economic importance of tourist sport hunting, to foreign nation programs. 73 FR at 28242.

64. In this instance, the FWS recognized the economic benefits and conservation practices dependent upon U.S. citizen polar bear hunting, but erroneously concluded that they were not legal factors to be considered in making the “threatened” listing determination. 73 FR at 28236.

65. The ESA permits divided listings including the separation of “distinct population segments.” 16 U.S.C. 1532(16); 61 FR 4722. In this instance, the FWS listed the whole world population, including the Canadian population, which is the healthiest and best managed in the world.

66. The ESA permits divided listings in different portions of a species' range.

Memorandum from Solicitor of the U.S. Dept. of Interior (March 16, 2007) (M-37013).

The FWS did not spare Canada's bear in this instance.

67. The ESA provides that the final listing rule provide a summary of the data upon which the rule is based and must show the relationship of the data to the regulation. 16 U.S.C. 1533(b)(8).

68. The prohibition against the taking of listed species does not apply to foreign species as it does species populations within the U.S. See 16 U.S.C. 1538 (2003). In the case of foreign species lawfully taken in a sport hunt in a foreign nation, an ESA listing as "threatened" does not prohibit the import of the listed game animal if the species is protected by an Appendix II CITES listing, as is the polar bear, 16 U.S.C. 1538(c)(2) (2003). (But see below that it triggers a prohibition within the MMPA). This exemption was adopted in full recognition of the "economic" benefits and conservation incentives such hunting provided foreign nations arising from sport hunting by Americans that the FWS did not take into consideration in this instance.

69. The FWS has recognized that sport hunting of an "endangered" species (not just "threatened") can be a net benefit to a species through a foreign nation's conservation program, yet inflexibly did not consider it a factor in the listing determination. 68 FR 49512.

V. Marine Mammal Protection Act (MMPA)

70. The polar bear is a marine mammal under the provisions of the Marine Mammal Protection Act. 16 U.S.C. 1362(6)(B) (2007).

71. “Depleted” under the MMPA is defined as any marine mammal listed as “threatened or endangered” under the ESA. 16 U.S.C. 1362(1). The prohibition is triggered by the ESA listing even though the ESA would permit the continued import of hunting trophies.

72. Hunting trophies of “depleted” populations of polar bear cannot be imported even though the ESA exempts hunting trophies. 16 U.S.C. 1371(a)(3)(B) (2007).

73. Both the MMPA, 16 U.S.C. 1371(b), and the ESA exempt native Alaskan take of polar bear/marine mammals in recognition by Congress of the conservation benefits and “economic” incentives it provides to Alaska natives. 16 U.S.C. 1539(e) (2003). FWS and Marine Mammal Commission regulations do the same. The interim special regulation and final special regulation exempts Alaskan native polar bear harvest and polar bear parts imports because of and in full recognition of its integral economic and conservation benefits. 73 FR at 76267. The FWS stated it was prohibited from taking consideration of those same factors in the ESA listing determination of Canada’s bear.

VI. Administrative Procedures Act (APA)

74. Judicial review of final rules like that at issue is provided by the APA. 5 U.S.C. 702. The APA includes the standards that are applicable in proposing and adopting final rules. 5 U.S.C. 553, 551(4).

75. The court shall also “hold unlawful and set aside agency action, findings and conclusions found to be...without observance of procedure required by law.” 5 U.S.C. 706(2)(D).

76. Under the APA, the agency proposing a rule is required to respond to public comments made to the rulemaking. 5 U.S.C. 553(c).

77. The APA provides that a reviewing 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 the law.” 5 U.S.C. 706(2)(A). That includes irrational determinations.

78. The listing is so irrational and arbitrary that it violates the APA.

79. A federal agency must supply a reasoned analysis and justification for proposed regulatory changes that is based on the evidence before the agency. Failure to do so renders the action arbitrary and capricious, therefore invalid. 5 U.S.C. 706(2).

VII. Factual Background

A. Polar Bear Status and Management

80. Canada manages or shares management responsibility of 13 of the world’s 19 polar bear populations. Six of those are in the Archipelago region of Canada that is expected to be affected the least and last, yet they were listed decades before projected decline.

