ARTICLES

RECONCILING POLAR BEAR PROTECTION UNDER UNITED STATES LAWS AND THE INTERNATIONAL AGREEMENT FOR THE CONSERVATION OF POLAR BEARS

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I. INTRODUCTION†

During deliberations on the Marine Mammal Protection Act of 1972[1] (MMPA), Congress considered the polar bear (*Ursus maritimus*) to be "one of the marine mammals . . . closest to endangerment."[2] The Senate noted that polar bear populations are shared among five circumpolar nations—Canada, Greenland, Norway, the former Union of Soviet Socialist Republics, and the United States—and that the species was exhibiting signs of decline as a result of hunting.[3] The Senate also reviewed the polar bear management programs of each of the five nations and observed that "[t]hese nations have considered drafting an international treaty . . . . However, as of June 1972, no action has been taken on this matter."[4] Con-

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1 The Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1994).

2 S. REP. No. 863, 92d Cong., 2d Sess. 4 (1972).

3 *Id.*

4 *Id.*

cern over the absence of a coordinated international program to protect polar bears prompted the House to declare that "the additional protection which would be provided by [the MMPA] has become almost essential."[5]

In addition to considering the status of, and threats to, individual marine mammal species such as the polar bear, Congress also expressed concern over environmental problems affecting all living marine resources. As the House Merchant Marine and Fisheries Committee declared, the most pervasive "threat to marine mammals is the degradation of the environment upon which they depend."[6] Among the causes of the ecosystem decline noted by Congress in 1971 were "ocean dumping, pesticide and heavy metal contamination, and the increased take of fish stocks upon which these animals depend."[7]

To respond to this concern, the House Merchant Marine and Fisheries Committee sought a strong injunction against the Department of State, which had not yet visibly taken an interest in more adequate protection for marine mammals, to begin to develop new arrangements for the protection of these animals and of ocean ecosystems that are significant to their welfare.[8] The Senate agreed, observing that "unilateral action by the United States . . . could be fruitless unless other nations involved in the taking of marine mammals work with the United States to preserve and protect these creatures."[9] Accordingly, Congress included in the Act "strong directives on international cooperation and coordination."[10]

These themes are reflected in several aspects of the MMPA. To address the problems caused by hunting, Congress established a moratorium on taking "all marine mammals."[11] Polar bears and other marine mammals thereby were put off-limits to hunting and other forms of taking with several limited exceptions—for example, hunting by Alaska Natives for subsistence and handicraft purposes.[12] This moratorium can be waived only when findings are made that the purposes of the MMPA will be satisfied, and other determinations are made.[13]

Ecosystem protection is reflected in the Congressional findings of policy in the MMPA. Section 2(2) directs that marine mammals should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.[14] Congress also stated that, in particular, efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal.[15] The

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5 H.R. REP. No. 707, 92d Cong., 1st Sess. 17 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4150.

6 *Id.* at 14.

7 *Id.*

8 *Id.* at 18.

9 S. REP. No. 863, *supra* note 2, at 10.

10 *Id.*

11 16 U.S.C. § 1361.

12 *Id.* § 1371.

13 *Id.* § 1371(a)(3).

14 *Id.* § 1361(2).

15 *Id.*

Act has as its primary objective managing marine mammals to maintain the health and stability of the marine ecosystem.[16] There are, however, no command and control provisions in the MMPA that expressly advance these objectives.

The policy directive to promote international cooperation is set forth in section 2(4), which provides that negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals.[17] Section 108 establishes the MMPA's international program, including the mandates to initiate negotiations to develop bilateral and multilateral treaties for the protection and conservation of marine mammals[18] and to encourage "other agreements for the protection of specific ocean and land regions which are of special significance to the health and stability of marine mammals."[19]

Discussions about the need for such an agreement were already underway when Congress began considering the MMPA. In fact, to protect polar bears, conservation had been addressed in scientific meetings among the five nations with jurisdiction over polar bear populations (with Denmark acting on behalf of Greenland) in 1965, 1968, 1970, and 1972. The International Union for the Conservation of Nature and Natural Resources (IUCN) had distributed a draft agreement by September 1972.[20] In 1973, the year after enactment of the MMPA, the Agreement on the Conservation of Polar Bears (Polar Bear Agreement) was concluded.[21]

The Polar Bear Agreement tracks the primary concerns reflected in the MMPA. It sets forth in Articles I and III a prohibition on taking, except for limited purposes.

Article II provides that the parties "shall take appropriate actions to protect ecosystems of which polar bears are a part, with special attention to habitat components such as denning and feeding sites and migration patterns."[22]

Finally, the Agreement lays the foundation for extensive international cooperation to advance polar bear protection and management. Article V prohibits trade in polar bears that are taken in violation of the Agreement. Article VII provides for cooperative research endeavors and the sharing of data and information. Article IX requires the parties to continue to consult with each other on polar bear management and research.

Although the MMPA and the Polar Bear Agreement generally track each other with regard to these basic objectives, there are several inconsistencies between them. Principal among these are: 1) the absence in the

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16 *Id.* § 1361(6).

17 *Id.* § 1361(4).

18 *Id.* § 1378(a)(1).

19 *Id.* § 1378(a)(4).

20 U.S. FISH & WILDLIFE SERVICE, ENVIRONMENTAL ASSESSMENT - RATIFICATION OF THE AGREEMENT ON THE CONSERVATION OF POLAR BEARS 1 (Apr. 1975) [hereinafter FWS EA].

21 Agreement on the Conservation of Polar Bears, Nov. 15, 1973, T.I.A.S. No. 8409, 27 U.S.T. 3918 (Nov. 15, 1973)[hereinafter Polar Bear Agreement].

22 *Id.* art. II.

MMPA of authority to the extent of that in the Agreement to protect polar bear habitat or the ecosystems of which they are a part; 2) the absence of a prohibition in the MMPA on the taking of polar bear cubs and female bears with cubs, as set forth in a non-binding Resolution appended to the Agreement; 3) the absence of a prohibition in the MMPA on hunting polar bears in denning areas; 4) the absence in the MMPA of a prohibition on using aircraft or large motorized vessels as an aid in taking polar bears;[23] and 5) the absence in the Agreement of a prohibition on harassment.

In addition to these inconsistencies, the Agreement has become outdated with respect to the principal threats to polar bears. When the Agreement was drafted, the primary concern was over the impact of polar bear hunting, especially in the offshore areas. Now, it is well understood that the greatest threats are habitat loss and adverse impacts on the ecosystems of polar bears. Both the Agreement and United States laws fall short of providing adequate tools to address these threats.

This article describes the current status of the legal authorities that are available to protect polar bears and the steps that could be taken to resolve the inconsistencies between the MMPA and the Agreement. Part II briefly summarizes the status of polar bear populations in the United States and the most significant threats to them and their habitat. Part III discusses the requirements of the Polar Bear Agreement. Part IV analyzes the relevant provisions of the MMPA and other United States laws. Part V describes ongoing negotiations between the United States and Russia and Native groups of each country addressing polar bear conservation issues. Part VI identifies the inconsistencies between the two authorities and discusses possible ways to resolve them. Finally, Part VII concludes with a recommendation to the Parties to the Agreement to revisit its polar bear protection provisions and bring them current with new knowledge about the species' needs.

II. Polar Bear Species Description and Conservation Issues

A. Species Description

1. Population Size and Distribution

Polar bears inhabit most ice-covered areas of the Arctic Ocean and adjacent coastal land areas.[24] They are commonly found along the perimeter of the polar basin, from about 120 to 180 miles offshore.[25]

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[23] Items 2 and 3 are not terms of the Agreement itself. They are provided for under a Resolution signed in 1973 concurrent with the Agreement. Items 2-4 are principally a concern for native take. There presently is no sport hunt for polar bears in the United States. Such authorization could be obtained only pursuant to a waiver of the MMPA moratorium under section 101(a)(3). Any such waiver would have to be based upon the "existing international treaty and agreement obligations of the United States." 16 U.S.C. § 1371(b)(2)(1994). Thus, in all likelihood, such a waiver would include these prohibitions.

[24] Steven Amstrup & Douglas DeMaster, *Polar Bear, in* Marine Mammal Commission, Selected Marine Mammals of Alaska 41 (1988). [hereinafter *Polar Bear Species Account*].

[25] U.S. Fish and Wildlife Service, Habitat Conservation Strategy for Polar Bears in Alaska 4 (1995) [hereinafter FWS Habitat Plan].

There are believed to be six relatively discrete polar bear populations throughout the circumpolar region. Parts of two of these are found in Alaska: the Wrangel Island and western Alaska population (Chukchi Sea population) and the northern Alaska and northwestern Canada population (Beaufort Sea population).[26]

It is estimated that there are ten to twenty thousand bears in all six populations,[27] with three to five thousand animals in Alaska.[28] There is no reliable estimate of the number of bears in the Chukchi Sea population, although it is believed that the stock has increased over the last twenty years and continues to increase or has stabilized at a "relatively high level." The Beaufort Sea population includes nearly 2,000 bears, with about 500 females of reproductive age, and appears to be growing.[29]

2. Prey Species

The principal prey species of the polar bear is the ringed seal. To a lesser extent, bears prey on bearded seals and spotted seals.[30] Bears hunt seals by stalking basking animals, lying in wait at breathing holes or along leads in the ice, and breaking into seal lairs. Other prey species that polar bears sometimes consume include carrion (whale, walrus, and seal carcasses), hooded seals, walruses, beluga whales, and occasionally other bears, small mammals, birds, eggs, and plants.[31]

Polar bears have very high energy demands, which apparently can best be met by consuming the energy-rich blubber of seals.[32] Fat deposits augment the insulating capacity of the bear's fur, particularly in water, and provide an energy reserve which allows survival when food is scarce. Polar bear predation on seals tends to focus on subadult animals that concentrate in areas of unstable offshore ice.[33]

3. Reproduction

Polar bears mate on sea ice from late March through May. Denning by pregnant females begins in late October and early November in maternity dens they excavate in the snow. To construct dens, bears need deep, compacted snow drifts.[34] Cubs are born in December and January, with litter sizes of one or two animals.[35] Bears emerge from their dens in late March and early April and stay near den sites for up to one month before beginning their movements in search of food. Cubs stay with their

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26 *Id.*

27 Marine Mammals: Incidental Take During Specified Activities, 56 Fed. Reg. 27,446 (1991).

28 *Polar Bear Species Account*, *supra* note 24, at 43.

29 FWS HABITAT PLAN, *supra* note 25, at 6.

30 *Id.* at 16; *see also* U.S. FISH AND WILDLIFE SERVICE, CONSERVATION PLAN FOR THE POLAR BEAR IN ALASKA 17 (Aug. 1994) [hereinafter FWS CONSERVATION PLAN].

31 *Id.*

32 *Id.*

33 *Id.*

34 *Polar Bear Species Account*, *supra* note 24, at 45.

35 FWS HABITAT PLAN, *supra* note 25, at 4, 6.

mothers about 2.5 years.[36] Polar bears have a relatively low reproductive rate. The average breeding interval for female bears is four years.[37]

4. Habitat

Polar bears in the Chukchi and Beaufort Sea populations make extensive movements that are strongly influenced by short term and seasonal ice changes.[38] During the summer, bears off the Alaskan coast are associated with drifting sea ice. In the fall, during ice formation, some pregnant females come ashore to den and ice allows other bears to come ashore for short periods for feeding purposes. Pregnant females spend four to five months in their dens and move with their cubs onto offshore areas again during the spring and early summer when the ice is breaking up.[39]

Little is known about polar bear habitat preferences for feeding purposes. It is known that polynyas[40] are particularly important because of the open water they provide and the prey species that congregate there. As noted above, polar bears are found extensively on the ice up to 120 miles offshore. This is an area of relatively active ice with substantial open water and areas of refreezing ice. The effect of human activities in these areas is unknown, but adverse impacts on the food web, ice, and water of this region are likely to be detrimental to polar bears.[41]

Studies conducted by the U.S. Fish and Wildlife Service (FWS) indicate a significant amount of denning on land.[42] Based on data gathered from radio-collared bears from the Beaufort Sea population, fifty-three percent of the denning sites were on drifting ice, four percent were on shorefast ice, and the remainder were on land.[43] Of the dens on land, forty-five percent were on the coastal plain of the Arctic National Wildlife Refuge.[44]

The protection offered by the maternity den is essential to polar bear cubs during their first four months of life. Female bears are very susceptible to disturbance during this period, and successful rearing requires a relatively undisturbed denning environment.[45] FWS studies indicate that denning has greater success on land (an average of 1.1 cubs per den) than on drifting sea ice (0.69 cubs per den). Possible explanations for the difference include the premature breakup of dens located on moving ice and

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36 *Id.* at 4.

37 *Id.* at 6.

38 *Id.* at 9.

39 INUVIALUIT GAME COUNCIL, NORTH SLOPE BOROUGH FISH AND GAME MANAGEMENT COMMITTEE, POLAR BEAR MANAGEMENT IN THE SOUTHERN BEAUFORT SEA 2 (1988) [hereinafter F&GMC/IGC AGREEMENT].

40 Polynyas are areas where ice consistently breaks up and creates open water or areas where ice is refrozen at intervals during the winter.

41 FWS HABITAT PLAN, *supra* note 25, at 20-21.

42 H.R. REP. No. 561, 102nd Cong., 1st Sess., pt. 1, at 193 (1992).

43 FWS HABITAT PLAN, *supra* note 25, at 31, Figure 6a.

44 *Id.* at 28.

45 *Polar Bear Species Account*, *supra* note 24, at 45.

the drifting of ice into areas where seals are not found in sufficient abundance when the females and their cubs emerge from their dens.[46]

B. Conservation Issues

1. Hunting

At the time of enactment of the MMPA and the signing of the Polar Bear Agreement, hunting was the major threat to polar bear populations.[47] During the early 1900's, polar bears were hunted by commercial seal and whale hunters, as well as some professional, commercial polar bear hunters.[48] In addition, Natives hunted polar bears for subsistence purposes.

a. U.S. Measures

Guided sport hunting in Alaska began in the 1940s.[49] Beginning in 1961, the State of Alaska began to regulate polar bear hunting. The state established a preference for Native harvest and imposed seasonal restrictions on the sport hunt. The killing of cubs and females with cubs was prohibited, and aircraft could not be used.[50] The State required that hides and skulls be presented to authorized officials for marking and examination.[51]

In 1972 the MMPA transferred all polar bear management authority from the State to the federal government through the FWS.[52] The MMPA also established a moratorium on taking (e.g., all sport hunting), but exempted Alaska Natives from the moratorium, provided their taking of marine mammals was nonwasteful and for subsistence or handicraft purposes.[53] No additional limitations could be imposed on Native take by the Secretary unless the population was determined to be depleted.[54]

Congress amended the MMPA in 1981 to authorize FWS to promulgate regulations requiring the marking, tagging, and reporting of animals

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[46] *Id.*

[47] As noted by naturalist Barry Lopez:

> In Alaska in the mid-sixties a combination of hunting by Native people and airborne sportsmen was accounting for a kill of about 300 bears a year. Greenlanders were killing about 200 a year, and more than 400 polar bears were being killed every year in Svalbard by commercial trappers and European sport hunters. The reported kill (smaller than the actual kill), then, was about 1300 bears a year, nearly 25 percent of the population. . .

BARRY LOPEZ, ARCTIC DREAMS: IMAGINATION AND DESIRE IN A NORTHERN LANDSCAPE 70 (1986).

[48] *Polar Bear Species Account*, *supra* note 24, at 48.

[49] *Id.*

[50] *Id.* at 47. During this period, the annual kill ranged from 148 to 405 animals. The average annual take was 260 animals. Seventy-five percent of the bears killed were male. The average take of females was 65/year. *Id.*

[51] *Id.* at 48.

[52] 16 U.S.C. § 1379. A procedure is available under section 109 for states to obtain a return of management authority for any marine mammal species. *Id.*

[53] *Id.* § 1371(b).

[54] *Id.*

taken under the Native exemption.[55] The purpose of that authority was to enable FWS to gather sufficient data on the taking of marine mammals by Alaska Natives to determine the effect of such taking is having on marine mammal populations.[56] It also was intended to track marine mammal by-products that enter commercial trade.[57] FWS promulgated these regulations in 1988.[58] Data produced under the FWS marking and tagging program for polar bears show the following Native take levels:[59]

YEAR	*TAKE LEVEL*
1988	132
1989	99
1990	76
1991	59
1992	65
1993	120
1994	80

Concerned over the take of cubs and females with cubs by Alaska Natives, the IUCN Polar Bear Specialist Group passed a resolution in 1985 calling for voluntary restrictions to protect these animals.[60] This resolution also called for the enactment of legal protections for cubs and females with cubs.[61]

b. Self-regulation by Alaska Natives

The first aspect of this resolution was partially realized when the Fish and Game Management Committee of the North Slope Borough in Alaska (F&GMC) and the Inuvialuit Game Council of Canada's Northwest Territories (IGC) entered into an agreement in January 1988 to govern the management of the Beaufort Sea polar bear population (F&GMC/IGC Agreement).[62] The F&GMC/IGC Agreement recognizes the MMPA and the Polar Bear Agreement and calls for achieving the conservation objectives of both authorities. The F&GMC/IGC Agreement notes that its management restrictions are consistent with the Polar Bear Agreement but, in

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[55] *Id.* § 1379(i).

[56] H.R. REP. No. 228, 97th Cong., 2d Sess. 29 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1458, 1479.

[57] *Id.*

[58] 53 Fed. Reg. 24,277 (June 28, 1988).

[59] MARINE MAMMAL COMMISSION, 1994 ANNUAL REPORT TO CONGRESS, at 187; MARINE MAMMAL COMMISSION, 1995 ANNUAL REPORT TO CONGRESS, at 87-88.

[60] *Polar Bear Species Account*, *supra* note 24, at 49. Since 1972, a higher percentage of females has been taken than during the 1960-72 period. From 1973 to 1979, the annual harvest averaged 86 bears, 43 percent of which were females. From 1980 to 1991, the average annual take was 130, with a male to female ratio of 64:36. FWS CONSERVATION PLAN, *supra* note 30, at 7-8. Cubs and females with cubs comprised 16% of the harvest (about 21 bears). Twenty-eight percent (38 bears) were from the Beaufort Sea population, while 72% (97 bears) were from the Chukchi Sea population. *Polar Bear Species Account*, *supra* note 24, at 48.

[61] *Id.*

[62] F&GMC/IGC AGREEMENT, *supra* note 39.

certain respects, are more stringent than the MMPA.[63] As stated in Section 1 of the Agreement:

> The intent of the drafters is to develop a management plan which provides protection for the habitat and the polar bear resource and equity in user opportunities for the Beaufort Sea area in full recognition that the requirements of existing legislation in both the United States and Canada take legal precedent.[64]

To implement this goal, the F&GMC/IGC Agreement: 1) protects all bears in dens or constructing dens, and family groups made up of females and cubs-of-the-year and yearlings; 2) prohibits the use of aircraft or large motorized vessels for taking polar bears; 3) establishes hunting seasons; 4) prohibits the exportation or importation of bears taken in violation of the Agreement; 5) allows the F&GMC and the IGC to impose additional conservation measures; 6) establishes procedures for setting and allocating take quotas;[65] and 7) imposes additional measures to control take levels and impacts.[66]

The F&GMC/IGC Agreement has been widely recognized as an effective management tool and an example of how native user groups have formalized their traditional practice of self-regulation. Similar approaches have been used by Alaska Natives to manage the subsistence/handicraft use of other species, such as bowhead whales and walruses. Although the Agreement has not eliminated all take of cubs and females with cubs, it has dramatically decreased the number taken in the area subject to the Agreement.[67]

The Agreement does not cover the Chukchi Sea population, from which females with cubs continue to be taken. Approximately 10-15 cubs are estimated to be taken each year from this population.[68] Some Native subsistence users in this region have a preference for the meat of young bears, including cubs.[69] In some villages, the harvest of these young bears has a strong cultural tradition. Natives in these villages do not hunt one-year-old cubs, but occasionally will kill two year old bears.

In another important development, Alaska Natives have formed the Alaska Nanuuq Commission. This Commission, composed of Alaska Native hunters and wildlife managers, is playing a leading role in the self-

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63 *Id.* at 6.

64 *Id.*

65 The annual harvest allocation for Canadian and Alaska Natives is 38 bears each. This quota was first set for the 1988-89 harvest season. With the exception of that season, when Alaska Natives exceeded the quota by 20 bears, take has been within the allocated limits. MARINE MAMMAL COMMISSION, 1993 ANNUAL REPORT TO CONGRESS, 1993, at 58.

66 F&GMC/IGC AGREEMENT, *supra* note 39, at 11. The Agreement does not prohibit the hunting of bears during periods when bears are moving into denning areas or are in dens as provided for in the Resolution to the Agreement.

67 Interview with Charles Brower, North Slope Borough Dep't of Wildlife Management (Nov. 8, 1993).

68 Interview with Matthew Iya, Special Advisor to Marine Mammal Commission on Native Affairs (Nov. 8, 1993).

69 U.S. FISH AND WILDLIFE SERVICE, MINUTES OF POLAR BEAR MANAGEMENT PLAN TEAM MEETING, Mar. 30, 1989, at 8 (May 29, 1989); Interview with Matthew Iya, *supra* note 68.

regulation of Native take of polar bears and representing the interests of Natives before federal agencies and in international negotiations. The Commission hopes to realize the potential benefits that could be gained from the conservation of this species.

c. Other Countries' Measures

Polar bears receive varying degrees of protection from hunting from the other parties to the Polar Bear Agreement. No hunting is currently allowed in Russia, and only a small number of bears are removed from the wild each year by government authorities. Russian authorities have been considering allowing a limited hunt of polar bears.[70]

Norway has prohibited sport and commercial hunting of polar bears in the Spitsbergen Archipelago since 1973, but a limited take of nuisance polar bears has been allowed.[71] An annual harvest of approximately one to two hundred bears occurs in Greenland. Such taking is subject to a number of restrictions. Cubs and females with cubs are protected from harvest, although some hunting of these animals by residents of certain villages during specified seasons is allowed. Disturbing bears in dens is prohibited, as is the use of motorized vehicles, planes, helicopters, large ships, and traps and set guns.[72]

In Canada, Provinces and Territories control management of polar bears, frequently in cooperation with Canadian Natives; the federal government in Canada does not play a role.[73] Hunting of bears is principally conducted by Natives. Females with cubs and their cubs are protected in most areas and subsistence harvest is controlled based on a village quota system. A limited sport hunt is permitted in Canada, subject to administration by regional and village hunting associations and the requirement that Native guides and dog teams be used.[74]

2. Oil and Gas Activities

Oil and gas exploration and development in the Arctic can affect polar bears in a variety of ways. [75] The potential impacts are:

1. death, injury, or harassment resulting from encounters with humans;
2. damage or destruction of essential habitat (e.g., feeding, breeding, and, especially, denning areas);
3. contact with oil and ingestion of oil from acute and chronic oil spills;
4. contact with and ingestion of other contaminants (e.g., ethylene glycol, heavy metals, organochlorines);
5. attraction to and disturbance by industrial noise;

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70 PAL PRESTURD AND IAN STIRLING, THE INTERNATIONAL POLAR BEAR AGREEMENT AND THE CURRENT STATUS OF POLAR BEAR CONSERVATION 9 (forthcoming).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 MARINE MAMMAL COMMISSION, WORKSHOP ON MEASURES TO ASSESS AND MITIGATE THE ADVERSE EFFECTS OF ARCTIC OIL AND GAS ACTIVITIES ON POLAR BEARS 4 (1989). [hereinafter MMC WORKSHOP REPORT].