Eight, and perhaps nine of those polar bear populations are increasing or stable. The Archipelago ecoregion is projected to lose no more than 3 to 14 percent of its polar bear sea ice carrying capacity over the next 45 years. 73 FR at 28273. Five of Canada’s populations are considered to be in the *Seasonal Ecoregion* that is forecasted to lose only 7 to 10 percent of the carrying capacity of its sea ice habitat over the next 45 years.

There is no way to reliably determine 45 years in advance what effect that speculative ice loss will have on the bear.

81. Most of the world’s polar bear exist in Canada (approximately two-thirds), which is renowned and recognized for having the best and most comprehensive

conservation/management strategy in existence. Of course, it needs revenue to operate and incentives to motivate native people.

82. In its proposed rule the FWS found that “Canada continues to manage polar bears in an effective and sustainable manner.” 72 FR 1064, 1090.

83. The bear was not listed because of its present status or population decline. The “threatened” listing was based upon projected population decline in a substantial portion of its range over the next 45 years and beyond. Most Canadian populations are not even projected to experience a decline for decades to come.

84. The listing does not reduce the harvest quota or the number of polar bear taken in Canada, i.e. it only reduces its value as a resource to practically zero.

85. The overall total worldwide decline in polar bear population today is an insignificantly small part of the total population, approximately one-tenth of one percent (less than 258/25,000). Even that one reduction is disputed. That one population is now stable or increasing.

86. The overall world polar bear population today is stable or increasing. The FWS published that the population was 20,000-25,000 worldwide (73 FR at 28215) as compared to 8,000-10,000 in 1970 and as low as 6,000-8,000 in 1960. More specifically, there are an estimated 22,208 bear in 15 populations not including the Arctic and three more population areas with unknown numbers. Determination of Threatened Status, *Id.* at 28217.

87. There are “19 relatively discrete populations.” *Id.* at 28215. They are “sufficiently discrete to manage the populations independently,” (72 FR at 1068) and in fact are managed separately. “The boundaries...are thought to be ecologically meaningful...”

and the bear are normally “geographically loyal.” 73 FR at 28215. For 12 years the FWS has reviewed and approved for trophy import the populations separately, but it did not treat them separately in the ESA listing complained of.

88. Today the polar bear is one of those exceptional species that still occupies its full historic range and its overall population remains stable after increasing for decades. The decline in the two suspect populations is at the most 22 percent (258 bear) in the Western Hudson Bay over a 17 year period, which comparison is skewed because that was at its historical apex. *Id.* at 28257. That population is now stable or increasing. Another survey located many of those bear a short distance away, demonstrating that even that estimate of reduction is further exaggerated. The second population in Southern Beaufort Sea has not declined.

89. The FWS erroneously concluded that “the effects of research, tourism harassment, density dependence, or shifts in distribution were not demonstrated to impact” the Western Hudson Bay population. *Id.* at 28238. To the contrary, there was a great deal of uncontradicted information of impacts other than reduction in Summer ice and the population decrease and decline in body characteristics of the bear commenced during a record cold period decades ago.

90. In the Beaufort Sea there was “no statistically significant difference between the most recent and earlier population estimates.” *Id.* at 28238. The body characteristics of those bear, such as skull size and body weight, have decreased but those changes began during a record cold, not warming period, and have been known to continue for a full decade or more without a population decline as in Hudson Bay.

91. The FWS also noted changes in the Western Hudson Bay and Southern Beaufort Sea populations such as changes in body condition “indices that serve as ‘early warning’ that may signal imminent population declines.” *Id.* at 28239. Those changes have been observed before without the species being “threatened”. In fact, those changes have been observed when it has been too cold, rather than too hot. The FWS relied heavily upon a documented decline in Western Hudson Bay, which is near the southern limit of its range and is the most harassed bear population in the world. That population is closer to Miami than it is to the Arctic Circle.

92. A sport harvest reduction in the population would be expected to reduce the nutritional stress within the population by bringing it within the new carrying capacity and prey base of the habitat, particularly a harvest of large, old male bear taken by sport hunters.

93. The preferred prey of polar bear are ringed seals and the most recent population estimates of those in Canada range to about 4 million or more, making them “one of the most abundant seal species in the world.” *Id.* at 28261.

94. Some bear populations, such as that in Davis Strait, have long existed without summer ice, yet are robust and healthy. The population is growing.

95. The listing is based upon projected range-wide population declines due to reduction in Summer sea ice that are not of any certain magnitude and vary in different areas. *Id.* at 28275. They are uncertain from year to year, but far more uncertain in the far distant future.

96. The carrying capacity of sea ice is projected by the FWS to decline 19 to 35 percent over the next 45 years in the Divergent Ice Areas, but only 7 to 10 percent in the Seasonal

Ice Area, 3 to 4 percent in the Archipelago Area, and increase 4 to decrease 24 percent in the Convergent Ice Areas. *Id.* at 28273.

97. The determination that projected loss of sea ice habitat constitutes being “threatened” rests upon a projected *range-wide* decline of a sea ice habitat of only 10 to 22 over 45 years. It would be 22 to 32 percent in 75 years. *Id.*

98. Polar bear are physiologically adapted to environmental stochasticity and accustomed to surviving long periods without food.

B. General Factual Background

99. Canada and Nunavut filed comments opposing the listing and have found that the bear is not threatened under their own equivalent laws, *Species at Risk Act (SARA)*.

100. The FWS has repeatedly determined that the species is managed by Canada using sound scientific principles and specifically the “best available scientific information” (72 FR at 1082) and in such a manner that existing populations would be sustained.

101. “Generally,” the FWS has found “that Canada continues to manage polar bears in an effective and sustainable manner.”

102. The management authority for polar bear in Canada rests with the provinces, territories and wildlife management boards established under land claims.

103. The FWS has repeatedly recognized the interrelated economic, conservation and management importance of sport hunting in Canada and native harvest in Alaska. *Id.* at 1090, *see also* 62 FR 7302 and 64 FR 1529. The special rule adopted simultaneously with the “threatened” listing preserves the harvest and polar bear product sale rights of Native Alaskans and specifically recognizes the conservation value of that sustainable

use. Had it felt legally able to, it would have no doubt done the same for Canada where the sport hunting is recognized as “conservation hunting” by the Sustainable Use Specialist Group and the Polar Bear Specialist Group of the IUCN and other experts and authorities.

104. “The majority of sport hunters in Canada are (were) U.S. citizens and in 1994 an Amendment to the MMPA was made to allow those hunters to import their trophies into the United States if the bears had been taken in a legal manner from approved populations.” 72 FR at 1082, also 28277.

105. “The Canadian system has resulted in tight controls on the size of harvest and high quality harvest reporting. It allows reduction of quotas in response to population declines....” (*Id.* at 1082) for whatever reason. The participation of U.S. citizen hunters has lead to a shift of harvest from females that are important to reproduction to large adult males that are generally considered biological surplus and numerous other favorable management developments and practices

106. The Canadian harvest is based upon an annual quota that does not change with the U.S. listing. The same number of bear will be harvested but it will not generate the conservation revenue and incentives for the conservation of the bear.

107. The listing has reduced the value of a polar bear from up to \$50,000.00 U.S. as a trophy to practically zero for its pelt.

108. “Canada’s constitutional arrangement specifies that the Provinces and Territories have the authority to manage...polar bear...[T]he decision making process is shared with aboriginal groups as part of the settlement of land claims.” *Id.* at 1089. The sport hunting is part of that and some of the plaintiffs are those aboriginal groups.

109. The FWS projected that polar bear populations would be affected differently in the rate, timing and magnitude of impact (*Id.* at 1094), but chose to list them all as one, lumping the well-managed Canadian populations with others expressly without regard to the effect of the listing on Canada's conservation program.

110. The FWS also chose not to delay the listing (of Canada's population as well) until future developments because "[a] delay in the proceeding would result in significant expenditures of fiscal and other resources to collect additional data and conduct analyses. As such, we have (FWS) determined that proceeding with the listing of the polar bear (including all populations in Canada) at this time is a responsible use of our fiscal and other resources...." *Id.* at 1096.