6. harassment by aircraft, ships, and other vehicles;
7. increased hunting pressure resulting from improved socio-economic conditions of coastal residents and/or increased access to bears;
8. indirect food chain effects on ringed seals and other components of the food web upon which polar bears depend due to the impacts of oil, noise, other contaminants, disturbance, and other causes; and
9. mortality, injury, and stress caused by scientists investigating the basic life history of bears and/or the possible effects of oil and gas activities, as well as conducting other studies in the Arctic.

These adverse impacts fall into two categories: taking—direct or incidental takes—and habitat impacts.

a. Taking

(1) Intentional takes

Directed, or intentional, takes of polar bears in association with oil and gas activities are generally prohibited by the MMPA, absent a waiver of the moratorium. So-called "nuisance bears" that present a threat to public health or welfare may be taken only by a government official or authorized representative.[76] Scientific research associated with oil and gas activities that requires the taking of polar bears is permissible, but only if authorized under an MMPA permit.[77] It is possible, as noted in the MMC Workshop Report, that increased hunting pressure would occur in the vicinity of Native villages as a result of improved socio-economic conditions and increased access to bears resulting from oil and gas development in the region.[78] All other intentional taking of polar bears that would be the result of oil and gas activities is prohibited.

(2) Incidental takes

Of the possible impacts on polar bears from oil and gas activities identified in the MMC Workshop Report, incidental take would be involved in the event of:

1. death, injury, or harassment resulting from encounters with humans (if not intentional);
2. contact with (oiling) and ingestion of oil from acute and chronic oil spills;
3. contact with and ingestion of other contaminants (e.g., ethylene glycol, heavy metals, organochlorines, etc.);
4. attraction to and disturbance by industrial noise; and
5. harassment by aircraft, ships, and other vehicles.[79]

The taking of polar bears incidental to oil and gas activities can be authorized under section 101(a)(5)(A) of the MMPA.[80] This provision, which was

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[76] 16 U.S.C. § 1379(h).

[77] *Id.* §§ 1371(a)(1), 1374.

[78] MMC WORKSHOP REPORT, *supra* note 75, at 4.

[79] *Id.*

[80] 16 U.S.C. § 1371(a)(5). FWS' implementing regulations for these incidental take authorizations are set forth in 50 C.F.R. § 18.27 (1995).

added to the MMPA in 1981, gives the Secretary of the Interior authority to allow, on request by U.S. citizens engaged in a specified activity other than commercial fishing in a defined geographical region, the incidental, but not intentional, taking of small numbers of marine mammals, including polar bears. This permission may be granted for five years or less. In 1994, the MMPA was amended to add special authority to incidentally, but not intentionally, take marine mammals by harassment only in activities other than commercial fishing.[81]

b. Adverse Impacts on Habitat

The MMC Workshop Report discusses two major areas of concern for habitat impacts that could result from oil and gas activities: 1) damage or destruction of essential habitat, such as that used for feeding, breeding, and especially denning areas; and 2) indirect food chain effects due to the impacts of oil, noise, other contaminants, disturbance, etc., upon ringed seals and other components of the food web upon which polar bears depend.[82]

Oil and gas activities such as dumping, dredging, and drilling activities and the construction of platforms, pipelines, and other facilities present a threat of damaging or destroying feeding and denning areas.[83] The effect of such impacts could be to cause polar bears to avoid or abandon essential habitat areas. For example, bears could be forced to relocate from preferred feeding areas, such as leads or polynyas where open water and active ice are found in the winter and early spring to less desirable areas.[84] Use of such marginal areas could bring about increased polar bear mortality and decreased reproduction.[85]

Disturbance of denning sites could result in similar problems. Denning females with cubs that are disturbed could be driven out of their dens and result in increased cub mortality.[86]

Because little is known about polar bear habitat preferences, it is difficult to predict what overall effect habitat disruption would have on these populations. The MMC Workshop Report notes that recommendations for minimizing habitat impact include excluding such areas from lease sales. In addition, the report notes that exploration and development in essential habitat locations should either be avoided or restricted, for example, to seasons when denning is not occurring; activities should be combined to reduce the area impacted; and zones could be established to intersperse activity zones, minimal activity zones, and no activity zones to minimize the potential for adverse habitat impacts.[87]

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81 16 U.S.C. § 1371(a)(5)(D)(i).

82 MMC WORKSHOP REPORT, *supra* note 75, at 4.

83 *Id.* at 11.

84 *Id.*

85 *Id.*

86 *Id.* at 12.

87 *Id.* at 13. The MMC WORKSHOP REPORT recommends:

Consideration should be given to establishment of a system for designating "activity zones," "minimal activity zones," and "activity-free zones" in polar bear habitat. Activ-

Even less is known about the potential second order effects on the Arctic marine ecosystem that could affect polar bears, such as contamination of the food chain. It is believed, however, that oil- and gas-related construction, drilling, and oil spills could affect the availability of important food species.[88] Forcing bears away from traditional, preferred feeding areas could drive them into areas that would produce undesirable effects, such as increased interactions with humans and nutritional stress.[89]

3. Shipping

Many goods and supplies reach Arctic coastal villages only by barge. Such traffic is limited to the summer. The Arctic coast in Russia also is supplied by vessels. These shipping activities rely upon routes through the Bering and Chukchi Seas. There also is the potential for increased international shipping in this region. To the extent this shipping is conducted in the fall, winter, and spring by icebreakers and other vessels, there is potential to disrupt bears in the Chukchi population. Those ships probably would use leads and polynyas, which are important feeding areas for bears. There is a potential to disturb bears and seals, as well as a risk of fuel spills.[90]

4. Contaminants

A number of different contaminants (pesticides, heavy metals, and radioactive wastes) are transported to the Arctic from other regions through a variety of means, such as through air and water currents. These contaminants degrade slowly in the Arctic because cold temperatures and reduced sunlight slow this degradation. Thus, these contaminants can accumulate in the tissues of species throughout the Arctic food chain and ultimately affect polar bears.[91]

5. Interactions With Humans

As a general matter, interactions between bears and humans present a threat to both bears and people. Bears are curious by nature, and may be attracted to human activities by visual, auditory, and olfactory stimuli.[92] These interactions can result in bear attacks or threats of attacks, with bears being killed as a result.[93] Polar bears can also be adversely

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ity zones should be alternated with zones of minimal or no activity. When oil and gas development is completed in an activity zone, the area should be designated a minimal activity zone. Exploration could then proceed in an adjacent area which until then would have been designated a "minimal activity zone." Known polar bear denning areas should be designated as "activity-free zones."

Id.

88 *Id.* at 25.

89 *Id.*

90 FWS HABITAT PLAN, *supra* note 25, at 49.

91 *Id.* at 50-53.

92 MMC WORKSHOP REPORT, *supra* note 75, at 4.

93 *Polar Bear Species Account*, *supra* note 24, at 51.

affected by such interactions through increased risk of coming into contact with, and possibly ingesting, contaminants.[94]

Although such incidents have been rare, any injury or death to polar bears is a matter of concern. Polar bear populations in Alaska are small, and reproductive potential is low. Thus, even the loss of a small number of bears, especially mature females, could have serious consequences for the long-term conservation of these populations.[95] This is a particularly strong concern given the possible cumulative effects of increasing human activities on polar bears.

6. Global Warming

Concern over global warming as a result of rising concentrations of greenhouse gases has increased in recent years. Most predictions call for this warming to be greatest in polar and subpolar regions, causing a reduction in sea ice cover. If this occurs, there will be an obvious loss of valuable polar bear habitat. Such a loss in ice cover could limit bear access to seals, reduce seal abundance or distribution, alter productivity of the marine ecosystem, make it more difficult for pregnant females to reach land dens, and reduce available habitat for ice dens and long range movements. Such a threat is most severe for bears at the southern end of the range.[96] A related problem could result if there is a decrease in the protective ozone layer, which could inhibit or diminish the overall productivity of the Arctic marine environment and the food chain upon which polar bears rely.[97]

7. Threats to Shared Populations

The Chukchi Sea polar bear population is shared between the United States (Alaska) and Russia. Adverse impacts on the population therefore can occur outside of the United States. For example, in recent years there has been increased interest in resuming a polar bear hunt in Russia for the first time since 1956. Alaska Native subsistence hunts take approximately 100 bears annually. It is not known how an increased take would affect the health and stability of the population.

Representatives of the Russian and United States management agencies acted upon these concerns in October 1992 when they signed a protocol of their joint intention to develop a management plan for this population.[98] Under the Protocol, the initial draft of the management plan was developed in 1993 through working groups that would include Alaska Native representation. It is to provide for an exchange of scientific information, regulation of uses, endorsements for monitoring and joint field

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94 *Id.* at 16.

95 *Id.* at 5.

96 FWS HABITAT PLAN, *supra* note 25, at 53.

97 *Id.*

98 Protocol of Intentions on the Conservation and Regulated Use of the Bering and Chukchi Seas Polar Bear Population Common to the United States and Russia, Oct. 22, 1992, U.S. - Russia (on file with author) [hereinafter U.S. - Russia Protocol].

research, coordination of conservation and management activities, and exchange of information on environmental legislation.

C. *Fish and Wildlife Service Polar Bear Conservation Plan*

In August 1994, FWS issued a *Conservation Plan for the Polar Bear in Alaska*. This document is intended to provide direction for polar bear research and management efforts through 1999. It addresses most of the threats discussed previously. FWS developed the FWS Conservation Plan in response to a recommendation from the Marine Mammal Commission.

The FWS Conservation Plan establishes the goal of maintaining populations of "polar bears in and adjacent to Alaska within their optimum sustainable range and to ensure that they remain a healthy functioning component of the Bering, Chukchi, and Beaufort Seas ecosystem."[99] To achieve this goal, FWS set four primary objectives: "1) conserve polar bears; 2) conserve polar bear habitat; 3) provide for beneficial human uses; and 4) coordinate the cooperative conservation effort at the international, national, and local levels, involving Natives and the various interested publics . . . ."[100]

Numerous tasks are set forth under each objective. Each task is ranked according to three priority levels. Highest priority is given to tasks aimed at increasing knowledge of polar bears and their population dynamics, determining optimum sustainable populations (OSP), and minimizing immediate threats. Second priority is assigned to tasks necessary to protect the population from threats that may become significant in the future. Tasks to address lower level threats are designated as the third priority.

In response to the 1994 MMPA Amendments enacting section 119 to encourage cooperative agreements with Alaska Native organizations, the FWS Conservation Plan places a high priority on such arrangements. The Conservation Plan notes that under this approach FWS would provide data on population status and trends, sustainable yield estimates, and health and life history parameters of harvested animals.[101] FWS would work with Native user groups on educational and outreach materials and grant and funding proposals. Knowledge about polar bears derived from Natives would be incorporated into federal research efforts.[102] The Native user groups would be responsible for working with their membership to ensure sustainable harvest and achieve compliance with harvest guidelines.[103]

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99 FWS CONSERVATION PLAN, *supra* note 30, at 28.

100 *Id.*

101 *Id.* at 59.

102 *Id.*

103 *Id.*

III. The Polar Bear Agreement

A. Development of the Agreement

At the request of the United States, the five circumpolar nations with jurisdiction over polar bears met in 1965 in Fairbanks, Alaska, to consider the status of, and threats to, this species. This conference led to three additional meetings in 1968, 1970, and 1972 of polar bear specialists, sponsored by the IUCN.[104] In February 1972, the IUCN developed a series of recommendations in the form of seven separate resolutions calling for international cooperation to protect polar bears.[105] The IUCN also developed draft agreements for consideration by the five polar bear nations, the first of which was issued in September 1972.[106] Subsequent drafts were distributed by the IUCN in November 1972 (incorporating comments made by the United States),[107] July 1973 (incorporating comments made by Canada and the United States),[108] and September 1973 (incorporating comments from all five nations).[109] The July and September drafts included a summary of the comments received from all five nations.

In the United States, in April 1972, Congressman Whitehurst introduced House Joint Resolution 1179, calling for the negotiation of a treaty that would establish a moratorium on the taking of polar bears in accordance with recommendations made by the IUCN.[110] Hearings were held on this resolution on July 26, 1972, before the Subcommittee on International Organizations and Movements of the House Committee on Foreign Affairs. All witnesses[111] supported the Resolution, although recommendations were made to allow more flexibility by supporting "other appropriate arrangements" as an alternative to seeking only a treaty and by calling for "due consideration" of IUCN recommendations, rather than mandating that the resulting agreement be "in accordance" with the same.[112] As a result of these recommendations, substitute House Joint Resolution 1268 was introduced on August 1, 1972. This Resolution, calling for the President to "seek [to negotiate] a treaty or other appropriate arrangement"

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104 FWS EA, *supra* note 20, at 1.

105 H.R. Rep. No. 1307, 92d Cong., 2d Sess. 4-6 (1972).

106 FWS EA, *supra* note 20, at 1.

107 IUCN, Draft Interim Agreement on the Conservation of Polar Bears (Nov. 1972) (on file with author)[hereinafter November IUCN Draft].

108 IUCN, Draft Interim Agreement on the Conservation of Polar Bears (July 1973) (on file with author) [hereinafter July IUCN Draft].

109 IUCN Draft Interim Agreement on the Conservation of Polar Bears (Sept. 1973) (on file with author) [hereinafter September IUCN Draft].

110 H.R. Rep. No.1307, *supra* note 105, at 102 (1972).

111 Witnesses were: Rep. Nick Begich; Bernard Fensterwald (Committee for Humane Legislation); Jack Lentfer (Alaska Department of Fish and Game); Nathaniel Reed (Assistant Secretary for Fish and Wildlife and Parks); Lewis Regenstein (Fund for Animals); Lee Talbot and Russell Train (Council on Environmental Quality). *Moratorium on the Killing of Polar Bears: Hearing on H.J. Res. 1179 Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 92d Cong., 2d Sess. (1972) [hereinafter *Resolution Hearings*].

112 H.R. Rep. No. 1307, *supra* note 105, at 2.

among the five nations to preserve and protect polar bears, passed the House on September 19, 1972.[113] It passed the Senate on September 25, 1972.[114]

The five nations met in Oslo, Norway from November 13-15, 1973, to consult on the September IUCN draft. This resulted in the Agreement on the Conservation of Polar Bears, which was signed on November 15, 1973. It entered into force on May 26, 1976, 90 days after the first three parties (U.S.S.R., Norway, Denmark) had deposited their instruments of ratification. All five parties had ratified the Agreement by January 25, 1978. The Agreement was effective initially for five years,[115] but entered into force on a permanent basis upon agreement of all five nations at the 1981 Meeting of the Parties, held in Oslo, Norway on January 20-22, 1981.

By letter of November 12, 1975, the State Department presented the Polar Bear Agreement to the President for transmission to the Senate for its advice and consent to ratification.[116] In this letter, the State Department took the position that "[s]ince protection offered under this Act [i.e., the MMPA] exceeds the requirements of the Agreement, implementation of this Agreement will require no additional United States legislation."[117] President Ford transmitted the Agreement to the Senate for advice and consent to ratification on November 28, 1975.[118] In his letter of transmittal, President Ford stated that, as a result of the MMPA, there was no need for additional legislation. This proposed ratification was supported by an environmental assessment prepared by FWS in 1975.[119]

Hearings on the Agreement were held by the Senate Committee on Foreign Relations on August 31, 1976. The Agreement was presented on the floor of the Senate for unanimous consent on September 10, 1976.[120] The Senate granted its advice and consent on September 15, 1976, by a vote of 88 to 0.[121]

B. Terms of the Agreement

1. Prohibition on Taking

Article I of the Polar Bear Agreement prohibits the taking of polar bears, except as provided in Article III.[122] The term "taking" is defined to mean "hunting, killing and capturing."[123]

The final version of Article I differs significantly from the IUCN drafts. Article I sets forth a straightforward prohibition, and it requires

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113 118 CONG. REC. 31,288 (1972).

114 118 CONG. REC. 34,199 (1972).

115 Polar Bear Agreement, *supra* note 21, art. X.5.

116 Message from the President Transmitting the Agreement on the Conservation of Polar Bears, S. Exec. Doc. No. 1, 94th Cong., 1st Sess. (1975).

117 *Id.*

118 *Id.*

119 FWS EA, *supra* note 20.

120 122 CONG. REC. 29,699, 29,702 (1976).

121 122 CONG. REC. 30,432 (1976).

122 Polar Bear Agreement, *supra* note 21, art. I.1.

123 *Id.* art. I(2).

each contracting party to establish such a prohibition. The IUCN drafts, however, only required each nation to "*take appropriate action* to prohibit the hunting, killing, and capturing of polar bears." Article I also applied only to "the high seas, including the area of circumpolar ice pack . . . ."[124] Canada objected to the use of the word "appropriate" because it felt it provided too much leeway for parties to escape strict enforcement of the prohibition.[125] General concern also was expressed over the use of the terms "high seas" and "circumpolar ice pack."[126]

In response to these concerns, the parties deleted the word "appropriate" from Article I and made the prohibition on taking absolute. Reference to the "high seas" also was deleted. Although Article I of the Agreement eliminated the limitation of the taking prohibition to the high seas, it is clear that the parties intended the prohibition to apply only to that area. Rather than include this limitation in Article I, the parties achieved the same result in the exceptions to the taking prohibition in Article III, where it is provided that taking may occur "wherever polar bears have or might have been subject to taking by traditional means by its nationals."[127] As will be discussed below, this language was intended to allow the contracting parties to allow sport hunts of bears on their coastal lands and in other areas close to shore, while establishing a "high seas" sanctuary where no hunting would occur, except as otherwise allowed under the agreement.

2. Habitat Protection

Article II of the Polar Bear Agreement imposes three obligations on the parties:

1) to take "appropriate action to protect the ecosystem of which polar bears are a part";[128]
2) to give "special attention to habitat components such as denning and feeding sites and migration patterns";[129] and
3) to manage polar bear populations in accordance with "sound conservation practices" based on the best available scientific data.[130]

The IUCN drafts limited Article II to the protection of unspecified habitat components located within the boundaries of each party. Article II also required international cooperation to protect polar bears that migrate across international boundaries. The parties greatly expanded this Article by: 1) requiring efforts to protect the overall ecosystem upon which polar bears depend; 2) specifying the habitat components of greatest concern; and 3) requiring management based on "sound conservation practices."

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124 November, July, and September IUCN drafts, *supra* notes 107-109.

125 July IUCN Draft, *supra* note 108, explanatory notes, at 2. (The United States supported the deletion of this term).

126 *Id.*; September IUCN Draft, *supra* note 109, explanatory notes, at 3.

127 Polar Bear Agreement, *supra* note 21, art. III.1(e).

128 *Id.* art. II.

129 *Id.*

130 *Id.*

The habitat and ecosystem protection goal of Article II received special consideration at the 1981 Consultative Meeting of the Parties.[131] The contracting parties agreed at the 1981 meeting that more had to be done to protect the specified habitat areas. They determined, for example, that national efforts should be directed towards identifying important denning and feeding areas. They also agreed that more needed to be done to protect such areas "from disturbance and destruction."[132] The parties singled out "the desirability of providing adequate protected zones around identified denning areas, where disturbances due to human activities otherwise may occur."[133] This goal was stated clearly by the head of the United States delegation to the 1973 meeting of the parties, Mr. Curtis Bohlen, who expressed the desire of the United States to achieve the "designation of a large portion of the Arctic region as an area where the polar bear would enjoy total protection." He also cited the need for "the protection of the polar bear's ecosystem including his habitat and food supply; and particularly the preservation within national areas of critical denning areas."[134]

With regard to the ecosystem protection obligation, the parties recognized the need to provide protection to the Arctic region "as a whole." Consideration was given to the need to use the "same lines as the polar bear cooperation is based on" to provide "improved protection of flora, fauna and nature in the Arctic."[135] Specific reference was made to the IUCN World Conservation Strategy, which included a proposal for "developing agreements among the Arctic nations on the conservation of the region's vital biological resources based on the principles and experience of the Agreement on Conservation of Polar Bears."[136]

Included in the record of the 1981 meeting is a statement by Dr. Lee Talbot, the IUCN representative, who noted that the concept of Arctic ecosystem protection began with the 1965 Polar Bear Specialist Group. Dr. Talbot observed that "[t]he modern search for and exploitation of nonrenewable resources, which was just getting underway fifteen years ago, has continued and intensified, with major impacts on the social structures and economics, as well as the environment of a no-longer-remote Arctic."[137] In light of these changes, he observed:

> If there were gaps and missing pieces to start with in our knowledge and actions about polar bears, there are even more now in a much broader context, with changes occurring more rapidly and so much more at stake. If we were able to gain by cooperating and exchanging information about polar bears the

131 IUCN, Consultative Meeting of the Contracting Parties to the Agreement on the Conservation of Polar Bears (1981).

132 *Id.* at 3.

133 *Id.*

134 Final Act and Summary Record of the Conference to Prepare an Agreement on the Conservation of Polar Bears 19 (1980) (on file with author) [hereinafter Final Act/Summary Record].

135 *Id.* at 69.

136 *Id.* at 73.

137 *Id.* at 75.

> arguments do indeed seem persuasive for extending this pattern of mutual help to include a wider range of present day Arctic problems.[133]

As these statements suggest, the ecosystem and habitat requirements of Article II go beyond the protection of the area actually occupied by bears. Instead, it applies to all components of the Arctic environment. The Agreement makes the protection of these areas a mandatory duty. It appears, however, by providing that "appropriate action" should be taken to protect these areas, the parties intended this concept to be a flexible affirmative duty, rather than a carefully circumscribed mandate to take certain actions.[139] Because Article II provides that such actions "shall" be taken, it is clear that the parties have an obligation to implement the "appropriate" habitat and ecosystem protection actions.

There is no discussion of the meaning of the phrase "sound conservation practices" in the background documentation of the Agreement. In a resolution passed by the parties during the 1973 Oslo meeting, however, it was specified that the taking of cubs and females with cubs would be contrary to "sound conservation practices."[140]

3. *Exceptions to the Prohibition on Taking*

Article III sets forth five exceptions to the Article I taking prohibition:

> (a) for *bona fide* scientific purposes; or
> (b) by that Party for conservation purposes; or
> (c) to prevent serious disturbance of the management of other living resources, subject to forfeiture to that Party of the skins and other items of value resulting from such taking; or
> (d) by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party; or
> (e) wherever polar bears have or might have been subject to taking by traditional means by that party's nationals.[141]

All of these exceptions are permissive. Each contracting party "may allow" taking for these purposes. It would not be contrary to the Agreement to disallow any of the exceptions.