111. It is difficult to objectively predict polar bear population trends into the future from data on climate warning done. For example, inferring demographic implications for polar bear from changes in extent of Summer sea ice is problematic because total or near total melting of sea ice that forces bears onshore in Summer is the normal situation faced by approximately 50-60% of the polar bear in Canada.

112. The USGS studies found no correlation between conditions of sea ice interannual variation and polar bear survival and body condition in Northern Beaufort Sea and Southern Hudson Bay, two Canadian populations that were listed.

113. Even if less available ice habitat were likely to reduce polar bear populations, exact relationships between habitat losses and population demographics remain unknown.

114. Most substantive comments opposed the listing of the Canadian populations of polar bear.

115. A large number of the FWS-chosen peer reviewers questioned the listing of the Canadian polar bear populations.
116. The outputs of the models used depended on inputs and assumptions and were not available to the commenting public.
117. Decreasing sea ice thickness has long been considered positive for polar bear.
118. Projected decline in sea ice thickness in parts of the Canadian High Arctic may provide better habitat for the bear.
119. Many Canadian populations are expected to have higher quality habitat for decades to come if the climate warms as projected, but only the negative side was considered.

VIII. Claims for Relief

Claim 1: Failure to Take Account of Canada's

Conservation Programs: Violation of ESA and APA

120. Plaintiffs re-allege and incorporate by reference all of the allegations set forth in paragraph 1 through 119.
121. Regardless of the projected decline of bear populations decades from today, the bear of Canada should not have been listed today had the FWS dutifully considered the impact upon and importance of foreign nations' programs dependant upon sport hunting revenue for decades to come.
122. The ESA mandates that the FWS "shall" not list a species until "after taking into account" the "efforts" and "other conservation practices" of the foreign nation when a foreign nation's species population is being considered for listing. That requirement is in the listing "determination" section and by Congressional history was intended

specifically for the FWS to consider the benefits of a foreign nation's sport hunting program.

123. The FWS skipped that threshold step and said it was not a factor to be considered.

124. The FWS did not just consider the rest of the listing criteria first, it did so to the exclusion of the foreign nation's program and economic consequences to the Canadian system of management and conservation incentives.

125. The FWS even refused to consider the "efficacy" of the listing in conserving the bear, much less to balance the benefits, if any, of the listing against the harm the listing would cause to Canada's conservation programs. 73 FR at 28252.

126. The FWS made no distinction in the listing process between Canada's bear and the two populations within the jurisdiction of the FWS. The U.S. shares one population with Russia and another with Canada and only has jurisdiction in those areas.

127. The FWS listed Canada's polar bear over the objection of Canada, Nunavut and plaintiffs without consideration of the harm it would do the bear and those that are the stewards of its conservation. It did not first enter into consultation with the foreign country or cooperate as the ESA intended.

128. The FWS did not evaluate or weigh the unintended negative conservation consequences of the listing. Erroneously, it said it could not as a matter of law.

129. Consequently, the FWS also did not consider the prematurity of the listing of Canada's bear or any particular management units within Canada that have robust polar bear populations and are expected to continue to have healthy populations for decades to come.

130. Delay in listing the Canadian population would not harm the bear but listing it prematurely has harmed it.

131. The failure to make these considerations before listing is a violation of the ESA, 16 U.S.C. 1533(b)(1)(A), and irrational under the APA.

132. The listing had the perverse effect of compromising the economic viability and consequently the effectiveness of the conservation hunting programs which have contributed to a coherent and effective conservation strategy in the Canadian North.

133. This and more entitles plaintiffs to the relief requested below.

Claim 2: The Listing of the Canadian Bear was Unconstitutional

134. Plaintiffs re-allege and incorporate by reference all of the allegations set forth in paragraph 1 through 133.

135. The irrational listing of Canada's bear without consideration of the "efficacy" of that listing when FWS knows that the listing will have a negative impact on Canada's conservation and management of the bear violates substantive "due process".

136. The premature listing of the Canadian bear irrationally and prematurely deprives plaintiffs of their protected property rights.

137. Neither the taking of plaintiff's property interests decades before necessary nor listing when the listing harms the species passes Constitutional muster.

138. The listing of all of Canada's polar bear populations is made more egregious by the degree of unreliability of the speculation relied upon and its prematurity.