All of these exceptions are made subject to Articles II (habitat/ecosystem protection, sound conservation practices) and IV (prohibition on use of aircraft and large motorized vessels). Thus, if any of the allowed forms of take would not be considered a "sound conservation practice" under Article II or would involve the use of aircraft or large motorized vessels, they could not be allowed even though they may fall within a taking exception authorized by Article III.

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138 *Id.* at 75-76.

139 The explanatory notes on the July and September 1973 IUCN drafts make it clear that the word "appropriate" was used to signal that contracting parties reserve the right to pursue "differing" approaches to fulfilling their commitments under the Agreement. *See* July IUCN Draft, *supra* note 108, at 2; September IUCN Draft, *supra* note 109, at 3.

140 *See* Polar Bear Agreement, *supra* note 21, at Appended Resolution.

141 *Id.* art. III.1(a)-(e).

The Article III.1(a) exception for taking for *bona fide* scientific research is straightforward. It appeared in all IUCN drafts, and does not appear to have generated any debate. The taking exception for conservation purposes in Article III.1(b) is not found in any of the IUCN drafts. It appears this exception was intended to allow taking when such action is necessary to protect the bears themselves and other components of the Arctic marine ecosystem.

The third exception, authorizing taking "to prevent serious disturbance of the management of other living resources," originally appeared in the IUCN drafts in a different form, designed to address the problem of "nuisance animals." In the September 1973 IUCN draft, for example, this exception would have applied "where such bears menace human life or property or seriously disturb the management of other resources."[142] In response to this language, the Norwegian delegation felt that language was needed to clarify that the taking of bears would be allowed "to deal with interference with the actual exploitation of other resources, such as sealing, and is not confined exclusively to the management of such resources at scientific or governmental levels."[143] In response to these concerns, the parties added the qualification that the taking of bears would be allowed when they interfere with the management of other "living resources." Presumably, this was directed at the Norwegian concern over bears that interfere with sealing. This limitation makes it clear, however, that such taking would not be allowed as a result of oil and gas exploration and development, which does not qualify as "living resource" management.

It is significant to note that the final draft deleted the allowance for takings of bears that "menace human life or property" included in the IUCN drafts. There is no apparent explanation for this change, other than the note that Denmark was opposed to that exception, along with the exception to prevent disturbance to other resources, on the grounds that they "undermine much of the major objectives of the Agreement and that it will be difficult to administer."[144] The fact that the parties retained the allowance for taking polar bears for serious disturbance to living resource management but dropped the human life and property exception suggests either that the delegates to the meeting intended to eliminate the latter grounds for permissible taking under the Agreement, or they considered humans to be a "living resource" covered by this provision.

The fourth exception allows the taking of polar bears "by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party."[145] This clause was the subject of considerable debate by the parties, as evidenced by the explanatory notes of the July and September IUCN drafts.[146] Originally, these exceptions would have been limited to "indigenous people." This term was dropped

142 September IUCN Draft, *supra* note 109, at 3.

143 *Id.*, explanatory notes, at 4 (Norwegian explanation of how polar bears frequently interfere with the harvest of harp and hooded seals).

144 *Id.*

145 Polar Bear Agreement, *supra* note 21, art. III.1.d.

146 *See* July and September Drafts, *supra* notes 108, 109, at explanatory notes.

in favor of "local people," which is a broader concept and would allow such take by non-Natives.

Canada objected to a limitation in the IUCN drafts that such taking be limited to local people "who depend on the resource."[147] Canada was concerned that such a limitation would require actual physical dependence on polar bear meat and by-products and that it would preclude taking for cultural purposes or by local people who were "potentially dependent" upon polar bears. Although the United States and Norway opposed the deletion of this phrase,[148] it appears that Canada prevailed during the government-to-government deliberations at the Oslo meeting over the final language for this provision.

During the deliberations over the IUCN drafts, the Canadian government stated its intent to make a declaration on its interpretation of the term "traditional rights"[149] in this exception. It did so when it deposited its instrument of ratification for the Agreement in 1976.[150]

In its declaration, Canada noted that the polar bear hunt is an "important traditional right and cultural element of the Inuit (Eskimo) and Indian peoples."[151] It also noted that, in exercising their "traditional rights," and based upon the use in the Agreement of the clause "in accordance with the laws of that Party," local people in Canada may "authorize the selling of a polar bear permit" to a non-Native.[152] This may be done only if the hunt is conducted under the guidance of a Native hunter and by use of a dog team.[153] Pursuant to this interpretation, in combination with the exception provided under Article III.1(e), Canada has allowed a sport hunt for polar bears by both nationals and non-nationals.[154]

The final exception, which allows for taking "wherever polar bears have or might have been subject to taking by traditional means by its nationals,"[155] is the most difficult to interpret. One possible interpretation is that this exception allows polar bears to be taken by any person so long as the take is conducted in an area where the nationals of that country have engaged in such taking by traditional means. Under this interpretation, a zone would be established in each country where takes could occur without restriction, subject only to the limitations of Articles II and IV.

Another possible interpretation is that only "nationals" of the party involved could take polar bears within such a zone and only by traditional

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147 September IUCN Draft, *supra* note 109, at 4.

148 *Id.* at 3.

149 *Id.*

150 *See* Polar Bear Agreement, *supra* note 21, app. (Canadian Declaration on the Ratification of the Agreement on the Conservation of Polar Bears).

151 *Id.* at 2(b).

152 *Id.* at 2(c).

153 *Id.*

154 In this regard, the Canadian Declaration on the Ratification of the Agreement on the Conservation of Polar Bears stated, "[t]he Government of Canada therefore interprets Article III, paragraph 1, subparagraphs (d) and (e) as permitting a token sports hunt based on scientifically sound settlement quotas as an exercise of the traditional rights of the local people".

155 Polar Bear Agreement, *supra* note 21, Art. III.1.e.

means. For instance, it would be illegal for non-Canadian citizens to hunt polar bears in Canada.[156] The United States supported this interpretation in its 1975 Environmental Assessment in support of Senate ratification of the Agreement.[157]

It appears that the first interpretation best reflects the intent of the parties, as there is no support in the background documentation or the discourse leading up to the Agreement for the latter view. As discussed previously, it was the intent in all IUCN drafts to establish a taking prohibition that applied to the "high seas." This fact was repeatedly emphasized during the 1972 hearings on House Joint Resolution 1179.[158] As stated by Mr. Jack Lentfer:

> The present legislation might be interpreted to mean that the IUCN favors a ban on all hunting of polar bears. That is not correct. The draft protocol calls for *prohibition of killing of polar bears on the high seas*, protection of polar bear denning and feeding areas, cooperative management of those polar bear populations which occur in more than one national jurisdiction, coordination of polar bear research, and exchange of research findings.[159]

This prohibition on high seas taking resulted from the fact that, at that time, ninety percent of the polar bear hunting conducted by U.S. citizens was believed to occur in that region.[160]

This provision was to have the effect of creating a *de facto* polar bear sanctuary where polar bears would be protected in international territory. Such an end result would track one of the objectives announced by the United States delegation to the 1973 conference of designating "a large portion of the Arctic region as an area where the polar bear would enjoy total protection."

This conclusion is supported by the IUCN drafts, which demonstrate a goal of restricting taking outside of national territories, with particular reference to the "high seas."[161] The apparent intent was to make the high seas, or the Arctic Ocean beyond the reach of hunters travelling by dog-sled or snowmachine, such a sanctuary. Because there was considerable dispute over the meaning of the term "high seas" and its potential applicability in light of the then ongoing Law of the Sea negotiations, the parties apparently chose to define the sanctuary area by limiting the area within which takes may occur to those where hunting by traditional means by the

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156 The ambiguity has been noted by other commentators. *See* MICHAEL BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 268 (1983); SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 57 n.85 (1985).

157 FWS EA, *supra* note 20, at 17.

158 *Resolution Hearings*, *supra* note 111, at 8, 9, 11, 18, 47, 67.

159 *Id.* at 18-19 (emphasis added).

160 *Id.* at 9. In 1972, the high seas were generally regarded as the area beyond the 12 mile territorial sea of each nation. To be consistent with the intent of Agreement, this area should still be regarded as the protected polar bear sanctuary even though parties now exert jurisdiction over natural resources throughout a 200 mile exclusive economic zone adjacent to each country.

161 September IUCN Draft, *supra* note 109, explanatory notes, at 1, 5-6. *See also Opening Statement of Dr. John Tener, Head of Delegation of Canada*, Final Act/Summary Record, *supra* note 134, at 13-14.

"nationals" of the country involved occurred. Because such hunting was conducted mostly by Natives by ground transportation (dog teams, snow mobiles), the area affected seldom reached into the region commonly understood to mean the high seas.[162]

This interpretation that the parties sought to create a high seas sanctuary is supported by the House Report on the 1972 Congressional Resolution directing the President to negotiate with the four other nations and in the State Department's 1975 letter to the President recommending transmittal of the Agreement to the Senate for its advice and consent. House Report 1307 stated that the IUCN "called for an international moratorium on high seas killing (which would cover 90 percent or more of all killing) and protection by national governments of denning and feeding areas within areas of national jurisdiction."[163]

The State Department explained that taking was to be prohibited throughout the area that "approximates this area traditionally identified as 'high seas'"[164] This term had to be dropped from the Agreement, however, "because of the present state of negotiations on the law of the sea" and the difficulty the parties had in agreeing on the precise meaning of the term.[165] Thus, paragraph (e) was added to identify the area where taking *would be* allowed. This had the effect of "leaving the area beyond such limits subject to the overall prohibition."[166]

The clearest interpretation of the meaning of this intent is set forth in State Department testimony in oversight hearings on the MMPA held in 1974. In describing the Agreement, Deputy Special Assistant for Fisheries and Wildlife Burdick Brittin stated:

> The Agreement creates a *de facto* Arctic polar bear sanctuary. The area of the sanctuary will be determined by the ability of hunters to penetrate into the Arctic from surrounding territories by the sole use of means which are, or have become, traditional for them; by dog sled or in some cases snowmobiles . . . . Outside the sanctuary, the generally accepted principles of polar bear conservation will continue to apply.[167]

Thus, the Arctic sanctuary would begin at the limit of where hunters could travel on dog sleds or snowmobiles.

When read together, Articles I and III have the effect of creating two "taking zones." Article I prohibits taking in all areas, both "high seas" and other areas under national control. However, under Article III.1(e), of all areas subject to the Article I ban, taking can be allowed for any purpose by any traditional means (other than aircraft or large motorized vessels) in

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162 Interview with Jack Lentfer, Marine Mammal Commission (March 19, 1996).

163 H.R. REP. No. 1307, *supra* note 105, at 3. The record reflects that the 90 percent take rate referred to in Report No. 1307 applied to polar bear hunting by United States citizens.

164 Message from the President, *supra* note 116, at v.

165 *Id.*

166 *Id.*

167 *Marine Mammal Protection Oversight Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 2d Sess. 190 (1974) (statement of Burdick Brittin, Deputy Special Assistant for Fisheries and Wildlife) [hereinafter *MMPA Oversight Hearings*].

those specific areas where polar bears "have or might have been subject to taking by traditional means by [that country's] nationals." Those areas are, in effect, the "non-high seas zone." In all other areas, such as the "high seas zone" or Arctic Ocean sanctuary, taking may be allowed only under one of the other four exceptions listed in Article III. Even in the "non-high seas zone," however, the Article II restrictions on protecting habitat areas (i.e., no taking in denning areas) and allowing taking only in accordance with sound conservation practices and Article IV prohibitions on use of aircraft and large motorized vessels are applicable.

In 1994, Congress amended the MMPA to allow the Secretary to authorize the importation into the United States of polar bear parts taken in sport hunts in Canada.[168] This amendment has placed a premium on the interpretation of the Article III.1(e) exception from the take prohibition. Under the 1994 law, the importation of polar bear skins and other parts is permissible only if it is determined that Canada has established a sport hunting program that is consistent with "the purposes" of the Polar Bear Agreement.[169] Assuming that "the purposes" of the Agreement can be met only if all of the terms of the treaty are complied with, one of the critical issues for determining consistency is whether the Article III.1(e) exception was intended to define an Arctic Ocean sanctuary (as argued above) or to limit polar bear takes to the "nationals" of the country involved. If the latter interpretation is correct, Canada would fail to meet the MMPA consistency standard by allowing citizens of the United States and other countries to hunt polar bears.

In July 1995, FWS published proposed regulations and findings to implement the 1994 polar bear importation amendment.[170] As part of this publication, FWS asked for comment on its proposed finding that Canada's sport hunting program is consistent with the Polar Bear Agreement. In making this proposed finding, FWS adopted the interpretation that Article III.1(e) does not limit taking to the "nationals" of the country involved. FWS relied upon an earlier version of this article to support that interpretation.[171]

In response to the FWS proposal, organizations concerned about polar bear conservation submitted comments arguing that the proposed consistency finding is incorrect.[172] Based on concerns that allowing United States sport hunters to import skins and other polar bear parts, such as skulls for trophies, could increase the number of bears killed in Canada,

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168 16 U.S.C. § 1374(c)(5)(A).

169 *Id.*

170 60 Fed. Reg. 36,382-400 (July 17,1995).

171 *Id.* at 36,388. FWS did not set forth an independent analysis of this issue, relying instead primarily on the earlier version of this article. It is incumbent upon FWS to set forth its own analysis. This is especially important because the agency's own 1975 Environmental Assessment supporting ratification of the Agreement espouses the view that Article III.1(e) limits take to the nationals of the country involved. *See supra* note 157.

172 Letter to FWS Director from Mark D. Colley for Humane Society of the United States (Aug. 31, 1995) (on file with author) [hereinafter HSUS Comments]. Similar comments were submitted by Polar Bears Alive. Letter to Margaret Tieger, from Robert J. Wilson (Oct. 7, 1995) (on file with author).

these comments set forth a detailed legal analysis supporting the conclusion that the Article III.1(e) exception limits take to Canadian nationals. Although this legal position is well-reasoned and reflects a legitimate concern for polar bear conservation, in the final analysis it is not the best interpretation of the Agreement's Article I take prohibition and Article III take exceptions.

As a threshold issue, even if Article III.1(e) is interpreted to limit take to the nationals of the country involved, Canada's sport hunting program would not necessarily be inconsistent with the Agreement. Canada has continually relied upon the Article III.1(d) exception for take by local people as authority for its sport hunt. As discussed previously, since development of the Agreement in 1973 Canada has adhered to the interpretation of exception (d) that local people who obtain permits to hunt polar bears under Canadian law may, as part of their "traditional rights," sell their permits to another party.[173] Exception (d) does not address whether such transfers can be made; nor does it limit such transfers, if permissible, to "nationals." To prevail in an argument that hunting is limited to Canadian citizens, it also is necessary for opponents of FWS' proposed consistency finding to establish that Canada is prohibited under the Agreement either from 1) allowing local people to transfer their take permits to sport hunters or 2) transferring those permits to non-Canadians.[174]

The commenters opposed to FWS' proposed consistency finding argue that the "plain language" of Article III.1(e) prohibits take by non-nationals. They reach this conclusion by first construing the Article III.1(d) exception. This provision, the commenters argue, limits polar bear take to "particular peoples using particular methods."[175] The take must be "by local people," "using traditional methods," such as dog sleds, in the exercise of their "traditional rights." By so restricting the method of take, exception (d) "limits hunting by locals to contiguous land areas and prevents hunting in the ocean or on floating ice."[176]

This legal theory argues that to interpret Article III.1(e) as "implicating only the exception's geographic component," and not interpreting it to prohibit take by non-nationals, "would improperly render [the phrase] 'by

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173 *See* discussion accompanying *infra* notes 190-195.

174 In its Declaration on Ratification, Canada noted that it was relying on exceptions (d) and (e) to permit a "token" sports hunt. *See infra* note 195. It is unclear what position Canada would take if it could invoke only exception (d) for this purpose. Certainly, there is an argument that exception (d) alone would suffice, based on Canada's practice of allowing such transfers as a "traditional right" and "in accordance with its laws." It also can be argued that the plain meaning of exception (d) limits take to only local people and that transfer of permits to sport hunters is inconsistent with the Agreement. Exception (e) appears to be directed at allowing a Party to establish a sport hunt that does not require in any way the transfer of a permit from an individual subject to the "local people" exception.

175 HSUS Comments, *supra* note 172, at 7. In arguing that only the language of Article III.1(e) should be considered, the commenters also argue that there is no ambiguity as to its meaning. This position is at odds with the views of the legal commentators who have considered this position, including this author. *See supra* note 156.

176 *Id.*

its nationals' meaningless."[177] This conclusion is supported by the assertion that "[t]he geographic limitation created by the 'traditional means' term [in exception (e)] has an equal effect in terms of the area where takes are permitted regardless of who does (or did) the taking; it is neither enhanced nor diminished by a reference to nationals."[178] Thus, it is argued that the use of the phrase "by its nationals" must be regarded as an expression of intent to limit who is permitted to hunt.

Opponents of the FWS proposed consistency finding completed their interpretation of the plain language of the Agreement by looking at exceptions III.1(d) and III.1(e) together. They argue that the "by its nationals" phrase in exception (e) must be given meaning beyond geographic considerations; "otherwise exception (d) would be superfluous."[179] Exception (d), it is argued, imposes the same geographic limit on polar bear takes that is imposed by exception (e); that is, areas reachable by dog sled or snowmachine. "Thus, the universe of taking permitted by (e)–taking so long as it is within the permissible area–would include all of the takings allowed under (d)."[180] Based on this interpretation, "[b]oth subsection (d) and (e) *have* meaning only if the phrase "by its nationals" in subsection (e) is interpreted to limit the exceptions scope to takings by that Party's citizens within the designated areas."[181]

This argument certainly is plausible. It highlights the ambiguity of Articles III.1(d) and III.1(e) and the need for clarification of the meaning of this provision by the Parties to the Agreement. It is also an acceptable interpretation of the plain meaning of Article III.1(e). However, it is not the only possible version of the plain meaning of this provision. To be sustained, the commenters' interpretation must overcome several weaknesses.

First, the underlying premise that the plain meaning of exceptions (d) and (e) can be reconciled only if (e) is interpreted to prohibit take by non-nationals is not necessarily correct. The commenters agree that exception (e) defines a zone for permissible takes. Under their interpretation, this zone is "wherever polar bears have or might have been subject to taking by traditional means." Within this zone, the commenters claim, take is authorized only for the nationals of the country involved. The alternative view, to which this author subscribes, is that the zone of permissible takes is defined by actual past taking or possible past taking of polar bears "by traditional means" by the "nationals" of the Party. Within that zone, any party may take polar bears (subject to other provisions of the Agreement); outside that zone, take is authorized only under the exceptions in Article III.1(a)-III.1(d).

A weakness in the reasoning of the commenters opposed to the consistency finding lies in the assumption that the area where take is permit-

177 *Id.* at 8.

178 *Id.*

179 *Id.* at 9.

180 *Id.*

181 *Id.* (emphasis in original).

ted is determined only by the limitation on the method of take and that this area is not affected by who does the taking. To the contrary, the areas where polar bears "have or might have been subject to taking by traditional means" will vary, as a factual matter, from country to country. Because all of the exceptions of Article III are to be applied by each "Contracting Party," it would have been perfectly logical for the drafters of the Agreement to allow the zone defined by exception (e) to be limited to the area where the nationals of the Party involved hunted or might have hunted polar bears. Otherwise, for example, Norway's exception (e) zone could be determined by where Russian hunters traditionally hunted; Canada's exception (e) zone could be determined where hunters from Alaska or Greenland took bears, and so on. Also, limiting the area based on the practices of the "nationals" of the Party would make it easier for each Party to define and administer this zone. No Party would be required to identify areas where foreign hunters may have taken bears. Thus, a rather obvious intent of the drafters was to allow each Party to define the zone established by exception (e) based on the historic practice of its own nationals.

A second weakness in the commenters' legal theory is the claim that the zone defined under exception (e) is necessarily the same as the zone defined under exception (d). Under the plain meaning of exception (d) local people can hunt in areas where take by traditional means has not previously occurred, so long as "traditional methods" are used to "exercise traditional rights" and "in accordance with the laws of the Party." Obviously, in the vast expanse of the Arctic there almost certainly are areas where, under exception (e), no prior take of polar bears by traditional means has occurred or is likely to have occurred. This area would be off-limits to take under exception (e), based on its geographic limitation. However, the plain meaning of exception (d) is that "local people" are allowed to hunt polar bears anywhere in accordance with the laws of that Party, so long as only traditional methods are used, even in areas where take would not be allowed under exception (e). Thus, local people could hunt in areas off-limits to polar bear take under exception (e), thereby differentiating the geographic area covered by the two provisions. The commenters, therefore, cannot claim that both exceptions (d) and (e) have meaning only if the phrase "by its nationals" limits exception (e)'s scope to that Party's citizens.

Such an interpretation is consistent with the intent of the Parties to provide local people, primarily Natives, the ability to hunt polar bears in the "exercise of their traditional rights."[182] As the background documents for the Agreement recognize, the Parties sought to protect the needs of

[182] As a practical matter, this legal distinction may not have much effect under current circumstances. In most cases, the areas hunted by local people under exception (d) will be the same as the area defined under exception (e). It is entirely conceivable, however, that new native communities will be established along the coast of the Arctic Ocean in areas not subject to exception (e). Under exception (d), people residing in such a community would be allowed to hunt polar bears by traditional methods and in accordance with the laws of the Party.

local people to make use of polar bears for subsistence and cultural purposes. It is consistent with this recognition of the special needs of local people to allow them greater latitude in where they could hunt.[183] Exception (d) still provides limits on where such take can occur by requiring that "traditional methods" be used. Thus, under this interpretation, local people can hunt polar bears anywhere authorized by the Party so long as traditional methods are employed in exercise of traditional rights; non-local people, on the other hand, are limited to takes in the zone defined by exception (e).

A third weakness in the legal argument of the groups opposed to polar bear trophy importation is that, although they correctly state that standard rules of construction must be applied to construe the terms of the Agreement, their own analysis does not meet several such principles. In construing provisions in a sequence in a particular section, it is to be assumed that the drafters applied principles of parallel construction.[184] In the case of Article III, there are two clauses that specify *who* can take polar bears. Exception III.1(b) allows take "*by that Party* for conservation purposes." Exception III.1(d) allows take "*by local people* using traditional methods."

Both of these clauses *begin* by identifying the party who could conduct the take. Exception (e), however, begins by defining an area, i.e., "wherever polar bears have or might have been subject to taking," rather than by specifying "who" can conduct the take. Had the Parties intended the interpretation suggested by the commenters, exception (e) would have been drafted instead to *begin* with the phrase "by its nationals." Instead, exception (e) ends with that phrase. Thus, it can be assumed the Parties did not intend exception (e) as a restriction on who can take polar bears.