139. If the listing is legal under the ESA, the ESA Determination section is unconstitutional.

140. The lump listing of all populations, including all Canadian populations primarily because it is convenient and fiscally efficient to do so at one time, as the FWS stated, is contrary to “due process”.

141. The declaratory and injunctive prayer for relief below would correct this illegality and the injuries to plaintiffs.

142. This and more entitles plaintiffs to the relief requested below.

**Claim 3: Violation of ESA for Not Treating Canada’s Populations as Portions of
Range not Threatened and/or as Distinct Population Segments**

143. Plaintiffs re-allege and incorporate by reference all of the allegations set forth in paragraph 1 through 142, particularly those most related to Canada.

144. The listing should have been on a smaller scale.

145. The ESA permits divided listings in different portions of a species’ range and gives the FWS broad discretion to do so, but it did not, despite the opposition to the listing and the potential harm to Canada’s system.

146. Although many of Canada’s polar bear populations were not projected to be at risk of becoming “endangered” for decades, they were prematurely lumped together and listed as “threatened” with the world population.

147. A significant portion of Canada’s habitat will become better polar bear habitat under all the projections of global warming.

148. Some Canadian populations will be the last to be threatened or endangered in this century, if at all. (Example: “populations in the Canadian archipelago...areas of ‘convergent sea ice’ will be affected later and to a lesser extent.”) 28248.

149. 11 of the 19 world populations were not even included in the USGS projections into the future.

150. The APA requires a summary of the data and the analysis, but in this case the FWS analyzed and explained in its Final Rule that a couple of populations were not being listed as “endangered,” but wholly failed to explain why the other Canadian populations were not being treated as distinct populations or otherwise not being listed.

151. There are 19 “relatively discrete populations, scientifically managed independently” with boundaries that are “ecologically meaningful” according to the FWS, but it made no attempt to delay the listing of any because it “would result in significant expenditures...”
72 FR 1096.

152. As an example, FWS listed the Davis Strait population of Canada, which FWS found to have a stable or increasing population and has never had Summer ice that the loss of is said to be the threat. The same is true of the Southern Hudson Bay and Baffin Bay populations. FWS incorrectly listed the six Canadian populations in the Archipelago geographic belt despite projecting them to have a miniscule loss of sea ice habitat in the next 45 years.

153. Had Canada’s program and the respective condition of its bear and future ice habitat been considered, the bear in Canada should not have been listed at this time.

154. The listing of those populations violates the ESA and the reasoning violates the APA. 16 USC 1533(b)(8) and 5 USC 706(2). It also violates the FWS’s own regulations. 61 FR 4722; *Solicitor Memorandum M-37013*.

155. The FWS did not determine what “substantial portion of its range” the bear is threatened in, but it is not Canada.

156. Listing in only a portion of the range may be all that is necessary and the FWS has the authority to protect a species in only a portion of its range as a distinct population segment of the species. It did not do that in Canada or any of its geographical, political or management parts.

157. The FWS has approved the import of polar bear trophies on a subpopulation management unit basis since 1996, but failed without adequate explanation to treat the units in Canada separately in the listing.

158. Canada's subpopulations are managed and modeled as unique demographic units by Canadian authorities and the IUCN Polar Bear Specialist Group, but were lumped by FWS as one for listing.

159. One example is the Northern Beaufort Sea in Canada which is a separate subpopulation than the Southern Beaufort Sea. Its population is stable, has a long history of stability, and the management unit is not currently experiencing a loss of early Summer ice.

160. Another example is the Viscount Melville Sound management unit in Canada that has had a lower bear density compared to other regions because of large expanses of multi-year ice, i.e. too much ice for ringed seals. It would be expected to improve with warming. At this time the population is believed to be increasing and is likely to benefit from a warming climate.

161. The Norwegian Bay population has been low in density because of the preponderance of multi-year ice contributing to low densities of ringed seals. The bear are likely to benefit from a warming climate due to an increase in abundance of and accessibility of seals.

162. The Lancaster Sound unit subpopulation, where many of the bear were taken by the plaintiffs that were U.S. citizen hunters, has high productivity and thus high densities of ringed seals and polar bear. Its western third has a lower density because of multi-year ice (too much ice) but the bear move there when the usual Spring and Summer ice breakup occurs to the east.