The commenters also fail to apply the rule of the "last antecedent." Under this doctrine, qualifying words, phrases and clauses "must be applied to the words or phrase immediately preceding them and are not to be construed as extending to and including others more remote."[185] Absent any clear evidence of the Parties' intent to exclude non-nationals from sport hunting, the phrase "by its nationals" must be interpreted as referring to the last antecedent, or the historical taking of polar bears, *not* the taking allowed under the Agreement.

The commenters also argue that exceptions to a prohibition must be narrowly construed.[186] However, it does not follow that the commenters'

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183 Under the MMPA, enacted the year before the Agreement, the United States recognized the same principle by not restricting where Alaska Natives could hunt. 16 U.S.C § 1371(b).

184 *See*, e.g., United States v. Thompson/Center Arms Co., 504 U.S. 505, 512 n.5 (1992) (per curiam); Mississippi Poultry Ass'n v. Madigan, 992 F.2d 1359, 1363 (5th Cir. 1993); CEMEX S.A. v. United States, 790 F. Supp. 290, 294 (1992) *aff'd*, 959 F.2d 1202 (1993).

185 United States v. Metate Asbestos Corp. 584 F. Supp. 1143, 1147 (D. Ariz. 1984). *see also* United States v. Ven-Fuel, Inc., 758 F.2d 741, 751 (1st Cir. 1985). According to rules of statutory construction, "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." SUTHERLAND, STATUTORY CONSTRUCTION § 47.33 (4th ed. 1992).

186 *See* HSUS Comments, *supra* note 172.

interpretation results in a more "narrow" construction. Arguing that take is limited to Canadians does not necessarily mean fewer bears will be taken, fewer hunts will occur, or the area hunted will be smaller. It simply means that the available permits for sport hunts can be used only by Canadians. All takes are to be governed by the Article II requirement that sound conservation practices will be applied, and this restriction should limit the number of bears taken regardless of who does the taking.

Finally, and perhaps most important, the interpretation that exception (e) limits hunting to nationals of the Party involved is at odds with the practice of Canada, and the understanding of the other Parties, at the time the Agreement was drafted and ever since. Canada has consistently allowed non-nationals to hunt polar bears. This was the practice in 1973.[187] It was also the practice at the time the Agreement entered into force in 1976. For example, in a 1977 report on polar bear hunting during 1975-76, the Canadian Wildlife Service (CWS) acknowledged that non-nationals could hunt in Canada. CWS also reported that attracting more hunters from the United States was desirable but problematic because of the MMPA ban on importation.[188] Clearly, contemporaneous with the development and execution of the Agreement, the Canadian government did not believe that Article I would prohibit citizens of the United States or other countries from hunting bears in Canada.

CWS records confirm that foreign citizens have conducted sport hunting of polar bears in Canada since the early 1970s. Research scientists for the Canadian federal government working in the Arctic have reported the occurence of sport hunts in Canada by non-Canadians dating back to the time of the enactment of the Polar Bear Agreement.[189]

The fact that Canada has allowed foreign citizens to hunt polar bears has been common knowledge of the other Parties to the Agreement. For example, in 1972 hearings on development of the Agreement, Congress heard testimony regarding the Canadian polar bear program and its practice of allowing non-Canadians to hunt.[190] In addition, in numerous meetings of the Polar Bear Specialist Group, convened every two years by the

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187 In a 1972-73 report prepared by the Royal Canadian Mounted Police, reference is made to polar bear hunting by United States citizens. Corporal R.E. Holtzbaum (R.C.M.P.), Report on Polar Bear Kills in Sachs Harbor, NWT (1972-73). *See also Resolution Hearings, supra*, note 111. As stated by Bernard Fensterwald, testifying for the Committee for Humane Legislation: "Under the Canadian system, they can sell their permits to the Texas oil millionaires or the German tourists and this is very widely done in Canada." *Id.*

188 P. SMITH, CWS, RESUME OF THE TRADE IN POLAR BEAR HIDES IN CANADA, 1976.

189 Interview with W. Calvert, Wildlife Biologist, Canadian Wildlife Service (March 19, 1996); Interview with C. Jonkel, former Research Scientist, Canadian Wildlife Service (March 19, 1996); Interview with M. Taylor, Wildlife Biologist, Department of Renewable Resources, Government of Northwest Territories (March 19, 1996); H. Kiliaan, Wildlife Technician, Canadian Wildlife Service (March 19, 1996).

190 *See supra* note 25. In addition, the 1972 Senate Report on enactment of the MMPA discusses the hunting practices of all five countries involved in the then anticipated Polar Bear Agreement. Countries where hunting was prohibited or limited to natives are identified. Canada's practice of granting quotas is discussed but, unlike the case of Greenland, no reference is made to a limitation to take by a particular class of people. S. REP. No. 863, *supra* note 2, at 4.

IUCN, there has been discussion of the Canadian sport hunting program and the occurrence of sport hunts by non-Canadians.[191] FWS had even received MMPA permit applications prior to the 1994 amendments to allow the import of polar bear trophies for public display purposes by U.S. citizens who had engaged in sport hunting in Canada.[192] In enacting the 1994 amendment, Congress expressed its understanding that Canada "is the only country which allows polar bears to be harvested by non-residents through a regulated sport hunt in Northwest Territories."[193] Thus, the United States has consistently been on notice of Canada's practice of allowing non-nationals to sport hunt polar bears.

Recently, the eight nations compromising the Arctic Environmental Protection Strategy (AEPS) also recognized Canada's practice of permitting polar bear hunting by non-Canadians under certain constraints. In a case study on the Agreement, prepared by the AEPS Task Force on Sustainable Development and informally referred to as the Norwegian Initiative, it was stated that "[n]on-residents in Canada are allowed to hunt polar bears if they are guided by Inuit hunters and travel by dog team."[194]

All of these references indicate that the Parties to the Agreement have consistently had knowledge that foreign citizens have been conducting sport hunts in Canada. Proper interpretation of a treaty requires that the terms be construed in accordance with "the practical construction adopted by the parties."[195] With the exception of the aforementioned 1975 FWS Environmental Assessment, there is no evidence that any Party has adopted the position that takes are limited to nationals of the Party involved.

The interpretation espoused by the opponents of the consistency finding, on the other hand, would mean that Canada intended, by entering into the agreement to abandon its practice and goal of allowing non-Canadians to hunt, an interpretation clearly belied by Canada's expressed intent to allow sport hunts by foreign citizens to continue. There is no support for this result in any of the documents pertaining to the Agreement. In fact, in an effort to clarify its own position, Canada appended to

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191 *See*, e.g., W. Calvert, *Polar Bear Management in Canada 1988-92, in* POLAR BEARS, PROCEEDINGS OF THE ELEVENTH WORKING MEETING OF THE IUCN/SSC POLAR BEAR SPECIALIST GROUP, at 72 (1995) (noting that hunting is allowed in Northwest Territories by "non-residents").

192 *See*, e.g., 55 Fed. Reg. 27,696 (July 5, 1990).

193 H.R. REP. No. 439, 103d Cong., 2d Sess. 34 (1994). The House Merchant Marine and Fisheries Committee announced its own position on this issue in 1994 when it stated: "[i]t also was determined that the sport hunting of polar bears in Canada does not conflict with the Agreement on the Conservation of Polar Bears." *Id.*, at 26.

194 AEPS TASK FORCE ON SUSTAINABLE DEVELOPMENT, DRAFT CASE STUDY ON THE 1973 POLAR BEAR AGREEMENT 11 (Nov. 1, 1995) (on file with author). AEPS is made up of representatives of the governments of Canada, Denmark/Greenland, Finland, Iceland, Norway, Russia, Sweden, and the United States. The members of AEPS appointed a task force to study the agreement as an example of an environmental protection measure in the context of sustainable development in the Arctic.

195 Air France v. Saks, 470 U.S. 392, 396 (1985), quoting Choctaw Nation of Indians v. United States 318 U.S. 423, 431-32 (1943).

the Polar Bear Agreement a declaration setting out its interpretation of a number of terms and outlining Canadian practice with respect to hunting rights. The language of the declaration clearly indicates Canada's desire to reserve its right to determine the criteria for authorizing sport hunts within its own jurisdiction.[196]

The interpretation that exception (e) limits take to nationals would also mean that Canadians have been in violation of the Agreement since its inception and that the other Parties, on notice of the practice of foreign citizens' hunting in Canada, have continuously ignored the violation. It must be questioned whether this violation of the Agreement would have been allowed to continue for twenty years without comment by other Parties. Under standard rules of treaty construction, longstanding interpretations by a Party to a treaty are accorded great weight in interpreting ambiguous terms.[197] Because the actions of Canada, acquiesced in by the other Parties to the Agreement, support the view that non-nationals can hunt, the argument limiting exception (e) to nationals is at odds with the history of implementation of the Agreement as well as the best interpretation of its plain meaning.[198]

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[196] The declaration makes specific reference to Articles III.1(d) and (e), stipulating, among other things, that "the local people in a settlement may authorize the selling of a polar bear permit . . . to a non-Inuit or non-Indian hunter" under certain constraints, none of which includes nationality. Furthermore, the Canadian Government interprets subsections (d) and (e) as "permitting a token sports hunt," electing not to define the word "token" in any respect, thereby leaving open the scope of permitted hunters. Had Canada intended to limit hunting rights to Canadian nationals, this declaration would have been the appropriate document in which to state such an intention. Canadian Declaration on the Ratification of the Agreement on the conservation of Polar Bears, *supra* note 150. The commenters argue that there is nothing in the background documents for the Agreement that conveys an express intent to allow hunts by non-nationals. HSUS Comments, *supra* note 172, at 173. This is accurate; however, the documents cited here clearly reference a sport hunting program broad enough to include non-Canadians. These statements (i.e., a polar bear permit could be sold to a "non-Inuit, non-Indian hunter") would be over-inclusive if the commenters were correct in their view that only Canadians who were non-Inuits and non-Indians could hunt. There are no documents setting forth the position of the United States or other Parties as to whether Canada's position was accepted.

[197] Article 31 of the Vienna Convention on the Law of Treaties requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning" of its terms "in their context and in the light of its object and purpose." The article further states that, together with the context, subsequent practice which establishes the agreement of the parties as to the interpretation should be taken into account. United States courts have frequently relied on subsequent conduct as evidence of the intent of the parties. *See, e.g., Sumitomo Shoji American v. Avagliano*, 457 U.S. 176 (1982); *United States v. Rutherford*, 442 U.S. 544 (1979). *See also Restatement (Third) of Foreign Relations Law* § 325(2) (1986).

In addition, Article 32 provides recourse to supplementary means of interpretation when the meaning is ambiguous. Vienna Convention on the Law of Treaties of 22 May 1969; (1969) 8 I.L.M. 679; (1969) 63 A.J.I.L. 875; (1980) T.S. No. 58; Cmnd. 7694. Recognizing the disputed intepretations of Article III.1(e), it can readily be concluded that the meaning of exception (e) is ambiguous. Thus, recourse to supplementary means of interpretation, such as the Canadian declaration, is appropriate.

[198] The commenters' argument would also render the 1994 amendment meaningless. If the Agreement prohibits U.S. citizens from hunting in Canada, and the MMPA requires Canadian sport hunts to conform with the Agreement, there would be no possibility of United

As discussed later in this article, the justification for the 1994 amendment to the MMPA to authorize the importation of polar bear parts taken during Canadian sport hunts has been controversial, and it represents a dramatic departure from MMPA precedent.[199] There are many valid concerns over the potential consequences of this amendment for polar bear conservation and the goals of the MMPA, and serious questions have been raised as to whether permits can be issued under the amendment. Nevertheless, the legal argument that sport hunts of polar bears in Canada by United States citizens are prohibited by the Agreement has several weaknesses. There is no clear answer to this question, and, as recommended by this article, it is time for the Parties to clarify, if not amend, Article III.1(e) to eliminate this ambiguity.

The final element of Article III is the prohibition in subsection 2 against the commercial use of polar bear skins and "other items of value" resulting from takes for conservation purposes (Article III.1(b)) or for management of living resources (Article III.1(c)).[200] When skins or such items result from the taking of bears to avoid "serious disturbance" to the management of living resources, those by-products are subject to forfeiture to the Party government.[201]

4. The Prohibition on Taking Cubs and Females with Cubs

At the 1973 Conference, the parties to the Agreement passed a Resolution recognizing the special need to protect cubs and female bears with cubs. In recognition of the comparatively low reproductive rate of polar bears, the parties noted that such protection was regarded as a "sound conservation practice" within the meaning of Article II. Accordingly, the Resolution requested that the parties "take such steps as possible" to, in the words of the Resolution:

1. provide a complete ban on the hunting of female polar bears with cubs and their cubs; and
2. prohibit the hunting of polar bears in denning areas during periods when bears are moving into denning areas or are in dens.[202]

This requirement was considered quite important by the parties. Indeed, the United States emphasized it in its opening statement presented by Mr. Bohlen at the 1973 Conference.[203] It is not clear why this prohibition was not included in the terms of the Agreement itself, but it has been

States citizens ever hunting in Canada or importing polar bear parts. Although the judgment of Congress in enacting this amendment can be questioned, it cannot be assumed that a meaningless law would have been enacted. "It is a well-established rule of legislative construction that no law, or any particular provision thereof, should be interpreted in a manner which renders it meaningless." Teamster's Local No. 429 v. Chain Bike Corp., 643 F. Supp. 1337, 1343 (E.D. Penn. 1986).

199 *See infra* text accompanying notes 266-293.

200 Polar Bear Agreement, *supra* note 21, art. III.2.

201 *Id.* art. III.1(c).

202 *Id.*, App. Res. The Resolution does not define what age class is considered to be a "cub."

203 Final Act/Summary Record, *supra* note 134, at 19.

reported that this was an oversight. Apparently, the parties simply forgot to include it in the Agreement language that was finally negotiated. Rather than reopen deliberations on this language, the parties agreed to append this provision to the Agreement as a Resolution.[204] Because this prohibition is contained in a Resolution and is not a term of the Agreement itself, it is not legally binding on the parties.

The statement in the Resolution that the taking of females with cubs and their cubs is inconsistent with "sound conservation practices" is potentially significant. Because the Article III taking exceptions are limited by Article II, any take of these bears under an Article III exception would violate the sound conservation practice requirements of Article II. For example, although the taking of females with cubs or their cubs might be a "traditional right" of local people "in accordance with the laws of that party," it nonetheless would not be allowed under Article III because the Article II "sound conservation practices" requirement overrides all inconsistent taking exceptions allowed by the Agreement.

The question that remains is whether all take of cubs and females with cubs would be inconsistent with sound conservation practices. Certainly, such take above a given level would be an unsound conservation practice. However, small levels of take to accommodate subsistence and cultural needs may not produce undue conservation impacts. It is clear that the non-binding Resolution was intended to prohibit all take of cubs and females with cubs. However, it does not necessarily follow that the requirement that all takes be in accordance with "sound conservation practices" would require an absolute prohibition when such take would not cause population impacts and is necessary to fulfill otherwise authorized subsistence/handicraft purposes or for other legitimate purposes.

5. The Prohibition on the Use of Aircraft and Large Motorized Vessels

Article IV of the Agreement prohibits the use of "aircraft and large motorized vessels for the purpose of taking polar bears . . . except where the application of such prohibition would be inconsistent with domestic laws."[205] This provision did not appear in the IUCN drafts. In adding this provision, the Agreement followed strong opinion that the hunting of polar bears with aircraft should be stopped.[206] The State of Alaska had previously prohibited such practice by regulation in July 1972. The MMPA superseded this regulation later in 1972. In the United States, the Airborne Hunting Act prohibits the use of aircraft for harassing wildlife or for shooting for the purpose of capturing or killing wildlife.[207]

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204 Interview with Lentfer and Bohlen, *supra* note 162.

205 Polar Bear Agreement, *supra* note 21, art. IV.

206 FWS EA, *supra* note 20, at 4. Bears would typically be hunted from February to May when their tracks could be followed and light airplanes landed on the ice. Two planes would be used. When a bear was located, the plane with the hunter was landed, and the bear was chased toward the hunter by the other plane. From 1951-1960, when airplanes first were used, the annual average kill was 150 bears. The rate increased to 260/year from 1961-1972. *Id.* at 2-3.

207 16 U.S.C. § 742j-1 (1994).

In addition to prohibiting the use of aircraft, Article IV requires the parties to prohibit the use of "large motorized vessels" for taking. This prohibition was directed at the practice, which was particularly common in the Spitsbergen area, of hunting bears from vessels of 100 feet or longer, which could be used to cruise in the ice pack to spot bears.[203]

This provision is weakened significantly by the exception that any party may allow for the use of aircraft or large motorized vessels by domestic law. The potential loophole created by this provision is evident from the Canadian statement about Article IV. Canada acknowledged that it prohibited the use of aircraft for this purpose, but noted that the regulation of the means employed in the taking of a polar bear "is a matter within both provincial and federal competence . . . ." Although Canada supported "uniform application of the Agreement" it stated that "there may at times be regional disparities."[209] Apparently, Canada was asserting that provincial regulations could supersede Federal regulations or interpretations of the Agreement and authorize the use of aircraft or large motorized vessels.

6. Trade Restrictions

The Polar Bear Agreement allows for commercial use of skins and other byproducts from bears taken for scientific research, or by local people exercising traditional rights.[210] Article V requires the parties to prohibit all export and import of any part or product of polar bears taken in violation of the Agreement.[211]

7. Research

Article VII recognizes the importance of conducting research on polar bears. It requires the parties to conduct national research programs, with an emphasis on "conservation and management" issues. Such research is to be coordinated with other parties "as appropriate." Research on migrating polar bear populations is to be undertaken on a consultative basis with other parties, and "information on research and management programs, research results and data on bears taken" is to be shared among the parties.[212]

8. Implementing Requirements

Article VI imposes upon the parties a mandatory duty to "enact and enforce such legislation and other measures as may be necessary" to implement the terms of the Agreement. Article VI also provides that the Agreement is not to be interpreted to prevent any party from taking steps to "provide more stringent controls" under its domestic laws.[213] Under

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208 Interview with Jack Lentfer, *supra* note 162.

209 Final Act/Summary Record, *supra* note 134, at 23.

210 Polar Bear Agreement, *supra* note 21, arts. III.1(a),(d); III.2.

211 *Id.* art. V.

212 *Id.* art. VII.

213 *Id.* art. VI.

Article VIII, the parties are directed to make efforts to promote even broader international protection for polar bears by seeking compliance "by nationals not party to the Agreement."[214] The continuous nature of the obligations of the parties under the Agreement is recognized in Article IX, which requires ongoing consultation "with the object of giving further protection to polar bears."[215]

9. Administration of the Agreement

Article X details the administrative mechanisms used to guide implementation of the Agreement. It addresses issues such as procedures for ratification, entry into force, duration of Agreement (a five-year initial term, subject to perpetual implementation unless termination is requested), denunciation by a party after initial five year period, and coordination with the United Nations. Under Article X,6, any party may request that consultation be conducted "with a view to convening a meeting of representatives of the five Governments to consider the revision or amendment of this Agreement."[216] Unlike many wildlife-related treaties, the Polar Bear Agreement does not have an administrative body to promote enforcement or convene regularly scheduled meetings. Under the auspices of the IUCN, scientists from the parties to the Agreement have continued to meet on a regularly scheduled basis.

IV. United States Laws Relevant to Polar Bear Conservation and Management

Although a number of United States laws have potential applicability to polar bear conservation and management, the only statute considered to serve as implementing legislation for the Polar Bear Agreement is the MMPA. The first part of this section discusses the provisions of the MMPA that correspond to the requirements of the Polar Bear Agreement. The second part of this section summarizes other United States laws that could be used to advance the goals of the Agreement.

A. MMPA

1. Moratorium on Taking and its Exceptions

The centerpiece of the MMPA is its moratorium on taking and importing marine mammals and marine mammal products. The moratorium establishes a general ban on the taking of marine mammals throughout the United States jurisdiction and by any person, vessel or conveyance subject to the jurisdiction of the United States.[217]

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214 *Id.* art. VIII.

215 *Id.* art. IX.

216 *Id.* art. X.6.

217 16 U.S.C. § 1371(a)(moratorium); *Id.* § 1372(a)(prohibition).

"Take" is defined under the MMPA to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[218] The prohibited act of taking is defined by regulation:

> Take means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal, including, without limitation, any of the following:
>
> The collection of dead animals or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in the disturbing or molesting of a marine mammal.[219]

The 1994 MMPA Amendments defined the term "harassment" to mean "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."[220] Harassment that has the potential to injure a marine mammal is considered Level A harassment; while other forms of harassment are classified as Level B.[221]

Like the Polar Bear Agreement, the MMPA allows the taking of polar bears in a few limited situations, which include:

1) scientific research;[222]
2) public display;[223]
3) photography for educational or commercial purposes;[224]
4) enhancing the survival or recovery of a species or stock;[225]
5) the incidental take of marine mammals in commercial fishing operations;[226]
6) the incidental, but not intentional, take of small numbers of marine mammals over a period of five consecutive years by citizens of the United States engaged in a specified activity other than commercial fishing within a specified geographical area;[227] or, if by harassment only, over a one year period;[228]
7) take by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking is

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218 *Id.* § 1362(13).

219 50 C.F.R. § 18.3 (1995).

220 16 U.S.C. § 1362(18)(A).

221 *Id.* § 1362(18)(B) - (C).

222 *Id.* § 1371(a)(1).

223 *Id.* The MMPA also prohibits the importation of marine mammals that were less than eight months old or nursing at the time of taking. *Id.* § 1372(b).

224 *Id.* § 1371(a)(1).

225 *Id.*

226 *Id.* §§ 1371(a)(2), 1371(a)(5)(E) (for endangered and threatened marine mammals). *See also id.* § 1387 (detailing procedures for regulating takings incidental to commercial fishing).

227 *Id.* § 1371(a)(5)(A).

228 *Id.* § 1371(a)(5)(D).

for subsistence or handicraft purposes and is not accomplished in a wasteful manner;[229] and

8) for purposes of self-defense or to save the life of a person in immediate danger.[230]

A variety of determinations must be made before these exceptions may be granted. Scientific research, public display, photographic, and species enhancement takes all require permits, which issue after notice and opportunity for public comment.[231] The commercial fishing incidental take authorization requires a permit issued after notice and opportunity for an on-the-record rulemaking proceeding (for foreign vessels which do not have valid fishing permits under the Magnuson Fishery Conservation and Management Act)[232] or authorizations issued under section 118 as added to the MMPA by the 1994 Amendments.[233] The small take exception for other than commercial fishing operations requires rulemaking unless only harassment is involved, in which case public notice and opportunity for comment is required.[234] Regulation of nonwasteful Native take of nondepleted marine mammals by the federal government is not permissible. Native take may be regulated only if the species is depleted.[235] Any take authorized by permit must be "humane"[236] and must be demonstrated to be consistent with the purposes of the MMPA.[237]

In addition to these exceptions, the MMPA allows the moratorium to be waived.[238] A waiver may be obtained after notice and opportunity for an on-the-record rulemaking.[239] The waiver must be "compatible" with the purposes of the MMPA and in accord with "sound principles of resource protection and conservation."[240] Any waiver must extend "due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals."[241]

Finally, under section 109(h), a federal, state, or local government official, or person formally designated under the MMPA for such purpose,

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229 *Id.* § 1371(b). There is also the possibility of a waiver of the moratorium on taking under section 101(a)(3).

230 *Id.* § 1371(c).

231 *Id.* § 1371(a)(1); *See also id.* § 1374 (detailing permit procedures).

232 *Id.* §§ 1371(a)(2), 1373.

233 The section 118 authorization is expected to serve as the basis for domestic commercial fishing incidental take authorizations. It provides for general authorization of such takes, subject to vessel registration requirements, regulations developed pursuant to recommendations from take reduction teams, and continued advances toward the MMPA's zero mortality goal. *Id.* § 1371(d).

234 *Id.* § 1371(a)(5).

235 *Id.* § 1371(h). A species or population stock is depleted if it is listed under the Endangered Species Act (ESA) or is below its optimum sustainable population level. *Id.* § 1362(1).

236 *Id.* § 1374(b)(2)(B). "Humane" is defined as that "method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved." *Id.* § 1362(4).

237 *Id.* § 1374(d)(3).

238 *Id.* § 1371(a)(3)(A).

239 *Id.*

240 *Id.*

241 *Id.*

may take a marine mammal "in the course of his or her duties" as an official or designee, if such taking is for the protection of the animal, the protection of the public health or welfare, or the nonlethal removal of nuisance animals.[242]

Of these exceptions, the commercial fishing incidental take authorizations are not relevant to polar bears because there are no bear/fisheries interactions. There is no record of any public display permits having been issued for the take of polar bears from the wild, although import permits frequently are granted for bears already in captivity.[243] The photography exception was enacted only in 1994 and there is no record to date of such permits. With the exception of a request by the State of Alaska for a transfer of management authority, no waiver request involving polar bears has ever been filed. A waiver would be required to authorize a sport hunt of polar bears in Alaska. Numerous scientific research permits have been issued for polar bears. Oil and gas activities have been authorized to take small numbers of polar bears under incidental take provisions.

Incidental take authorization under section 101(a)(5)(A) may be granted only if FWS finds, based on the best available scientific evidence, that the taking will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses.[244] Permission to take must be set forth by regulations which are to include permissible methods of taking and other means to ensure the least practicable adverse impact on the species and its habitat.[245] Monitoring and reporting measures also must be undertaken. The regulations are then to be extended to specific entities through letters of authorization. Under section 101(a)(5)(D), authorization for incidental take by harassment only requires public notice and comment but does not require the promulgation of regulations. Incidental take authority under this provision is limited to one year.

a. Chukchi Sea Incidental Take Exception

On June 14, 1991, FWS issued final regulations authorizing the incidental, but not intentional, taking of small numbers of walruses and polar bears during open water exploration for oil and gas in the Chukchi Sea adjacent to the coast of Alaska.[246] The regulations do not allow lethal take of walruses or polar bears.[247] Take was authorized pursuant to specified exploratory activities only.[248] No take was authorized during the time of year when the spring ice lead system is intact.[249]

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242 *Id.* § 1379(h)(1).

243 Most polar bear public display permits involve the importation of captive bred bears from zoos in foreign countries. Occasionally, orphaned cubs were taken to zoos under public display permits when no other means were available for their protection.

244 *Id.*

245 *Id.*

246 56 Fed. Reg. 27,443-65 (1991).

247 50 C.F.R. § 18.114 (1995).

248 *Id.* § 18.113.

249 *Id.* § 18.112.

The *Federal Register* notice indicates that the exploratory activities could affect polar bears by: 1) drill rigs and icebreakers serving as physical obstructions to bear movements; 2) noise, sights, and smells from the activities that disrupt natural behavior; and 3) bear deaths that result from oiling or impacts to prey caused by oil spills or a blowout.[250] Based on its assessment of these risks, FWS concluded that the exploratory activity would have a negligible impact on polar bears and walruses. FWS also determined that there would not be an unmitigable adverse impact on the availability of these species for native subsistence hunting.[251]

In response to a comment on the proposed 1991 regulations, FWS stated that the authorization would not conflict with the Polar Bear Agreement. FWS also stated that the Agreement is not self-executing and has never been implemented under the MMPA.[252] "Therefore," FWS stated, "even if a conflict existed, such would not be an impediment to issuance of the Final Rule."[253]

By letter on August 5, 1991, the Marine Mammal Commission took issue with the FWS statement regarding the requirement to comply with the Agreement. The Commission noted that President Ford's 1975 memorandum transmitting the Polar Bear Agreement to the Senate for advice and consent indicated that no implementing legislation beyond the MMPA was needed. FWS replied by letter of December 29, 1991, stating that the subject of implementing legislation required further review.[254]

On July 26, 1991, FWS published a *Federal Register* notice that it had issued a letter of authorization to Shell Western E&P, Inc. pursuant to the Chukchi Sea incidental take regulations.[255] It was valid for calendar year 1991. A letter of authorization also was issued to Chevron USA, Inc.[256] No letters of authorization for activities in that area have been issued since then.

b. Beaufort Sea Incidental Take Exception

In 1993, in response to a petition submitted by BP Exploration (Alaska) Inc. for itself and several other oil companies, FWS promulgated section 101(a)(5)(A) regulations establishing the process for the issuance of letters of authorization that will permit the unintentional take of small numbers of polar bears and walruses incidental to oil and gas exploration, development, and production activities in the Beaufort Sea. The regulations covered the incidental, unintentional take of small numbers of polar bears and walrus for 18 months beginning on December 16, 1993.[257] The regulations were subject to extension to the full five year period author-

250 56 Fed. Reg. 27,449-50 (1991).
251 *Id.* at 27,451.
252 *Id.* at 27,454.
253 *Id.*
254 MARINE MAMMAL COMMISSION, 1991 ANNUAL REPORT TO CONGRESS, at 172.
255 56 Fed. Reg. 34,215 (1991).
256 *Id.* at 46,010.
257 58 Fed. Reg. 60,402-412 (Nov. 16, 1993) (codified at 18 C.F.R., pt. 18, subpt. J). The letters of authorization may be issued annually. However, during the second year, the letter

ized by the MMPA, contingent upon FWS developing and implementing a "Polar Bear Habitat Conservation Strategy," the review of monitoring reports submitted by the letter of authorization holders, and an affirmative finding by the Secretary that the impacts of the activities on polar bears and their habitat are consistent with the requirements of the MMPA.[258] The area covered includes all Alaska State and Outer Continental Shelf waters from Barrow east to the Canadian border. Also included are onshore areas within that region up to 25 miles inland, excluding the Arctic National Wildlife Refuge. The regulations cover oil and gas exploration, development, and production on a year-round basis.

The potential adverse impacts of this request on polar bears are greater than those from the Chukchi Sea incidental take authorization. This is because the Beaufort Sea proposal is not limited to exploration; it includes onshore areas; it will cover known areas of important polar bear habitat; and it seeks authorization for incidental take on a year-round basis.

In its *Federal Register* notice of the regulations, FWS identified the same potential impacts from exploration that would be caused by the Chukchi Sea authorization. FWS also noted that the winter oil and gas activities associated with exploration "have a far greater possibility of having a detrimental impact on the polar bear." Interactions with polar bears "are likely" as a result of polar bear movements during this period.[259] In addition, winter seismic activity has the potential to disturb denning females.[260] FWS stated that, based on available data about known denning sites and cooperative operating procedures with seismic survey crews, it should be possible to avoid known denning sites "within all practicable limits."[261]

The agency also concluded that the effects of oil and gas development and production activities for the next 5 years in the subject geographic area "will have a negligible impact on the polar bear and the Pacific walrus and their habitat and on the availability of these species for subsistence uses" if the specified conditions are met. The central component of the approach set forth in the regulations is the development of the FWS' Polar Bear Habitat Conservation Strategy. This Strategy is to consider, among other issues, measures to protect habitat, including "the designation of special protective areas (e.g., 'sanctuaries'), to ensure that important denning and feeding sites, migration routes, or other habitat components have a high degree of protection." This requirement specifically refers to the United States' obligations under the Polar Bear Agreement to protect polar bear habitat. It does not describe what legal authority would be used to establish these "special protective areas."[262]

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of authorization could be limited to six months, contingent upon the completion of the FWS' Polar Bear Habitat Conservation Strategy.

258 *Id.* § 18.122; 58 Fed. Reg. 60,408 (Nov. 16, 1993).

259 58 Fed. Reg. 60,406 (Nov. 16, 1993).

260 *Id.*

261 *Id.* at 60,407.

262 *Id.* at 60,408-409.

On August 17, 1995, FWS published final regulations extending, through December 15, 1998, the section 101(a)(5) incidental take authorization for oil and gas operations in the Beaufort Sea and adjacent northern coast of Alaska.[263] Coincident with this extension, FWS released its final Habitat Conservation Strategy for Polar Bears in Alaska. FWS developed the strategy through public comment and consultation with Alaska Natives. The strategy identifies important polar bear feeding and denning areas and contains measures for enhanced consideration of these areas during oil and gas activities. It also includes a number of measures for enhanced information gathering and consultation with Alaska Natives and mechanisms for responding quickly to threats to polar bears resulting from oil and gas activities. Although important habitat areas were identified, no affirmative steps were taken to protect these areas. FWS did acknowledge, however, that it has authority under sections 2, 101(a)(5)(A), and 112 of the MMPA and Article II of the Polar Bear Agreement to impose additional habitat protection requirements if necessary.[264]

2. Moratorium on Import and Its Exceptions

The MMPA moratorium also applies to the importation of marine mammals and marine mammal products.[265] The same exceptions apply to the importation ban, except that none of the incidental take exceptions are relevant to importation. The laws of the country of origin must also, under section 101(a)(3)(A), be consistent with the MMPA. The moratorium on importation may be waived under the same conditions as for taking.[266] In addition, under the 1994 MMPA amendments, exceptions were created for the importation of marine mammal products that are: 1) legally possessed and exported by a United States citizen for purposes of foreign travel if imported by the same person; 2) acquired outside the United States as part of a cultural exchange by an Alaska Native; or 3) owned by a Native inhabitant of Russia, Canada or Greenland and imported for noncommercial purposes in conjunction with travel inside the United States or as part of a cultural exchange with an Alaska Native.[267]

Except for scientific research, the welfare or protection of the animal, or species enhancement, no exceptions may be granted for the importation of marine mammals that were: pregnant at the time of taking; nursing at the time of taking or less than eight months old, whichever occurs later; taken from a depleted species or stock or taken in an inhumane manner.[268] No marine mammal taken in violation of the MMPA or the law of a foreign nation may be imported for any reason.[269] Neither the taking nor

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263 60 Fed. Reg. 42,805-09 (Aug. 17, 1995). Because the previous regulations expired on June 16, 1995, FWS issued a 60 day extension to allow time to complete the public review process. 60 Fed. Reg. 31,258 (June 14, 1995).

264 *Id.* at 42,808.

265 16 U.S.C. § 1371(a)(1)(moratorium); *Id.* § 1372(a)(prohibition).

266 *Id.* § 1371(a)(3).

267 *Id.* § 1371(a)(6).

268 *Id.* § 1372(b).

269 *Id.* § 1372(c).

the importation prohibitions apply to animals taken or imported before enactment of the MMPA.[270] Marine mammals also may be imported by the Secretary or a designee "if . . . necessary to render medical treatment that is otherwise not available."[271]

In a change from over twenty years of MMPA precedent, the 1994 Amendments also established an exception to allow the issuance of permits for the importation of polar bear parts taken in sport hunts in Canada.[272] Although the existing waiver authority of the MMPA was available for this purpose, Congress relaxed the MMPA's previous importation protections by authorizing these imports under a permit system. FWS is now in the process of developing regulations to implement this permit system.[273] Proposed findings required under the amendment to authorize import also have been published by FWS.[274] These proposed regulations are controversial, as was the amendment itself. Importation of polar bear parts is strongly favored by sport hunting groups, who lobbied successfully for the amendment. Conservation groups are concerned, however, that by allowing such import there will be much greater demand to hunt polar bears in Canada and that this will create adverse impacts on polar bear population status. As of the publication of this article, it is apparent that there are serious questions as to whether the statutory criteria to authorize import can be met based on the significant and critical comments submitted by several parties.

Under the 1994 Amendments, importation permits (including permits for bears taken before 1994) are to be issued if the Secretary, in consultation with the Marine Mammal Commission and after public comment, finds: 1) Canada's sport hunting program is consistent with the Agreement; 2) the program is based on scientifically sound quotas ensuring maintenance of the population at a sustainable level; 3) exports and imports are consistent with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and other international agreements; and 4) exports and imports are not likely to contribute to illegal trade.[275] Reasonable fees are to be charged for the permits, with the funds going toward cooperative research and management programs for the conservation of polar bears in Alaska and Russia.[276] Status reviews must be conducted every two years,[277]and no permits may be issued if the Secretary determines, based on a status review, that such hunting is having an adverse impact on the status of polar bear population stocks in Canada.[278]

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270 *Id.* § 1372(e).

271 *Id.* § 1379(h)(2).

272 *Id.* §§ 1371(a), 1374(c) (5).

273 60 Fed. Reg. 70 (Jan. 3, 1995).

274 60 Fed. Reg. 36,382 (July 17, 1995).

275 16 U.S.C. § 1374(c)(5)(A)(I)-(iv).

276 *Id.* § 1374(c)(5)(B).

277 *Id.* § 1374(c)(5)(C)(i).

278 *Id.* § 1374(c)(5)(C)(ii).

The passage of this provision was one of the more contentious aspects of the 1994 MMPA reauthorization. It was stongly opposed in both the House and Senate;[279] many interest groups opposed the amendment;[280] and it lacked support from the Executive Branch. It had strong backing, however, from key members of Congress[281] and the sport hunting lobby.[282] Ultimately, it gained passage as part of the political compromise necessary to achieve MMPA reauthorization.[283]

During the debate on this amendment, little attention was given to the true reason for polar bear part importation: to allow United States sport hunters to come home with trophies. Arguments were made that such an amendment was good for conservation, because it would produce funds for research through permit fees, and good for Canadian Natives, because it would provide a source of revenue through both the sale by local people to sport hunters of their polar bear permits, and an increased demand for guides.[284] While these benefits would be extended, proponents of the amendment argued, there would be no adverse impact on Canadian polar

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279 *See, e.g.*, 140 CONG. REC. H1602 (daily ed. Mar.21, 1994) (statement of Rep. Hughes); 140 CONG. REC. S4933 (daily ed. Apr. 26, 1994) (statement of Sen. Kerry).

280 This opposition is reflected in comments submitted by environmental and animal rights groups in opposition to the FWS importation regulations. *See, e.g.*, Letter from Mark D. Colley and Laura Gasser to Director, FWS (Aug. 31, 1995) (on file with author).

281 140 CONG. REC. H2725 (daily ed. Apr. 26, 1994) (statement of Rep. Fields); 140 CONG. REC. S3677 (daily ed. Mar. 24, 1994) (statement of Sen. Murkowski).

282 This support is reflected in comments submitted by sport hunting groups encouraging adoption of the polar bear importation regulations. *See, e.g.*, Letter from Susan Lamson, National Rifle Association to Director, FWS (Apr. 5, 1995) (on file with author).

283 140 CONG. REC. S4933 (Apr. 26, 1994) (statement of Sen. Kerry) ("Notwithstanding my personal preference not to permit any importation of polar bear trophies, with this additional polar bear protection language I believe the benefits of the overall MMPA package vastly outweigh the potential problems the polar bear provision may cause. If we fail to take action now on this bill before us, we sentence thousands of marine mammals to death and injury that could be avoided by the new regime the bill will establish.").

284 An example of this argument is an op-ed article published by Bill Morrill, the Director of Conservation for the Safari Club. In supporting the then-proposed MMPA amendment for polar bear trophy importation, Mr. Morrill makes no reference to the true purpose of the amendment: to allow members of his organization to bring home polar bear skulls, skins, claws, etc. as souvenirs of their hunt. Instead, he portrays the amendment as a great benefit for "a native people living in a harsh environment" and as providing conservation benefits to polar bears. B. Morrill, *No Friend of the Polar Bear*, WASH. POST, May 10, 1994, at A17. No facts are offered to support his claims on benefits to polar bears, other than the general proposition that hunting organizations make extensive contributions to conservation causes. With respect to Canadian natives, Mr. Morrill implies that the Inuit were the moving force for the amendment, not sport hunting groups, and that the natives brought the Safari Club into the lobbying effort. In fact, the sport hunting interests had pursued polar bear importation through a variety of means for many years before the 1994 MMPA amendments. Although opponents of the polar bear importation amendment were accused of having a "patronizing" attitude toward natives, see 140 CONG. REC. S3677 (daily ed. Mar.24, 1994) (statement of Sen. Murkowski), Mr. Morrill displayed the same attitude, finding it necessary to point out that a Canadian Native involved in lobbying on this issue was: "a woman"; "articulate"; "well educated"; and "well able to convey the truth about this subject," as if any of those facts are noteworthy when a native representative is involved.

bear population stocks because of the requirement that the program be managed for sustainability.[285]

None of these arguments is persuasive. The amount of funds generated by issuance of the permits will be relatively small, inasmuch as relatively few sport hunts occur in Canada,[286] and only a portion of those will be by United States citizens. In addition, the sport hunting lobby is vigorously opposing as too costly FWS' proposed permit fee of $1,000,[287] even though Congress noted that such a fee would be acceptable.[288]

The prospect of significant economic benefit to native communities is also overstated. If the number of total permits made available to harvest polar bears in Canada does not change, as supporters of the Amendment argue, then it is not likely that there will be a significant increase in the number of permits sold by local Canadian people for sport hunts. The total number of sport hunts has remained relatively stable (ranging from 7.3 to 14.4% of the total allowable harvest)[289] and, if more permits are made available to accommodate increased interest from the United States, then it would be necessary to reduce subsistence hunting opportunities for local hunters. Thus, it is not likely there will be any notable infusion of money into the rural Canadian communities, unless local hunters are willing to give up their own right to take bears.

As for the impact of the importation exception on the status of Canadian polar bear populations, the consequences of the Amendment remain to be seen. If the number of permits issued does not increase, and Canada properly manages its hunt and sets reasonable quotas, then the impact on polar bear population stocks may not be significant. In this regard, it is important to note that the IUCN Polar Bear Specialist Group has expressed concerns over the reliability of the population models used by Canada to calculate quotas.[290] However, it is foreseeable that there will be added pressure to increase the allowable harvest to accommodate increased demand from the United States, and that take levels will rise to a level where the sustainability of population stocks is adversely affected.

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285 *See, e.g.*, H.R. REP. No. 439, *supra* note 193, at 34; 140 CONG. REC. H2725 (Apr. 26, 1994) (statement of Rep. Fields).

286 The largest number of sport hunts in any past year was 83 in 1987-88. 60 Fed. Reg. 36,386 (1995).

287 *See, e.g.*, Letter from William P. Horn, Wildlife Legislative Fund to Mollie Beattie, Director, FWS (Mar. 6, 1995); Letter from D. Patrick Ballman, Safari Club International to Director, FWS (Mar. 6, 1995); Letter from Susan Lamsan, National Rifle Ass'n to Director, FWS (Apr. 5, 1995). These commenters support a fee of $250. If this recommendation is adopted and as many as one-half of the Canadian sport hunts are by United States citizens, only $6,750 would be raised annually for polar bear research (assuming 27 permits issued/year based on the average sport hunt in Canada of 55/year between 1989-1994). 60 Fed. Reg. 36,386 (1995). The amount contributed to research would be even less if the costs to FWS of issuing the permit are deducted from the fee. This total revenue from permit issuance should be compared to the total cost of $18,500 for a typical Canadian sport hunt for a single polar bear. *Id.*

288 H.R. REP. No. 439, *supra* note 193, at 34.

289 60 Fed. Reg. 36,386 (1995).

290 *Id.* at 36,392.

The most significant conservation threat created by the 1994 polar bear amendment is the breach it has created in the strong protection principles underlying the MMPA. One of the primary reasons the MMPA was enacted was to eliminate the threat to marine mammals posed by hunting.[291] Since 1972, the MMPA has countered this threat by prohibiting (in the absence of a waiver) all hunting other than for subsistence purposes and by reducing the incentive for United States citizens to hunt marine mammals in other countries by prohibiting importation. The polar bear importation amendment marks the first time since enactment of the MMPA that Congress has elevated the interests of sport hunters over the strong protection goals of the MMPA. Only time will tell whether this amendment serves as a precedent for further weakening of the Act.

3. Habitat Protection

As noted in the Introduction to this article, the MMPA places strong emphasis on habitat and ecosystem protection in its "Findings and Declaration of Policy" section. The importance of habitat protection was reaffirmed in the MMPA's 1994 amendments.

The habitat and ecosystem goals set forth in the MMPA include:

1) management of marine mammals to ensure they do not cease to be a significant functioning element of the ecosystem of which they are a part;[292]
2) protection of essential habitats, including rookeries, mating grounds, and areas of similar significance "from the adverse effect of man's actions;"[293]
3) recognition that marine mammals "affect the balance of marine ecosystems in a manner which is important to other animals and animal products" and that marine mammals should therefore be protected and conserved;[294] and
4) the primary objective of maintenance of "the health and stability of the marine ecosystem."[295]

The MMPA also refers to habitat in the definition of "conservation and management."[296] That term is defined to include "habitat acquisition and improvement."

Unlike other wildlife laws, such as the ESA,[297] there is no clearly articulated affirmative duty or mandate imposed on the federal government to protect, conserve, or recover marine mammal species, stocks, or habitat. The MMPA is, for all effective purposes, built primarily around the taking moratorium. The Act does authorize, however, the Secretary to "prescribe such regulations as are necessary and appropriate to carry out

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291 H.R. REP. No. 707, *supra* note 5, at 12-13, 16. Sport hunting of polar bears was singled out as a cause for concern. *Id.* at 17. As in the House, the hunting of polar bears was identified as an activity specifically targeted by the MMPA moratorium on take. S. REP. No. 863, *supra* note 2, at 4.

292 16 U.S.C. § 1361(2).

293 *Id.*

294 *Id.* § 1361(5).

295 *Id.* § 1361(6).

296 *Id.* § 1362(2).

297 Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(1) (1994).

the purposes of the MMPA."[298] An argument can be made that this authority would extend to the promulgation of regulations to protect habitat areas. As discussed below, this argument has been strengthened by the legislative history of the 1994 MMPA Amendments.

Since the MMPA was enacted, marine mammal habitat has been protected only twice by regulation. The first instance was in the case of regulations by FWS to designate no speedboat zones in certain Florida waters to protect manatees.[299] The cited authority for this action was both the ESA and the MMPA. Thus, it is unclear whether FWS felt it would have had authority to establish such zones under the MMPA alone.[300] The second case was when the National Park Service relied upon the MMPA, the ESA, and its Organic Act authority to establish zones in the Glacier Bay National Park to protect humpback whales from cruise ship and other vessel activity.[301] Once again, however, the MMPA was not the exclusive basis for the regulations. Moreover, in both cases the intent of the regulations was primarily to prevent take rather than directly protect habitat.