163. The Gulf of Boothia management unit subpopulation has a high population with a relatively high recruitment and survival rate and is considered growing. It was in the process of being approved by FWS for trophy import at the time of the listing.

164. The ranging migratory nature of bear in Canada alone was reason not to list those bear had the FWS shown deference to Canada's conservation program.

165. This and more entitles plaintiffs to the relief requested below.

**Claim 4: The FWS Applied the Wrong "Foreseeable" Period,
"Available" Data and "Likely" Tests**

166. Plaintiffs re-allege and incorporate by reference all of the allegations set forth in paragraph 1 through 165.

167. The listing of the Canadian populations was not based upon the "foreseeable" future under the ESA and the listing of the Canadian populations was not analyzed and explained sufficiently to satisfy the ESA or APA.

168. The projections of loss of habitat and prey were neither "likely" or within a reliably "foreseeable future", so the bear are not threatened with becoming in danger of extinction.

169. Because of the nature of the threat it cannot be foreseen to the extent of being “likely.” Both the length of time and the number of variables are too great.
170. The state of “available” information governs what period is “foreseeable”, not an arbitrary period of time.
171. The best projections are not necessarily “likely” under the ESA or sound in reason.
172. The selection of three biological life spans, 45 years, is beyond a period that can be reliably projected with sufficient confidence to be “likely” and certainly is not “available” data as intended by the ESA.
173. The FWS arbitrarily chose a period of foreseeability that is beyond the period that can be foreseen, much less can be tested by scientific method.
174. Foreseeability is not a measure of time, it is a measure of reliability and proofing.
175. The USGS reports to support the listing were based upon 50 or more year projections, not 45.
176. The FWS arbitrarily adopted a 45-year period used by one small specialist group of IUCN that were bear biologists, not meteorologists or statisticians. That group used a formula that was not species-specific and primarily intended for past reductions of habitat or population numbers, not future weather or ice projections.
177. Future projections of half a century regarding arctic wind (intensity, velocity, direction, variability, etc.), sea currents (wave height, direction, rate of flow, etc.) arctic temperatures, arctic cloud cover, summer ice coverage and location, weather fronts, seals, solar cycles, bear adaptation and much more are beyond the state of the art/foreseeable future.

178. The timing, magnitude and continuity of arctic ice or a quantified impact on bear cannot reliably be projected 45 years well enough to be predictable or foreseen.

179. Never has such a projection into the future been based upon so little here-and-now, or so much contradictory and variable data. It is science fiction or exercise, not information.

180. The ESA requires a determination that the species is *likely* to become endangered in the foreseeable future, not merely a prospect. *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139 at 1152 (Or., 1998).

181. The history of the ESA suggests that listing a species based upon long-range projections (foreseeable future) was intended for those limited situations where *preventive measures* could or would change that course. (to “regulated these animals before the danger becomes imminent while long-range action is begun.” S. Rep. No.307, 93d Cong. 1st Sess. 3 (1973). In this instance that is not applicable because of the nature of the threat, but the listing itself is the threat to Canada’s system and the bear supported by that system.

182. Even the 15 year life span and three generations totaling 45 years was arbitrary and capricious. Three generations should have been 36 years as per the Canadian authorities.

183. It is not really possible to quantitatively know the likelihood of polar bear decline in the future. The further into the future, the more unlikely and unreliable the projections.

184. The greater the period of time the less foreseeable the condition of ice habitat (favorable and unfavorable) and the less quantifiable the biological response of the bear. Had the FWS chosen 36 years (3 x 12) as the Canadian authorities have, instead of 45, it would not have listed the bear.

185. The listing is predicated on the unpredictable. It can't be truthed.

186. The listing is based upon a linear dependence of the bear upon summer sea ice which is incorrect and known not to be true. In fact, "polar bears...have adopted their movement strategies to accommodate a broad range of sea ice characteristics."

187. This and more entitles plaintiffs to the relief prayed for below.

Claim 5: Not Based Upon the Best Available Scientific Information

188. Plaintiffs re-allege and incorporate by reference all of the allegations set forth in paragraph 1 through 187.

189. The listing was not based upon the best available scientific information.

190. It was not scientifically made because it was not subject to test through the scientific method. It is nothing more than opinion based upon forced hypothetical modeling not subject to testing under the scientific method.