The recently promulgated incidental take regulations for the Beaufort Sea suggest that FWS could take action to establish "special protective areas" for polar bears. FWS states that these areas could include "closures" and "sanctuaries" to ensure that important denning and feeding sites, migration routes or other habitat components are protected.[302] However, FWS does not explain the legal authority that would be used for this purpose.

In the legislative history of the 1994 Amendments, Congress made it clear that section 112 was understood to include the authority to promulgate regulations to protect habitat. As stated by the House Merchant and Fisheries Committee regarding its amendment to section 2(2), which added the phrase "essential habitats," "[t]he Committee believes that the Secretary currently has the authority to protect marine mammals and their habitats under the general rulemaking authority of section 112 of the MMPA."[303] The Committee expressly noted that this authority would apply "to protect polar bear denning, feeding, and migration routes in order to fully comply with the United States obligations under Article II of the Agreement on the Conservation of Polar Bears."[304]

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298 16 U.S.C. § 1382(a).

299 50 C.F.R. § 17.100-17.108 (1994).

300 The Marine Mammal Commission recommended that this authority be used to establish zones where drift gillnet fishing would be prohibited around the Aleutian Islands in a section 103 rulemaking proceeding for authorization to take Dall's porpoise and other marine mammals in the Japanese high seas drift gillnet fishery. MARINE MAMMAL COMMISSION, DALL'S PORPOISE BRIEF 58-66 (1986). NMFS also has relied upon the ESA to establish "no approach and buffer zones" to protect Steller sea lions from taking and to protect important feeding areas near rookeries, 50 C.F.R. § 227.12(b)(2) (1995), and areas where human activities are prohibited to protect humpback whales in Hawaii. 50 C.F.R. § 222.31 (1995).

301 36 C.F.R. § 13.65(b). *See* 50 Fed. Reg. 19,880 (1985).

302 58 Fed. Reg. 60,405 (1993).

303 H.R. REP. No. 439, *supra* note 193, at 29.

304 *Id.*

Finally, also through the 1994 Amendments, Congress declared the importance of obtaining a better understanding of marine ecosystem dynamics by requiring the Secretary of Commerce to convene an ecosystem workshop on the Gulf of Maine and undertake a long-term ecosystem study for the Bering Sea.[305] The Bering Sea study is to focus specifically on declines of marine mammals, sea birds, and other living marine resources of the region.

4. Methods and Means of Taking

The MMPA does not prescribe any specific requirements on the methods or means of taking relevant to polar bears other than that the taking be humane,[306] and, in the case of Native take, nonwasteful.[307] However, any permit authorizing take is to set forth the manner in which the marine mammals may be taken.[308] This authority could be used to prohibit the use of aircraft or large motorized vessels. Such permits also must specify the "kind of animals" authorized to be taken.[309] Under this authority, the take of females with cubs and their cubs could be prohibited for any activities subject to permit requirements. Native take is not subject to the MMPA's permitting requirements, and use of aircraft and large motorized vessels, or the taking of females with cubs and their cubs by Alaska Natives is not subject to restriction unless polar bears were to be designated as depleted.

5. Research

The MMPA places a high priority on research. In section 2(3), Congress set forth the finding and declaration of policy that "there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully."[310] Congress also declared that "negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals."[311] In defining the terms "conservation" and "management," the MMPA includes "the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census" and other activities.[312]

In section 110, the MMPA provides for grants, or other forms of financial assistance, to qualified entities or persons "to undertake research in subjects which are relevant to the protection and conservation of marine mammals." Waivers of the moratorium and permits authorizing the taking

305 16 U.S.C. § 1380(c) (1994).
306 *Id.* § 1374(b)(2)(B).
307 *Id.* § 1371(b).
308 *Id.* § 1374(b)(2)(B).
309 *Id.* § 1374(b)(2)A).
310 *Id.* § 1361(3).
311 *Id.* § 1361(4).
312 *Id.* § 1362(2).

of marine mammals also must be based upon "the best scientific evidence available."[313] As noted above, under the 1994 Amendments, Congress directed research to be undertaken on ecosystem relationships in the Bering Sea, which includes polar bear habitat.

Finally, the importance Congress placed upon conducting scientific research on marine mammals is confirmed by the establishment of the Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals. The Commission is charged with a number of scientific research responsibilities,[314] and its studies and recommendations must be made in consultation with the Committee of Scientific Advisors. The Commission itself is to consist of three members who are "knowledgeable in the fields of marine ecology and resource management,"[315] while the nine members of the Committee are to be "scientists knowledgeable in marine ecology and marine mammal affairs."[316]

6. International Cooperation

The MMPA recognizes that adequate protection of marine mammals depends upon international protection efforts. For this reason, Congress set the policy that "negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals."[317]

The MMPA's "international program" is set forth in section 108.[318] It requires the Secretary, through the Secretary of State, to "initiate negotiations as soon as possible for the development of bilateral or multinational agreements with other nations for the protection and conservation of all marine mammals."[319] It also directs the federal government to encourage other agreements to protect specific ocean and land regions "which are of special significance to the health and stability of marine mammals,"[320] and to amend any existing treaty to make it consistent with the purposes and policies of the MMPA.[321] By July 1, 1973, the agencies were to have sought to convene an "international ministerial meeting on marine mammals" to pursue a "binding international convention for the protection and conservation of marine mammals" and habitat areas of special significance.[322] Such a meeting has yet to occur.

Congress also took note of specific concerns that had been raised of the effectiveness of the United States' implementation of the Polar Bear Agreement by amending section 113 of the MMPA in 1994 to require a

313 *Id.* §§ 1371(a)(3), 1373(a).
314 *Id.* § 1402(a).
315 *Id.* § 1401(b)(1).
316 *Id.* § 1403(a).
317 *Id.* § 1361(4).
318 *Id.* § 1378.
319 *Id.* § 1378(a)(1).
320 *Id.* § 1378(a)(3).
321 *Id.* § 1378(a)(4).
322 *Id.* § 1378(a)(5).

review of that treaty.[323] That review is to be conducted by the Secretary of the Interior, in consultation with the other contracting parties. This review was to be initiated by April 30, 1995, and a process is to be established for conducting similar reviews in the future.

A special directive is imposed on the Secretary to review the effectiveness of the United States implementation of the Agreement, "particularly with respect to the habitat protection mandates contained in Article II." The results of this review were to be submitted to Congress by April 1, 1995.[324] To assist in the preparation of this report, FWS convened a meeting in Anchorage, Alaska in June 1995 attended by representatives of Alaska Native organizations, the Department of State, and the Marine Mammal Commission.

Finally, by October 31, 1994, the Secretary of the Interior, acting through the Secretary of State and in consultation with the Marine Mammal Commission and the State of Alaska, was to have consulted with appropriate officials of the Russian Federation on the development of enhanced cooperative research and management programs for the conservation of polar bears in Russia and Alaska. Reports on this consultation and follow up research and management programs are to be provided to Congress.[325]

B. Other United States Laws Relevant to Polar Bear Conservation and Management

1. Airborne Hunting Act

The Airborne Hunting Act makes it unlawful for any person to shoot or attempt to shoot "while airborne in an aircraft" any bird, fish, or animal.[326] It also prohibits the use of aircraft to "harass any bird, fish or other animal,"[327] or to participate in either of these prohibited activities.[328] The prohibition does not apply to any person employed by, or an authorized agent of, any State or the United States, to "protect or aid in the administration or protection of land, water, wildlife, livestock, or domesticated animals, human life, or crops."[329]

The FWS regulations under the Airborne Hunting Act provide that the exceptions which allow airborne hunting noted above "do not supersede, or authorize the violation of, other laws designed for the conservation or protection of wildlife, including polar bears and other marine mammals."[330] The regulations define "harass" to mean "to disturb, worry, molest, rally, concentrate, harry, chase, drive, herd, or torment."[331] The FWS

323 *Id.* § 1383(b).
324 *Id.* § 1383(c).
325 *Id.* § 1383(d).
326 16 U.S.C. § 742j(a)-1(1) (1994).
327 *Id.* § 742j(a)-1(2).
328 *Id.* § 742j(a)-1(3).
329 *Id.* § 742j(b)(1).
330 50 C.F.R. § 19.3 (1994).
331 *Id.* § 19.4.

regulations make it clear that the prohibition applies to pilots as well as to others who assist in operating an aircraft and to any person who, "while on the ground takes or attempts to take any wildlife by means, aid, or use of an aircraft."[332]

The Airborne Hunting Act and its regulations do not, however; prohibit the use of aircraft to track or spot polar bears and then land nearby for relatively easy hunting. In this regard, the federal laws are less protective than the State of Alaska regulations which were promulgated shortly before enactment of the MMPA, which pre-empted them. As discussed by Mr. Jack Lentfer during the 1972 Hearings on H.J. Res. 1179, the State's regulations prohibited using aircraft "as an aid in hunting polar bears."[333] The only permissible use of aircraft under the Alaska regulations, according to Mr. Lentfer, was to "transport the hides between established airports."[334] He explained that

> Any polar bear skin that is transported must be loaded on the airplane at an established airport. Likewise, hunters that are pursuing bears must be transported only between established airports with an airplane . . . . You cannot land a hunter out on the ice and then leave him to take off with a dog team to hunt bears.[335]

This prohibition was relatively easy to enforce, Mr. Lentfer explained, because "[t]here are so few established airports, that we have knowledge of who is in the area."[336] Any guide who arrived with an airplane in March or April would become "immediate knowledge" and appropriate surveillance would be set up.

Enactment of the MMPA preempted the State regulations and prohibited sport hunting. Under the MMPA native take exemption, aircraft have occasionally been used by Eskimos to aid in hunting polar bears from the Chukchi Sea population.[337]

2. Outer Continental Shelf Lands Act

Oil and gas development off the coast of Alaska in polar bear habitat beyond State of Alaska jurisdiction is governed by the Outer Continental Shelf Lands Act (OCSLA).[338] The Outer Continental Shelf is the seabed and its subsoil that lie beyond the submerged lands granted to individual states under the Submerged Lands Act,[339] an area from about three to 200 nautical miles off the coast.

Under the OCSLA, there are three distinct phases of activities-leasing, exploration, and development. In connection with leasing, the OCSLA au-

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332 *Id.* § 19.11(b).

333 *Resolution Hearings*, *supra* note 111, at 23.

334 *Id.* at 55.

335 *Id.*

336 *Id.* at 56.

337 Interview with M. Iya, *supra* note 67; Interview with Jack Lentfer, *supra* note 64; Interview with S. Schliebe, supra note 68.

338 43 U.S.C. § 1331 (1988).

339 *Id.* § 1301.

thorizes the Secretary to promulgate "such rules and regulations as he determines to be necessary and proper in order to provide for the . . . conservation of the natural resources" of the Outer Continental Shelf.[340] The Act also requires the Secretary, through the Minerals Management Service (MMS), to prevent "serious, irreparable, or immediate harm or damage to living marine resources."[341] This authority could be used to develop standards to protect polar bears and polar bear habitat. To assist the Secretary in exercising this authority, the OCSLA requires a study to be prepared before leasing occurs to assess and manage environmental impacts and address the problems presented for "marine biota which may result from chronic low level pollution or large spills."[342] Leases may be canceled if the resulting activities would cause "serious harm" to the "marine, coastal, or human environment."[343]

At both the exploration and development stages, the lessee must submit detailed plans to MMS. These plans are reviewed to address a variety of environmental concerns. Plans may be rejected, modified, or terminated to ensure adequate protection of the environment. Also, leases and permits issued under the OCSLA can include environmental stipulations. Through all of these mechanisms, the Secretary of the Interior has authority to impose restrictions on oil and gas development to protect polar bears and their habitat. Areas could be declared off-limits to leasing, exploration, and development; seasonal restrictions could be imposed to avoid denning conflicts; and activities could even be prohibited when necessary for polar bear protection. All such actions are preventive in nature, however, and the OCSLA does not establish any affirmative duties to protect polar bears or polar bear habitat.

MMS has promulgated regulations to implement these OCSLA provisions. Of particular relevance to polar bear and polar bear habitat protection is the provision which provides authority to suspend an oil and gas operation being conducted under the OCSLA if those activities are presenting a risk to the marine environment.[344] This authority has not been exercised, to date, to protect polar bears or polar bear habitat.

In addition to these general regulations, MMS has established lease stipulations and "Information to Lessees" (ITLs) requirements to protect polar bears. Stipulations are enforceable requirements of OCSLA leases. ITLs are not legally binding; they are advisory guidance documents for lessees and offshore operators. MMS reports that ITLs are generally closely followed by lessees and operators.

For example, one of the most recent OCSLA lease sales involving polar bear habitat is Sale 124 for the Beaufort Sea (June 26, 1991). Two stipulations under Sale 124 could be used to protect polar bears and their habitat. Stipulation 2 provides that if "biological populations or habitats"

340 *Id.* § 1334(a)(1).
341 *Id.* § 1334(a)(1)(B).
342 *Id.* § 1346(a)(3).
343 *Id.* § 1334(a)(2)(A)(i).
344 30 C.F.R. § 250.10(b)(2) (1995).

in the lease area are determined by the MMS Regional Supervisor to possibly require "additional protection," the lessee may be required to conduct biological surveys. Based on those surveys, the MMS Regional Supervisor may require the lessee to relocate its operations, conduct activities during limited time periods, or otherwise modify operations to protect the resource. Lessees are prohibited from conducting activities that may affect any resources subject to a survey until MMS provides written directions on "permissible actions." These actions therefore could be taken to protect polar bears, although, to date, they have not been.

Under Stipulation 3, lessees must include "orientation programs" in their exploration, development, and production plans. These programs, which must be approved by MMS, are to provide personnel involved in the OCSLA activities with instruction on "biological resources and habitats, including . . . marine mammals . . . ." Such a program must also provide instruction on how to avoid harassing wildlife resources and subsistence activities. Thus, lessee orientation programs are required to cover issues such as avoidance of harm to polar bears and other marine mammals.

Several ITL clauses developed for Sale 124 are relevant to polar bear conservation. Sale 124 ITL clause (a) advises lessees and operators of the taking prohibition of the MMPA. Clause (a) also states that authorized lease activities are subject to "applicable international treaties." Although this statement apparently includes the Polar Bear Agreement, it is not specifically named. This ITL clause also notes that "disturbance at major wildlife concentration areas, including . . . marine mammal haulout and breeding areas" is a matter of particular concern. Lessees are encouraged to obtain maps of such areas from MMS and to consult with FWS in planning transportation routes. Aircraft and vessels are advised to keep a one mile horizontal distance from such areas, and aircraft are recommended to keep a fifteen hundred foot vertical distance.

Clause (b) identifies specific areas that are "especially valuable for their concentrations of . . . marine mammals" and other resources. These areas include:

> (1) the lead system off Point Barrow, April-June;
> (5) the Camden Bay Area (especially the Nuvugag and Kaninniivik hunting sites), January, April-September, November;
> (7) the Barter Island-Demarcation Point Area, January-December; and
> (10) the Flaxman Island polar bear denning area.

All such areas are to be considered in the mandatory oil spill contingency plan required to be developed by lessees.[345]

ITL clause (o) specifically addresses polar bears. It notifies lessees that polar bears may be present during the solid ice period. Lessees are advised to conduct their activities in a manner that will limit encounters with bears and to consult with FWS about how to accomplish that objective. Clause (o) "reminds" lessees that they are prohibited from discharging pollutants into offshore waters and further recommends that trash,

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345 30 C.F.R. § 250.42 (1995).

waste or debris that could attract or harm polar bears be properly stored and disposed.[346]

3. *Coastal Zone Management Act and the Alaska Coastal Management Act*

a. *The Coastal Zone Management Act*

In 1972, Congress passed the Coastal Zone Management Act (CZMA)[347] for two principal purposes: 1) "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone;"[348] and 2) "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone."[349] The state management programs were to give "full consideration to ecological, cultural, historical and aesthetic values as well as the needs for compatible economic development"[350] within coastal zone[351] areas.

The CZMA was enacted to address increased Outer Continental Shelf oil and gas development and the accompanying industrialization which could lead to the degradation of coastal lands and waters. Specifically, Congress found that "increasing and competing demands upon lands and waters of our coastal zone" had "resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion."[352] The CZMA sought to protect coastal zones by encouraging coastal states to prepare special coastal area management plans.[353] The Act authorized the Secretary of Commerce (Secretary) to make grants to any coastal state for the development of a coastal management plan,[354] to

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346 *Id.* § 250.40.

347 16 U.S.C. §§ 1451-1464 (1994).

348 *Id.* § 1452(1) (Supp. 1995).

349 *Id.* § 1452(2).

350 *Id.* When Congress amended section 1452(2) in 1990, it added the word "compatible" when referring to economic development.

351 "Coastal zone" means:

> The coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches . . . . The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers, or agents.

Id. § 1453(1).

352 S. REP. No. 753, 92d Cong., 2d Sess. 1-5 (1972).

353 16 U.S.C. § 1452(3) (Supp. 1995).

354 *Id.* § 1454(a)(1).

assist in the completion of its development, and to assist with the initial implementation of the plan.[355]

Once a coastal state has completed the development of a management plan, it is subject to the Secretary's review and approval.[356] To obtain federal approval, a state plan must meet all applicable requirements of the CZMA, consistent with Congress' policy declarations. The management plan must contain, among other elements: "an identification of the boundaries of the coastal zone subject to the management program; a definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters; an inventory and designation of areas of particular concern within the coastal zone;" procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values; the inventory and designation of areas that contain one or more coastal resources of national significance; and specific and enforceable standards to protect such resources.[357]

b. Federal Activities

Pursuant to 16 U.S.C. § 1456(c)(1)(A), any federal agency activity "within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone" must be "consistent" with the enforceable policies of an approved state management program "to the maximum extent possible." Federal agency activity means any function "performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities," such as offshore oil and gas lease sales.[358]

Federal agencies planning or authorizing an activity that affects any land or water use or natural resource of the coastal zone must provide to the relevant state agency a consistency determination.[359] The consistency determination is to be provided to the state agency at the earliest time practicable, but no later than 90 days before the final approval of the federal activity.[360] Once a state has received a federal consistency determination, the state must inform the federal agency of its agreement or disagreement with the determination as early as is practicable.[361]

If a state agency disagrees with the federal agency's consistency determination, the state must respond with its reasons for the disagreement along with supporting information.[362] The response *should* describe how the federal activity will be inconsistent with specific elements of the state's management plan and alternative means which, if the federal agency were to adopt them, would allow the federal activity to proceed

355 *Id.* § 1454(a).
356 *Id.* § 1454(b).
357 *Id.* § 1455(d)(2).
358 *Id.* § 1456(c)(1)(A); 15 C.F.R. § 930.31(a)(1995).
359 16 U.S.C. § 1456(c)(1)(C) (Supp. 1995).
360 *Id.* § 1456(c)(1)(C); 15 C.F.R. § 930.34(b) (1995).
361 15 C.F.R. § 930.41 (1995).
362 *Id.* § 930.42(a).

consistent with the state's management program. Federal regulations strongly encourage informal consultations between federal and state agencies to resolve differences regarding the consistency of a proposed federal activity affecting the coastal zone. Should a serious disagreement arise between those agencies, formal mediation is available through the Secretary of Commerce.[363]

Mediation will terminate if the federal and state agencies agree to a resolution of the serious disagreement; if one of the agencies withdraws from the mediation process; if the disagreeing agencies do not resolve their differences within 15 days following the Secretary's mediation efforts and the parties do not agree to extend the period of mediation; or for other good cause.[364] If mediation fails, the only recourse available is through the courts. The federal activity is prohibited in the absence of a consistency determination from the state.

c. Federally-Approved Activities

A different procedure applies when a federal license or permit is involved, as opposed to an activity undertaken directly by the federal government. Any applicant seeking a required federal license or permit to conduct an activity within or outside the coastal zone of a state affecting any land or water use or natural resource of the coastal zone, must provide a consistency certification that the proposed activity complies with the enforceable policies of the state's management program.[365] No federal license or permit may be granted until the state or its designated agency has concurred with the applicant's certification or (if the state fails to act) unless the Secretary, on his own initiative or upon appeal by the applicant, finds that the activity is consistent with the objectives or purposes of the CZMA or otherwise necessary in the interest of national security.[366]

If a federal license or permit activity is inconsistent with a management program, the activity may nonetheless be approved if the Secretary, upon appeal, finds the activity satisfies the following four requirements:

1. The activity furthers one or more of the competing national objectives or purposes contained in 16 U.S.C. § 1451 (Title III, § 302) or 16 U.S.C. § 1452 (Title III, § 303);
2. The activity, when performed separately or when its cumulative effects are considered, will not cause adverse effects on the coastal zone's natural resources substantially to outweigh the activity's contribution to national interest;
3. The activity will not violate any requirements of the Clean Air Act or the Federal Water Pollution Control Act; and
4. There is no reasonable alternative available which will permit the activity to be conducted in a manner consistent with the state's management program.[367]

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363 *Id.* §§ 930.43(a), 930.111.
364 *Id.* § 930.115.
365 16 U.S.C. § 1456(c)(3)(A) (Supp.1995).
366 15 C.F.R. §§ 930.64, 930.132(a) (1995).
367 *Id.* § 930.121(a)-(d).

The Secretary's decision constitutes final agency action for purposes of judicial review.[368]

d. Alaska Coastal Management Program

In 1977, in accordance with the CZMA, the State of Alaska enacted the Alaska Coastal Management Act.[369] Under this Act, coastal resource districts (local municipalities or governmental entities)[370] are to develop and adopt coastal management programs based upon that entity's existing land management plan and zoning standards governing resource use within the coastal area of the district.[371]

Guidelines for the district coastal management programs require each program to include the following: needs, objectives, and goals of the district;[372] boundaries of the coastal area for each district;[373] a resource inventory which describes the habitats, cultural resources, major land and water uses and activities, major land and resource ownership and management responsibilities, and major historic, prehistoric, and archaeological resources found within or adjacent to the district;[374] a resource analysis which describes the significant anticipated changes of matters described under resource inventory; an evaluation of environmental capability and sensitivity of resources, habitats, cultural resources, and for land and water uses and activities; and an assessment of present and anticipated needs and demands for coastal habitats and resources.[375] In addition, districts are required to recognize and assure opportunities for subsistence use of coastal areas and resources. Districts may designate areas within a coastal district as subsistence zones in which "subsistence uses and activities have priority over all nonsubsistence uses and activities."[376]

The habitats subject to the Alaska coastal management program include: offshore areas; estuaries; wetlands and tideflats; rocky islands and seacliffs; barrier islands and lagoons; exposed high energy coasts; rivers, streams, and lakes; and important upland habitat.[377] The Alaska Administrative Code requires that these areas "must be managed so as to maintain or enhance the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources."[378] In addition, other standards must be applied in the development of a district management plan for specific types of habitats. For example, barrier islands and lagoons must be managed to avoid or discourage activities

368 *Id.* § 930.130(d).
369 ALASKA STAT. §§ 46.40.190-46.40.210 (1991).
370 *Id.* § 46.40.210(2).
371 *Id.* § 46.40.030.
372 ALASKA ADMIN. CODE, tit. 6, § 85.020 (Jan. 1993).
373 *Id.* § 85.040.
374 *Id.* § 85.050.
375 *Id.* § 85.060.
376 *Id.* § 80.120.
377 *Id.* § 80.130(a).
378 *Id.* § 80.130(b).