191. The best "available" data does not mean invented data and forced projections. 16 U.S.C. 1533(b)(1)(A).

192. The listing was based upon the worst case scenario rather than the "likely" scenario, particularly the Canadian listing.

193. The broad, all-encompassing, unprecedented listing is contrary to the FWS's own policy that the information relied upon be "impartially evaluated," "reliable," and "credible." *Endangered and Threatened Wildlife and Plants* Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, July 1, 1994.

194. It was not made objectively because it was primarily made by a small, elite group of polar bear biologists without expertise in climatology or ice that had pre-decided it and were economically and career self-interested.

195. It was not made objectively because it was largely based upon nine forced and result-driven USGS reports that the Secretary irregularly commissioned as a “[s]trategy to [s]upport” and generate supporting projections rather than analyze “available” data. The FWS had to wholly reject the concluding report and ignored a great many critical findings in the others that are contrary to the listing.

196. The FWS represents the determination to list as being based upon the consensus position, which is not true. There is no consensus on the projections of ice melt, much less future polar bear population response. Also, the selective parts of the forced USGS reports relied upon are far worse than the intergovernmental projections they cite.

197. Contrary to the *Petition Management Guidance*, the FWS “listed a species that now appears to be secure on the basis of an uncertain future threat” instead of substantial “findings...rooted in the here-and-now of a species’ status.”

198. The listing was based upon undisclosed, invented and untestable models contrary to both the ESA and APA.

199. “Range contraction, even very substantial range contraction, does not itself require a species to be listed.” *Center for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M., 2005).

200. The simulations and projections did not include immigration or emigration among subpopulations, so the overall results are skewed to indicate more decline than is the case.

201. Should global warming cause the degradation in the quality of the habitat or construction of the range, the bear can be expected to immigrate to adapt within Canada and there is sufficient habitat to do that.

202. The negative effects of expected global warming on the polar bear cannot be reliably assessed even if the climate projections were reliable.

203. Models don't project impacts at a local level with any degree of certainty, thus Canada's bear were not listed on a sound basis.

204. The FWS admitted that it "is not possible to examine climate forecast uncertainty" yet it relied upon an average of those uncertain forecasts.

205. The FWS failed to reliably determine the degree of threat as distinguished from an unquantifiable negative impact.

206. Being "impacted" or "affected" is not the same as "threatened" with becoming "endangered." The FWS only made a determination that the bear would be "impacted" or "affected" worldwide over the next century, not the degree worldwide or in any particular locale. Reliable quantitative projections are not even possible.

207. The projected negative impact is not quantifiable and was not quantified.

208. This and more entitles plaintiffs to the relief requested below.

Claim 6: Failure to Provide Reasoned Analysis and Justification of the

Listing or Response to Comments: Violation of APA

209. Plaintiffs re-allege and incorporate by reference all of the allegations set forth in paragraph 1 through 208.

210. The FWS failed to respond to significant comments filed by plaintiffs in violation of APA, 5 U.S.C. 553(b),(c).

211. The FWS failed to adequately justify and support aspects of its determination and failed to adequately address and explain its position on numerous issues. 5 U.S.C. 706.

212. The FWS failed to respond to many substantive comments and/or only responded in a conclusory and truncated manner without support in the record. 5 U.S.C. 553.

213. The FWS failed to adequately address and explain why the forthcoming cooler solar cycle was not taken into consideration, nor is there support in the record for not taking that into consideration. The cooling that has begun and that is projected to worsen suggests the listing is even more premature.

214. The FWS failed to adequately determine and explain the quantifiable degree of risks rather than just impact.

215. The FWS failed to adequately explain why the often cited decline in the Western Hudson Bay polar bear population was not related to being too cold rather than too warm since it began during a frigid cold period and the area has been cooling for the past decade.

216. The FWS did not adequately explain its unsupported conclusion that the often cited Western Hudson Bay polar bear population decline was real and was due primarily to a warming trend, nor did FWS address the comments and charts that the particular area had been cooling, not warming.