"which would decrease the use of barrier islands by coastal species, including polar bears and nesting birds."[379]

Despite the intent of the standards established to protect coastal habitat, uses and activities otherwise not conforming to such standards may be allowed.[380] For such activities to be allowed, it must be shown that: (1) there is a significant public need for the proposed use or activity; (2) there is no feasible and prudent alternative to meet the public need; and (3) all feasible and prudent steps will be taken to maximize conformance with the established standards.[381]

Boundaries of district coastal areas must include lands which would reasonably be included in the coastal area and subject to the district program if not subject to the exclusive jurisdiction of the federal government.[382] The initial boundaries are based on *Biophysical Boundaries of Alaska's Coastal Zone*, published by the Office of Coastal Management and the Alaska Department of Fish and Game.[383] However, the final boundaries are subject to change if they: "extend inland and seaward to the extent necessary to manage uses and activities that have or are likely to have a direct and significant impact on marine coastal water;"[384] and "include all transitional and intertidal areas, salt marshes, saltwater wetlands, islands, and beaches."[385]

Any party may recommend areas either within a district, or within the coastal area but outside a coastal resource district, to be designated as an area which merits special attention.[386] Such a designation would require additional management planning for the area.[387]

The CZMA and the Alaska Coastal Management Act therefore provide the framework for a potentially greater degree of protection for polar bear habitat. Denning areas and other important habitat areas that fall within the State's coastal resource districts are to be managed, under Alaska law, to "maintain or enhance the biological, physical, and chemical characteristics of the habitat which contribute to its capacity to support living resources." Barrier islands and lagoons, for example, are to be managed so as to "avoid or discourage" activities which would "decrease use" of these

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379 *Id.* § 80.130(c)(5).

380 *Id.* § 80.130(d).

381 *Id.*

382 *Id.* § 85.040(a).

383 *Id.* § 85.040(b).

384 *Id.* § 85.040(c)(1).

385 *Id.* § 85.040(c)(2).

386 *Id.* §§ 80.160, 80.170. An "area which merits special attention" means

> [a] delineated geographic area within the coastal area which is sensitive to change or alteration and which, because of plans or commitments or because a claim on the resources within the area delineated would preclude subsequent use of the resources to a conflicting or incompatible use, warrants special management attention, or which, because of its value to the general public, should be identified for current or future planning, protection, or acquisition; these areas [are] subject to council definition of criteria for their identification. . . .

ALASKA STAT. § 46.40.210(1) (1991).

387 *Id.*

areas by polar bears.[388] Federal activities and federally permitted activities must be consistent with these State requirements.

Despite these requirements, this protection is far from complete. One serious limitation is that considerable important polar bear habitat is not covered by the program, which is limited to nearshore and coastal environments. The Arctic Ocean Sanctuary Area, which was the focal point of deliberations on the Agreement, is not covered. Nor are habitat areas under "exclusive federal jurisdiction," such as the Arctic National Wildlife Refuge. Under the CZMA, the Secretary may authorize federally permitted activities even if they are inconsistent with the Alaska Coastal Management Act. Moreover, under the State plan, activities that would interfere with coastal habitat protection can be allowed if there is a "significant public need" and no "feasible and prudent alternative." Thus, the State could exempt oil and gas exploration activities that would adversely impact polar bear habitat by making these findings.[389]

4. Protected Areas

The most effective means for protecting polar bear habitat is to set aside such areas as part of protected land classifications that impose restrictions on or prohibit activities which could adversely impact such habitat. Within the range of polar bears in Alaska there are several such protected areas.

The most important of these is the Arctic National Wildlife Refuge (ANWR), located in northeastern Alaska and bounded by the Trans Alaskan Pipeline on the west, the Alaska/Canada border on the east, the Beaufort Sea on the north, and the Yukon Flats Refuge on the south.[390] Of this nineteen million acre refuge, approximately eight million acres are designated as wilderness.[391]

Although many activities that could adversely affect polar bears within the Refuge are prohibited by the Alaska National Interest Lands Conservation Act, including oil and gas leasing,[392] section 1002 of that statute requires the Secretary of the Interior to assess and report to Congress on whether oil and gas exploration, development, and production should be allowed on the "coastal plain" of the Refuge.[393]

The coastal plain is important polar bear denning habitat and, as stated by Mr. Jack Lentfer in Congressional testimony, "[o]il and gas ex-

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388 *Id.* § 80.130(c)(5).

389 The Alaska Department of Fish and Game, in conjunction with the Alaska Department of Natural Resources, requires oil and gas operators subject to state jurisdiction to develop "Polar Bear Interaction Plans" for their operations. These plans require site lay-out to be developed so as to minimize the potential for polar bear interactions. They also include an education and awareness program for employees.

390 FWS, ARCTIC NATIONAL WILDLIFE REFUGE, ALASKA, COASTAL PLAIN ASSESSMENT 2 (1987) [hereinafter COASTAL PLAIN ASSESSMENT].

391 *Id.* at 1.

392 Alaska Native Interest Lands Conservation Act, 16 U.S.C. § 3143 (1985).

393 16 U.S.C. § 3142(a). In the report prepared by the Reagan Administration in 1987, oil and gas leasing in this area was favored. *See* COASTAL PLAIN ASSESSMENT, *supra* note 406.

ploration and development on the coastal plain of ANWR could have serious impacts on the Beaufort Sea polar bear population." As Mr. Lentfer testified, "about 25 percent of the bears in the Beaufort Sea population den on land and . . . more than 60 percent of the bears that den on land do so on the coastal plain of the Arctic Refuge."[394] Thus, even though this area is currently protected, the possibility remains that Congress will someday authorize oil and gas activity on the coastal plain, thereby creating the potential for impacts to this important polar bear habitat.

Four other federally protected areas are located within polar bear habitat in Alaska—the Cape Krusenstern National Monument, the Bering Land Bridge National Preserve, portions of the Alaska Maritime National Wildlife Refuge, and the National Petroleum Reserve-Alaska (NPRA). All of these areas are located within habitat for the Chukchi Sea polar bear population, except the NPRA, which is located on the North Slope and provides habitat for the Beaufort Sea population. Polar bears are not known to make extensive use of these areas.

Nearly complete protection is provided for bears located in the Monument, Preserve, and Refuge. The Monument and Preserve are units of the National Park System, and thus are closed to most forms of development that could affect polar bear habitats. A similar degree of protection is provided to the Refuge. As a general rule, the Department of the Interior could apply existing land management legal authorities to impose by regulation, or in some cases by other administrative action, restrictions on activities occurring on federal lands that would be harmful to polar bears or their habitat.[395] To date, no regulations have been promulgated specifically for that purpose.

The NPRA was established by the Naval Petroleum Reserves Production Act of 1976.[396] Its purpose is to create an area "reserved and withdrawn from all forms of entry under public lands laws, including the mining and mineral leasing laws . . . ."[397] Administration of the NPRA is vested in the Secretary of the Interior.[398] Included in this authority is the duty to take necessary actions "[w]ith respect to any activities related to the protection of environmental, fish and wildlife, and historical or scenic values" including the promulgation of regulations for this purpose.[399]

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394 *Hearings on H.R. 1320 and 759 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Merchant Marine and Fisheries Comm.*, 101st Cong., 2d Sess. 48 (1991) (statement of Jack Lentfer, Marine Mammal Commission).

395 For example, in National Park System units, regulations may be promulgated under 16 U.S.C. § 3. *See*, e.g., 36 C.F.R. pt. 13, subpart c (1995) (special regulations for Alaska units). For National Wildlife Refuge System units, the authority of the Refuge Administration Act and the Refuge Recreation Act may be used to promulgate regulations. 16 U.S.C. §§ 460k, 668dd. *See*, e.g., 50 C.F.R. pts. 26, 29-33, 36, 37. FWS also can prohibit or restrict activities determined to be incompatible with the purposes for which the affected refuges are established. 16 U.S.C. § 668dd(d)(1).

396 42 U.S.C. §§ 6501-6508 (1994).

397 *Id.* § 6502.

398 *Id.*

399 *Id.* § 6503(b).

In 1977, the Department of the Interior promulgated regulations that place responsibility for managing the NPRA in the Bureau of Land Management (BLM).[400] BLM is specifically authorized to take such actions as may be necessary "to protect fish and wildlife breeding. . . major migrations of fish and wildlife, and other environmental . . . values."[401] In addition, the regulations also provide for "maximum protection measures" to be taken "on all actions within the Utukok River Uplands, Colville River and Teshekpuk Lake" and "any other special areas . . . having significant . . . fish and wildlife, or historical or scenic value."[402]

To date, BLM has not taken any action under this authority specifically to protect polar bears.[403] However, clear authority exists to designate protected polar bear habitat. Of the already designated special areas, both the Colville River and Teshekpuk Lake include polar bear habitat and it is appropriate for BLM to impose regulatory restrictions in those areas to protect polar bear habitat, as well as possibly designate more extensive protected areas in other locations used by bears.

V. Proposal for a United States/Russian Federation Agreement on the Chukotka-Alaska Polar Bear Population

International efforts to protect polar bears have not been limited to the Agreement. It has been recognized that there is a need for joint efforts between the United States and Russia to protect the shared Chukchi Sea polar bear population. The first meaningful initial discussion of the need for a unified management approach for polar bears between the United States and Russia occurred at the 1988 IUCN Polar Bear Specialists Group Meeting in Sochi, Russia. No follow-up action occurred, however, until October 1992, when the FWS Regional Director for the Alaska Region signed a protocol with the Deputy Director of the Main Directorate of Biological Natural Resources, Ministry of Ecology and Natural Resources of the Russian Federation, on the intent of both parties to develop a management agreement for the Bering and Chukchi Seas polar bear populations.[404] The Protocol states that it is guided by the 1973 Polar Bear Agreement.[405] It expressly recognizes the importance of the Bering and Chukchi Seas population for indigenous Native peoples of Alaska and Chukotka and the fragility of the Bering and Chukchi Seas ecosystem and the international status of the polar bear habitat, including denning, feeding areas, and migratory routes.[406] The concept of such an agreement provides an excellent opportunity to further the polar bear conservation objectives of the 1973 Agreement and the MMPA. This would be the case

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400 43 C.F.R. § 2361.0-4 (1995).

401 *Id.* § 2361.1(e)(1).

402 *Id.* § 2361.1(c).

403 Telephone interview with David Yokel, Wildlife Biologist, Arctic District, United States Department of the Interior, Bureau of Land Management (Jul. 18, 1994).

404 U.S.-Russia Protocol, *supra* note 98.

405 *Id.*

406 *Id.*

especially for the Chukchi Sea population, which does not now have the benefit of a formalized conservation program such as that which exists for the Beaufort Sea population under the F&GMC/IGC Agreement.

The Protocol established the task of developing a management agreement for this population. As called for by the Protocol, the agreement was to specify the forms of U.S./Russian cooperation necessary to protect and manage these polar bear populations, including:

1. exchange of ecological information, with an emphasis on the evaluation of population abundance and regulation of use;
2. coordination and cooperation with international and native organizations where activities are connected with the study and conservation of polar bears;
3. using coordinated methodologies;
4. coordination of polar bear conservation and management activities; and
5. exchanging information on environmental legislation.

All of these objectives would further the goals of the MMPA and the 1973 Agreement.

The Protocol also provides that it is essential to create special working groups composed of representatives of both government agencies as well as Native peoples to prepare proposals for such an agreement.[407] The parties agreed to convene a meeting of those "working groups" in Russia in 1993 to prepare a draft management agreement.

Pursuant to this Protocol, FWS and the Russian Ministry of Environmental Protection and Natural Resources engaged in discussions between themselves which produced a draft agreement for management of the Chukotka-Alaska polar bear population. This draft was prepared by representatives of the Russian Federation with an apparent, but unspecified, level of involvement by FWS. The Russian Ministry of Environmental Protection and Natural Resources formally transmitted this draft agreement to FWS on June 25, 1993. Unfortunately the 1993 draft agreement was not developed under the working group format called for by the 1992 Protocol. It lacked consultation with affected Alaska Native communities.

Concerned over the contents of the draft agreement and the lack of native support for it, the Seward Peninsula Subsistence Regional Advisory Council submitted a resolution on October 1, 1993, calling for postponement of further negotiations until a Northwest Alaska Polar Bear Hunters Organization could be formed and consensus is reached on the terms of the Agreement. On October 11, 1993, the Indigenous People's Council for Marine Mammals wrote to the FWS Director stating the same concerns. Similar opposition was expressed by the Alaska Federation of Natives, the Eskimo Walrus Commission and other Alaska Native organizations. As a result of this opposition, FWS postponed further meetings with the Russian Federation. The concerns expressed by the Alaska Native organizations over the draft agreement were well founded.[408]

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407 *Id.*

408 The draft agreement purported not to be inconsistent with the 1973 Polar Bear Agreement; however, this was not the case. Inconsistencies also existed between the draft agree-

Following these expressions of concern, FWS began a serious effort to involve Alaska and Russian Natives in the discussion. FWS shelved the

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ment and the MMPA (if the agreement had been self-executing, these inconsistencies would not have existed as the agreement would have taken precedence over the MMPA). The draft agreement included many concepts that would have advanced the conservation goals of the 1973 Agreement and the MMPA, but a number of its specific terms conflicted with the MMPA, especially with reference to the Native take exemption.

Article 2.2 of the draft agreement, for example, provided that "only native peoples have the right to hunt polar bears in this area to satisfy their subsistence needs, particularly including, manufacture of handicrafts and clothes, as well as food." This provision was more limiting than both the 1973 Agreement and the MMPA, which allows for a waiver of the moratorium on taking.

Article 3 of the draft agreement also was inconsistent with the 1973 Agreement. This Article would have limited native subsistence harvest to specified seasons and under "special licenses." Article III.1(d) of the 1973 Agreement, however, authorizes hunting by "local people" in accordance with the laws of the affected Party. The applicable law in the United States - the MMPA - provides in section 101(b) an exemption for nonwasteful Native hunting for subsistence and handicraft purposes without limitation (except as may be developed by regulation for depleted species). Thus, under the combined operation of Article III.1.(d) of the 1973 Agreement and section 101(b) of the MMPA, Alaska Natives are not required to hunt within seasons or obtain licenses, and the draft agreement imposed restrictions that did not exist under United States law.

A similar problem was presented by Article 7 of the draft agreement, which would have provided for quotas for Native coastal villages. No such quota exists under the MMPA and, through the Article III.1(d) incorporation by reference of domestic laws applicable to local people involved in hunting polar bears by traditional methods, is not provided for by the 1973 Polar Bear Agreement.

Article 6 of the draft agreement provided that the use of polar bear populations would be based upon the "principles and criteria of sustainable use of rare species." No explanation was provided for this term. Depending upon its meaning, it could have conflicted with the management directive of the 1973 Agreement to apply "sound conservation practices" in making management decisions. The concept of "sustainable use" suggests managing populations from an economic or harvest-based perspective, which would have been at odds with the underlying goals of the MMPA and the 1973 Agreement to manage polar bear populations for their own benefit and based upon ecosystem health and stability concerns.

Article 9 of the draft agreement would have prohibited hunting bears from planes, helicopters, or on-the-ground vehicles including snowmachines, and marine vessels having a displacement of more than forty tons. It also prohibited the use of poisons, traps, snares, shotguns, and automatic rifles. This provision was broader than the prohibited methods of take provided for in Article IV of the 1973 Agreement. Such added restrictions would, of course, be permitted, if not encouraged, by the 1973 Agreement. Nevertheless, to the extent this Article would have prohibited the use of a "traditional method" of hunting by "local people," it would have been inconsistent with Article III.1(d). The question for consideration was whether any of the prohibited methods of take, such as the use of snowmachines, was "traditional" within the meaning of Article III.1(d).

Article 10 of the draft agreement would have authorized sport hunting by non-Native hunters if accompanied by a licensed guide and a dog-sled were used. This provision was inconsistent with the MMPA, which prohibits such a hunt in the absence of a waiver of the moratorium.

Finally, Article 11 of the draft agreement also would have been inconsistent with the 1973 Agreement. Under the draft agreement, any export or import of polar bear parts and products could be allowed by "special permission" from the Parties' authorized agencies. Article V of the 1973 Agreement, however, prohibits all export and import of polar bears and their parts and products if taken in violation of the Agreement. In addition, it failed to take into account the import and export prohibitions of sections 101(a)(1) and 102(b) and (c) of the MMPA.

controversial 1993 draft agreement, and began over again. At the same time, in an effort to establish the basis for Alaska and Russian Native participation in cooperative efforts to protect, manage, and study the Chukchi Sea polar bear population, representatives of Native groups in both countries met in Anadyr, Russia in April 1994. As a result of this meeting they entered into a Protocol.[409] In the Protocol, the Natives agreed to develop an agreement to provide for joint management of the Bering/Chukchi Sea polar bear population. The Native management agreement would be consistent with the Polar Bear Agreement, and provide for a unified system of polar bear management and habitat protection based on both western scientific knowledge and the traditional knowledge of Natives.

To follow-up on this Protocol and address concerns over the relationship between the federal government and Alaska Natives, a meeting was held in July 1994 between FWS and Alaska Native representatives. This meeting resolved several issues and paved the way for future cooperation between the Alaska Native community and FWS on this issue. It was agreed that four separate agreements would be established: 1) a United States-Russia government to government agreement; 2) an agreement between Native organizations in both countries; and 3) separate agreements in each country between the governments and Natives. A follow-up meeting between the United States and the Russian Federation, with participation by Alaska Natives, occurred in September 1994. That meeting laid additional groundwork for an agreement to be entered into by the parties. The United States and Russia entered into a protocol, which specified a number of measures that would be undertaken to facilitate studies on polar bears of the shared Chukchi Sea stock.[410]

In October 1994, a meeting took place in Nome between Alaska and Russian Natives. During this meeting, the Natives developed a draft management agreement. Since then, FWS, in cooperation with the State Department, the Marine Mammal Commission, and Alaska Natives, has been working on a revised government-to-government agreement. In June 1995, these parties met in Anchorage to discuss the effectiveness of the United States' implementation of the Polar Bear Agreement and the status of negotiations with Russia and Russian Natives for the counterpart agreements.

The understandings reached in Anchorage led to another working meeting of the U.S. and Russian representatives in September 1995 in Petropavlovsk-Kamchatskiy, where a protocol was signed outlining a number of areas of mutual interest and joint effort.[411] Alaska and Canada Natives participated in this discussion, in addition to pursuing their own

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409 Protocol of Intentions Between the Indigenous Peoples of Chukotka and Alaska on the Conservation, Protection, Management, and Study of the Bering and Chukchi Seas Shared Polar Bear Population, Sept, 9, 1995 (on file with author).

410 U.S./Russia Technical Consultation for the Conservation of Polar Bears of the Chukchi/Bering Sea Region, Sept. 9, 1994 (on file with author).

411 Protocol of the U.S.-Russia Working Meeting for Preparation of Draft Principles for the Conservation and Management of the Chukotka-Alaska Population of Polar Bears, Sept, 19, 1995 (on file with author).

negotiations for the Native-to-Native agreement. The protocol outlined the following guiding principles for future negotiations:

1) a determination that the polar bear population may be used for subsistence purposes by the Native People of both Alaska and Chukotka, based on a finding that the population is prospering;
2) cooperation on various levels within and between the United States and Russia to promote the recovery and sustainability of the populations abundance and to protect polar bear habitat and migration routes;
3) the need to create a mechanism for joint protection and continued study of the Chukotka-Alaska population;
4) specified use of polar bears in accordance with the principles of sustainable use;
5) a constructive approach to the problem of conservation and use of polar bears by the Native Peoples, with a view to establishing scientifically-based standards for take.[412]

This most recent protocol also called for the drafting of Principles for the Conservation and Management of the Chukotka-Alaska Population of Polar Bears.[413] These Principles are now being developed by the representatives of the United States, Russia, and the Natives. The Principles will specify in greater detail the contents of the bilateral agreement. If approved by the Parties, the Principles will serve as the blueprint for future negotiations. FWS intends to publish the Principles for public comment in mid-1996.[414] Based on those comments, the United States will revise the Draft Principles as appropriate and pursue further negotiations looking toward the development of a new treaty between the United States and Russia on polar bear conservation. Depending on the outcome of the public comment process, it is anticipated that the final agreement will be signed by the end of 1996 and, if necessary, ratified by the U.S. Senate in 1997.[415]

As currently proposed, the Draft Principles build on the purposes of the 1973 Agreement and establish several new initiatives that should, for the most part, benefit polar bear conservation and research. The Draft Principles also recognize the need for, and legitimacy of, Native self-regulation and participation in national and international research and management efforts.

The Agreement, as envisioned, would also call for several significant departures from the MMPA. As such, new implementing legislation would be necessary, or the Agreement would need to be self-executing to override inconsistent provisions of the MMPA. In addition, it could serve as the basis for opening the hunting of polar bears in Russia. Currently, no lawful take of bears occurs. Thus, unless such take is carefully monitored and enforced in Russia, allowing such take could have adverse effects on

412 *Id.*

413 Draft Principles of Conservation Agreement for the Alaska-Chukotka Polar Bear Population, Feb. 29, 1996 [hereinafter Draft Principles].

414 Telephone Interview with Steven G. Kohl, Russia Program Coordinator, FWS (Feb. 27, 1996).

415 *Id.*

the Chukchi Sea polar bear stock. This is an especially strong concern in Russia because of the lack of resources for enforcement and the apparent absence of a strong Native organization to pursue self-regulation.

The Draft Principles call for the new Agreement to be consistent with the terms of the 1973 Agreement.[416] To do so, the Agreement will have to resolve a number of important issues. For example, will the use of aircraft to hunt be prohibited? Will the taking of cubs and females with cubs be prohibited? Will the take of denning bears be prohibited? Will sport hunts be allowed, and, if so, will they be limited in area to traditional means, and will restrictions be imposed on who can hunt?

The 1973 Agreement allows the Parties to be more restrictive. The Draft Principles are ambiguous as to whether an effort will be made to be more protective than the 1973 Agreement. The new Agreement, for example, could prohibit take by harassment. It also could specify what actions should be taken to protect polar bear habitat, including the designation of zones where no take is allowed or is subject to greater restrictions than those specified in the Agreement.