217. The FWS did not adequately explain and the record does not justify the undue weight given the alleged decline of bear in the Western Hudson Bay.

218. The issue was repeatedly raised but defendants failed to adequately explain the fact that there is a negative correlation between the increase in carbon dioxide and global warming.

219. The FWS failed to adequately explain why it wholly disregarded the many predictions that the next solar cycle will be the weakest since the little ice age around 1750 and may presage a long-term decline in global temperature, particularly in light of its effect within 11 or more of the next 45 years.

220. The FWS wholly failed to address the cooling in Western Hudson Bay and the Arctic North that is a matter of record.

221. The FWS ignored the fact that the Western Hudson Bay harvest level has been reduced and the population was considered to be stable or increasing at the time of listing.

222. The FWS failed to adequately explain the total disregard of the solar and orbital variations that are the essential drivers and positive correlators of long-term climate change.

223. The FWS did not adequately explain why it was not treating Canada's bear distinctly or separately.

224. The FWS failed to determine or adequately explain the degree of risk that warranted the listing as distinguished from a mere determination of negative impact.

225. The FWS failed to adequately explain why it lumped and listed all populations as one.

226. The FWS failed to determine or explain the degree of likelihood of the projected but unquantifiable population-by-population declines.

227. The FWS failed to explain why it used a lesser standard of “likely” climate change than the sources cited as the consensus position.

228. The FWS did not rationally explain why it used 45-year projections when near time periods are admittedly more reliable projections.

229. The FWS did not make its models available to the public for expert comment, only the biased conclusions from the projections.

230. The FWS failed to explain how and why the projections it relied upon are likely, reliable and foreseeable when the reports it relied upon state the climate change is “inherently unpredictable” and “have high scientific uncertainties.”

231. The FWS failed to explain why it did not follow its own directions in the many instances it did not as specified in plaintiff’s notice of intent to sue.

232. The FWS wholly failed to explain why “we are [it is] confident the future of the polar bear can be secured.” 73 FR at 28302, particularly in light of the listing itself destroying the conservation paradigm of the largest and best managed polar bear populations in the world in Canada.

233. The FWS did not address the recognized migratory nature and adaptability of the bear that in and of itself prevents the bear from being threatened within Canada.

234. The FWS wholly failed to adequately explain how rationally a relatively small decrease in percentage of population or habitat over the next 45 years or the adequacy of the remaining habitat justified listing as threatened.

235. The FWS (USGS Reports) concluded that “if conditions over the past 2001-2005 remained constant they would lead to a nearly stationary population” in Southern

Beaufort Sea, and found no correlation between demographic changes and ice melt, yet that area is irrationally cited as one of the primary reasons for listing.

236. The FWS did not explain how climate, much less sea ice and bear, are predictable beyond 10 years.

237. The FWS did not explain why the bear did not become extinct from 1920-1940 when it was warmer than it is now for 20 years.

238. This and more entitles plaintiffs to the relief prayed for below.

IX. Prayer for Relief

WHEREFORE, the plaintiffs respectfully request that this Court:

- A. Issue a declaratory judgment that the defendants violated the ESA when they listed the polar bear populations of Canada;
- B. Issue a declaratory judgment that the listing clause of the ESA or the listing of the Canadian bear is unconstitutionally irrational and contrary to “due process”;
- C. Issue a declaratory judgment that the defendants violated the APA in making the listing determination and issuing the final rule listing the Canadian populations of the polar bear;
- D. Enjoin defendants from relying upon or enforcing the threatened/depleted status determination made under the ESA and MMPA;
- E. Issue an order declaring the listing of the Canadian populations of polar bear invalid and suspending the dependent special rule prohibiting the importation of Canadian polar bear trophies, particularly those taken before the effective date of the listing in pre-approved areas;

- F. Issue a mandatory injunction order remanding the final rule to defendants commanding them to properly review and re-determine the Canadian population listing and to suspend restriction on trophy imports of bear on quota in FWS previously approved areas during the interval;
- G. Award the plaintiffs their costs, expenses and reasonable attorney's fees; and
- H. Award such other relief as this Court may deem just and proper.

Dated February 9, 2009

Respectfully submitted,



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