The proposed Agreement between the United States and Russia also presents an ideal opportunity to continue the trend recognized by the 1994 MMPA amendments of sharing responsibility for, or co-managing, marine mammal conservation with Native peoples. The Draft Principles appear to reflect an intent to do so by calling for government-to-Native co-management agreements,[417]and establishing a "Joint Commission" to implement the Agreement that would consist of equal participation by federal government and Native representatives.[418] The Joint Commission would play a key role in defining habitat protection measures and establishing take levels. The preferred method for decision-making would be by consensus.[419]

The Draft Principles also call for the Agreement to create a strong, independent role for Alaskan and Russian Natives. In particular, enforcement of quotas, seasons and similar restrictions would be left to the natives, as would allocation of quotas among villages. These issues would be addressed in the Native-to-Native Agreement now under development. The Draft Principles are silent, however, on how local traditional knowledge will be incorporated into, or recognized as having a role equal to, scientific research efforts under the Agreement. Nor do the Principles indicate whether Natives will be provided an active, meaningful role in carrying out the research program. Such a role is essential to a comprehensive research and management effort.

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416 Draft Principles, *supra* note 412, at 1.

417 *Id.* at 2.

418 *Id.* at 3. There appears to be debate whether public-at-large representatives will be included. If not properly structured, doing so could "dilute" the co-management model which recognizes shared responsibility, at least on native-related issues, between the federal government and Native entities. Nevertheless, public input into the deliberations of the Joint Commission is important and should be accommodated.

419 *Id.* at 3.

The Draft Principles also suggest that several aspects of the new Agreement would be inconsistent with the MMPA. For example, quotas would be set on Native take.[420] Reference is also made to Native-guided sport take and "local resident subsistence harvest" as distinct from "Native subsistence harvest." Neither form of take is currently allowed under the MMPA without a waiver. The policy justification for such expanded take authority is not apparent in the Draft Principles. These are potentially controversial issues that will benefit from public review and comment.

Overall, the Draft Principles hold out promise for an innovative, proactive international Agreement. On the other hand, if not properly crafted and enforced, the Agreement could also set back conservation by opening up new opportunities for take in both countries. If the Parties carry through with the development of a carefully constructed agreement, this new bilateral treaty could very well serve as the model for revision to the 1973 Agreement.

While the United States and Russian governments are developing the Draft Principles, negotiations between the natives of Chukotka and Alaska have produced a separate draft agreement relating directly to issues of greatest mutual concern to them. This agreement will be modeled after the F&GMC/IGC Agreement.[421] It will address the full range of conservation and subsistence issues of concern to Alaska and Russian natives, including allocation of harvest quotas.

VI. Reconciling United States Laws and the Polar Bear Agreement

This section discusses the inconsistencies between United States laws applicable to polar bears and polar bear habitat conservation and management and the Polar Bear Agreement. It identifies actions that could be taken to eliminate these inconsistencies. Such actions include developing additional United States legal authorities and possibly amending the Agreement itself. Before considering these actions, this section discusses the current legal status of the Agreement under United States law.

A. Legal Status of the Polar Bear Agreement

1. Even If the Agreement is Not Self-Executing or Subject to Implementing Legislation, the United States is Bound by Its Terms

In the preamble to the 1991 incidental take regulations for oil and gas exploration in the Chukchi Sea, the Department of the Interior (DOI) took the position that the Polar Bear Agreement is not self-executing.[422] DOI also stated that Congress "has not implemented the 1973 Agreement under

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420 No quotas can be set under the MMPA absent a depletion finding. Thus, it is important that Native participation in quota-setting be ensured and that a consensus decision-making approach be used on such issues so as not to undermine the MMPA precept that federal officials cannot dictate Native take of nondepleted species.

421 *See* text accompanying *supra* notes 62-69.

422 56 Fed. Reg. 27,454 (1991).

section 101(a)" of the MMPA. Based on this conclusion, DOI asserted that, "even if a conflict existed between the Agreement and the MMPA, such would not be an impediment to the issuance of this Final Rule" authorizing incidental take.[423]

These assertions by DOI are troubling on several levels. First, it is disturbing that FWS would suggest it could promulgate regulations authorizing the taking of polar bears in contravention of the Agreement based on the premise that Congress has not enacted implementing legislation. Setting aside legal arguments as to the binding effect of the Agreement, it is clear that the United States is a party to this Agreement and has openly supported its terms for twenty years. Indeed, the United States seeks to portray itself as a leader in promoting wildlife conservation in general, and polar bear protection specifically. For DOI to announce its willingness to disregard these obligations for the convenience of promulgating incidental take regulations is at best, inconsistent; at worst, it is an abdication of fundamental principles of international diplomacy and United States wildlife conservation leadership and philosophy. It is significant that no such assertion is made in the November 1993 incidental take regulations for the Beaufort Sea and adjacent coast. Indeed, to the contrary, in the preamble to these regulations, FWS recognizes its habitat protection obligations under the Agreement and identifies measures to be taken to fulfill them.[424]

Even if it is true that the Agreement is not self-executing and lacks implementing legislation, it does not follow that the Agreement "would not be an impediment" to authorizing activities inconsistent with its terms. The United States still has obligations to fulfill under the Agreement.[425] Those Agreements remain in full force and effect as between the governments of the contracting parties.[426]

To deliberately act contrary to the Agreement would not only be a political embarrassment for the United States, it would provide other parties with an argument that they too can escape their international polar bear conservation obligations. Other countries could invoke this example to use against the United States in other environmental treaty contexts, for example, under the International Convention for the Regulation of Whaling. At the extreme, under Article X.7, other parties could denounce the Polar Bear Agreement based upon the deliberate decision by the United States to flout its provisions by failing to fulfill its commitments.

The disingenuous nature of the DOI position becomes even more pronounced when it is considered in light of the repeated statements made by the United States government, including the President, the State Department, and DOI itself when the Agreement was presented to the Senate for its advice and consent that no implementing legislation beyond the ex-

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423 *Id.*

424 58 Fed. Reg. 60,408 (1993).

425 *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations").

426 Section 321 of RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 190 (1986) [hereinafter RESTATEMENT], provides that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith."

isting provisions of the MMPA was necessary.[427] Purely on grounds of governmental integrity and honesty in diplomatic relations, DOI should disavow this statement from its 1991 rulemaking. DOI also should support the development of any implementing legislation it now considers necessary to implement the Agreement so that no question or conflict would exist.

2. The Polar Bear Agreement May Be Self-Executing

Under the Constitution, treaties entered into by the United States are "the law of the land."[428] A self-executing treaty therefore supersedes prior inconsistent law. Section 115 of *The Restatement Third* provides that "a provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States." Treaties are to "be enforced over directly conflicting federal law unless Congress has clearly and affirmatively disavowed rights provided by treaty."[429] Thus, if the Agreement is self-executing, its provisions will control over conflicting provisions of the MMPA or other United States laws.

This question of whether the Agreement is self-executing is not free from doubt, and reasonable arguments can be made on both sides of the issue. However, it is unwise for the DOI to be formulating policy based on the assumption that the Agreement is either not self-executing or can simply be disregarded.

It is well-recognized that there is a strong presumption that treaties are self-executing. *The Restatement Third* notes that "if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches."[430] *The Restatement Third* cautions that "this is especially so if some time has elapsed since the treaty has come into force. In that event, a finding that a treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided."[431] As noted above, the consensus view by the Executive Branch and Congress in the years immediately following the 1973 Oslo meeting was that no additional legislation was necessary to implement the Agreement. Thus, it could be argued under these rules of treaty interpretation that the Agreement should be considered self-executing. Another possible interpretation is that the Ex-

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427 In oversight hearings on the MMPA in 1973, FWS acknowledged that the recently signed Polar Bear Agreement did not require implementing legislation. As stated by Director Greenwalt, "[i]t is our view that the Marine Mammal Protection Act of 1972, and the Endangered Species Act of 1973 provide sufficient authority for the United States to implement the obligations under the treaty once it comes into force." *MMPA Oversight Hearings*, *supra* note 167, at 166; *see also id.* at 167 (testimony of Rick Parsons) ("We would not need any further implementing legislation.").

428 Frolova v. USSR, 761 F.2d 370, 373 (7th Cir. 1985).

429 Lemnitzer v. Phillippine Airlines, 783 F. Supp. 1238, 1241 (N.D. Cal. 1991).

430 RESTATEMENT, § 111, reporters' notes 5, at 53.

431 *Id.* at 53-54.

ecutive Branch did not believe the Agreement was self-executing; instead, it may have been of the view that the required implementing legislation already existed in the form of the MMPA. The only interpretation that is highly unlikely is the one which DOI appears to advance in the Chukchi Sea rulemaking, which is that the Agreement is not self-executing *and* was not implemented in any fashion by the United States.

To determine whether a treaty is self-executing, it is necessary to first review the language of the agreement itself in an effort to discern the intent of the parties.[432] A treaty is considered self-executing unless it manifests an intention that it shall not be binding without domestic legislation.[433] In other words, the parties must state their intent that the Agreement is *not* self-executing.

If the language of the treaty is ambiguous, the facts surrounding its negotiation are to be considered.[434] Other factors to be considered include: the nature of the obligations imposed; the availability of alternative enforcement mechanisms; the effect of allowing a private right of action; and the capability of the judiciary to resolve a dispute.[435] Under all of these tests, a reasonable argument can be made that the Polar Bear Agreement is self-executing.

The Agreement itself provides in Article VI.1 that "[e]ach Contracting Party shall enact and enforce such legislation and other measures *as may be necessary for the purpose of giving effect to this Agreement.*"[436] This clause does not require implementing legislation to give effect to the Agreement. Instead, it reflects the intent of the parties that such legislation should be enacted only "if necessary." Thus, if legislation is not "necessary for the purpose of giving effect to this Agreement" for one of the five nations, it follows that the Agreement is self-executing as to that contracting party.

Because there is ambiguity, however, in this provision as to whether the Agreement was intended to be self-executing, other factors should be considered. When these factors are assessed, a reasonable argument can be made that the Agreement is self-executing. The circumstances surrounding the Agreement suggest it was to be automatically binding. In the preamble to the Agreement, the parties noted the need "to take immediate action" to protect polar bears.[437] Clearly, a lengthy domestic implementation period is inconsistent with this goal. In addition, the 1973 Agreement was intended to be reviewed after five years. It would be contrary to the goals of a short-term agreement to allow each party to take the time necessary to achieve domestic implementation.

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[432] *See, e.g.*, Frolova v. USSR, *supra* note 428, at 373; Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976).

[433] Diggs, 55 F.2d at 852.

[434] *Id.*

[435] Frolova, *supra* note 428, at 373; People of Saipan v. United States Dep't of the Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

[436] Polar Bear Agreement, *supra* note 21, art. VI.1 (emphasis added).

[437] *Id.*, preamble.

In the explanatory notes of the IUCN draft, Art. VI.1 was explained as applying to "supporting legislation." This terminology conveys a different meaning than "implementing legislation;" to "support" the Agreement suggests that it already was effective.[438] In addition, the IUCN explanatory notes for the September Draft indicate that the parties thought the language in Article VI.1 could be deleted "in view of the wording used in Article I and II."[439] It appears that this statement refers to the fact that Articles I (taking prohibition) and II (duty to protect habitat) imposed direct, specific, and affirmative duties on the parties. Language of this nature, which compels parties to act in a specific way, is generally regarded as self-executing.[440] General treaty obligations—which are not the kind found in Article I and II—are usually regarded as non-self-executing and requiring of implementing legislation.[441]

Under the other tests set forth in case law, an argument can be made that the Polar Bear Agreement is self-executing.

- The nature of the obligations imposed are narrow, specific, and well-defined. The requirements of the treaty are not so vague and generalized that it would not be possible for the parties to implement them without further domestic guidance.
- There are no effective alternative enforcement mechanisms. The Agreement was entered into precisely because there was no way to control the taking of polar bears on the "high seas" or protect polar bear habitat. The Agreement therefore is necessary to protect bears from the harmful effects of taking in international territory.
- There are no disadvantageous implications of permitting a private cause of action for the obligations the United States agreed to undertake. A lawsuit by a private party to enforce the Agreement would only have the effect, if successful, of requiring the United States to meet the obligations it has already accepted through international negotiations.
- There are no major foreign policy implications that would flow from enforcing the taking prohibition or the requirement that the United States protect polar bear habitat within its jurisdiction. Indeed, adverse foreign implications may result from failure to uphold the treaty's obligations.[442]
- Finally, there is no reason the courts should be unable to interpret and apply the Agreement. Most of the requirements of the Agreement are clear and straightforward, and the intent of the parties is relatively easy to determine. The Courts would not be intruding upon the foreign affairs prerogatives of the Executive Branch. Judicial enforcement of the Agreement

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438 September IUCN Draft, *supra* note 109, explanatory notes, at 4.

439 *Id.* at 4-5.

440 *See* United States v. Rauscher, 119 U.S. 407, 427-28 (1886); Schwartz v. United States Dep't of Justice, 494 F. Supp. 1268 (E.D. Pa. 1986).

441 I.N.S. v. Stevic, 467 U.S. 407, 428 n.25 (1984).

442 If the Agreement is self-executing, an implication could arise that Congress chose to ignore the Agreement in 1981 and 1986 when it amended the MMPA to establish § 101(a)(5) authorization for incidental take in non-commercial fisheries activities. No such taking exception exists in the Agreement, and by amending the MMPA in this way Congress set in place the framework to authorize takes that are not permissible under the Agreement. There is no indication that Congress considered this potential inconsistency when amending the MMPA.

> would not result in a court order requiring the United States to take action against a foreign nation (which could raise separation of powers problems); it would only compel the United States to conform its own behavior to the international standards it accepted in 1973.

For all of these reasons, a reasonable argument can be made that the Polar Bear Agreement is self-executing. The argument to the contrary would be based upon statements made by United States participants in congressional deliberations to approve the Agreement that it was to be implemented by the MMPA and the fact that, over the 20 years the Agreement has been in force, no parties have asserted that the Agreement is self-executing. On balance, the better argument is that the Agreement is not self-executing because of the statements of congressional and executive branch intent that the MMPA served as implementing legislation and the subsequent actions of other parties which also demonstrated no such intent. The question is not free from doubt, however. Possible confusion, debate, and litigation over the self-implementing nature of the Agreement could be avoided, however, through actions by the United States to fully and finally implement all terms of the Agreement under United States law. The issue should be addressed under the review of the Polar Bear Agreement required by section 113(b) of the MMPA, as amended in 1994.

3. *Even If the Agreement is Not Self-Executing, the MMPA Has Implemented Most of Its Terms*

The *Restatement Third* explains that an international agreement is non-self-executing "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation."[443] As noted above, the Polar Bear Agreement requires additional legislation only if necessary. *The Restatement Third* notes "there can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it."[444] Thus, it can be argued that the MMPA implements the Polar Bear Agreement for the provisions that are consistent with the Agreement. For example, the taking prohibition of the Agreement is implemented by the MMPA moratorium. To the extent, however, that there are inconsistencies between the MMPA and the Agreement, those provisions of the Agreement are not implemented by domestic law. As to all of these provisions, which are discussed below, implementing legislation would be needed to give them full force and effect and would seem to be "necessary" for purposes of Article VI.

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443 RESTATEMENT § 111 (4)(a), at 43.

444 *Id.* at 47 comment h.

B. Eliminating Inconsistencies Between United States Laws and the Polar Bear Agreement

This section identifies the areas of inconsistency between United States laws and the Polar Bear Agreement. It identifies changes that could be made to the MMPA, its implementing regulations, and the Agreement itself to eliminate these inconsistencies. In setting forth this analysis, the key elements of the international polar bear protection program are dealt with separately. Under each element, a discussion is provided of amendatory language that would resolve the inconsistency. These are issues that should be fully addressed by the executive branch and the parties to the Agreement in consultations undertaken pursuant to section 113(b) of the MMPA to carry out the 1994 amendments.

1. Prohibition on Taking

The MMPA is, in most respects, more protective than the Polar Bear Agreement with regard to the prohibition on taking. The Agreement prohibits only "hunting, killing and capturing" bears,[445] where the MMPA defines the prohibited act of taking to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill."[446] The Agreement therefore omits the prohibited act of "harassing" bears and "attempting" to conduct any of the prohibited acts.

Protection against harassment is important to the protection of polar bears, especially for purposes of preventing the disturbance of bears in dens or when they are moving into dens. As discussed in section I, the disturbance of bears during denning activities is a serious threat to species conservation. Because such disturbance does not involve the actual hunting, capturing, or killing of bears, it is not prohibited by the Agreement. The protection provided to habitat, including denning sites, under the Agreement is to be undertaken by the parties "as appropriate," and therefore affords flexibility in the methods used to achieve this goal. In addition, prohibiting "attempts" to take bears has the important advantage of not requiring bears to actually be taken before enforcement action can occur. For these reasons, Article I of the Agreement would be strengthened in several important ways if it were made consistent with the MMPA.

2. Prohibited Methods of Taking

The Agreement prohibits the use of aircraft and large motorized vessels for purposes of taking polar bears. The MMPA does not contain such a prohibition. The Airborne Hunting Act does not prohibit the use of aircraft as an aid in hunting. Aircraft have been used on occasion by Native hunters to take bears, and the Polar Bear Specialist Group has recognized

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445 Polar Bear Agreement, *supra* note 21, art. I.2.

446 16 U.S.C. § 1362(12) (1994).

this as a problem requiring action by the United States.[447] In addition, if a waiver of the MMPA moratorium were granted, it conceivably could allow the use of large motorized vessels for sport hunting and the use of aircraft to aid hunting in a manner not prohibited by the Airborne Hunting Act. Taking by such means is contrary to the Agreement.[448]

To address this inconsistency, the MMPA should be amended to prohibit the use of aircraft and large motorized vessels to take polar bears. An exception should be made for scientific research and species enhancement purposes. An amendment to the Act would be necessary because this prohibition would apply to Native take. Regulations could not be promulgated for this purpose because polar bears have not been designated as depleted.

3. The Prohibition on the Hunting of Cubs and Females with Cubs

The taking of females with cubs and their cubs remains a matter of concern under the Agreement. Native take of these animals is permissible under the MMPA and is occurring in Alaska. Such takes also would not be necessarily prohibited for sport hunting purposes if a waiver of the moratorium were granted. The Polar Bear Specialist Group has passed a resolution requesting that Alaska Native take be directed to male bears.[449] Also, the MMPA imposes no restrictions on the hunting of bears in denning areas, as called for under the Agreement Resolution.

Two steps could be undertaken to fulfill the intent of the parties with respect to this Resolution. Parties to the Agreement, in full consultation with Native user groups, should determine how important this prohibition is to polar bear conservation. Full consideration also must be given to how important the take of cubs is to Native use of polar bears for subsistence and handicraft purposes. Specifically, the question that should be answered is whether all take of cubs and females with cubs must be prohibited or whether some level of take is permissible to accommodate local subsistence and handicraft needs. Whatever answer to this question results should be reflected in an actual term of the Agreement. The current status of this provision as a Resolution creates confusion as to its importance and weakens its significance. If such action is deemed desirable, the appropriate action would be for the parties to add such a clarification to the Agreement as either subparagraph 3 under Article I or as a new Article. The second step would be to amend the MMPA to add a corresponding provision to reflect the intent of the parties.

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447 IUCN Polar Bear Specialist Group, *Polar Bears, Proceedings of the Tenth Working Meeting of the IUCN/SSC Polar Bear Specialist Group*, Resolution 9, at 105 (1988) [hereinafter Specialist Group].

448 As noted previously, waivers should be consistent with international treaty obligations. Thus, any waiver granted for this purpose should prohibit the use of large motorized vessels and aircraft.

449 Specialist Group, *supra* note 447, res. 2, at 104.

4. Exceptions to the Taking Prohibition

As discussed below, there are several inconsistencies between the MMPA's exceptions for taking and those contained in the Polar Bear Agreement. To resolve them, changes would be necessary to both the MMPA or its regulations and the Agreement.

a. Public Display

The Polar Bear Agreement does not explicitly allow the taking of bears for public display purposes, but such takes are allowed under the MMPA. Because the Agreement only contemplates that domestic laws would be more stringent, it would be necessary to amend the MMPA or its implementing regulations to prohibit such take. As noted above, polar bears (other than orphaned cubs) have not been taken from the wild for this purpose, and the United States is not in violation of this requirement, even though the MMPA allows for such takes. Consequently, this issue has not resulted in any impact on polar bears. Nevertheless, for the sake of consistency, it is desirable to amend the MMPA or the FWS public display regulations to prohibit such takes.

b. Management of Other Living Resources

The MMPA does not explicitly allow takes for the purpose recognized by Article III.1.c. for the "serious disturbance of the management of other living resources." In this regard, the MMPA is more restrictive than the Agreement. There is no evidence that this authority is being abused by any party to the Agreement. On the other hand, it is questionable whether this provision is needed, especially in light of the decline of commercial sealing, which was the object of including this provision in the Agreement. Because this provision is ambiguous and subject to possible abuse as an excuse for taking bears, serious consideration should be given to deleting it from the Agreement.

c. Incidental Take

The Polar Bear Agreement does not authorize incidental take within the polar bear protection zone. Such takes are authorized under section 101(a)(5) of the MMPA. Because the Agreement does not now prohibit harassment, an inconsistency exists only to the extent such takes would be lethal, involve the capture of bears, or be a product of habitat degradation or destruction. Because there is potential for polar bears to be lethally taken incidental to activities such as oil and gas operations, it is necessary to either amend the Agreement or to amend the MMPA to prohibit such takes if consistency with the Agreement is the goal.[450] Takes by harassment could still be allowed under the MMPA, consistent with the Agreement.

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[450] The alternative would be to amend the Agreement to establish authoritiy for incidental takes.

If the Agreement is amended to prohibit harassment, it would also be necessary to establish an exception under Article III for unintentional, non-lethal takes if the intent is to achieve consistency with the MMPA. If this is not done, another inconsistency would be created between the MMPA and the Agreement.[451] It is highly unlikely that the incidental take authority of section 101(a)(5) can be deleted from the MMPA. Indeed, to do so would eliminate an important regulatory tool necessary to allow certain activities that result in negligible levels of incidental take of bears to occur. A preferred approach would be to strengthen the protection available under this authority, especially for habitat protection, and to add such authority to the Agreement as well.

d. Nuisance Animals

Although it was provided for in the IUCN drafts, the Polar Bear Agreement does not authorize the take of "nuisance bears" within the polar bear protection zone that present a risk to human life. Such takes are authorized under section 109(h) of the MMPA and the revised section 101(c) as amended in 1994. It is unlikely that any party would be considered out of compliance with the Agreement for a take lawfully conducted for this purpose. Nevertheless, the absence of such authority deprives the Agreement of needed flexibility. Thus, if changes are to be sought to the Agreement, such an exception should be established if consistency with the MMPA is the goal.

e. Polar Bear High Seas Protection Zone

The exception from the take prohibitions set forth in Article III.1(e) of the Agreement ("wherever polar bears have or might have been subject to taking by traditional means by its nationals") is in need of clarification or amendment. As discussed in section II.B.3 of this article, the meaning of this provision is confusing and controversial. If for no reason other than to resolve the questions over the meaning of this provision, the Parties should amend Article III.1(e) to clarify its intent.

In addition, it is clear that this provision no longer provides adequate protection to polar bears. As originally drafted, it was designed to define an Arctic Ocean sanctuary in which only limited types of take could occur, for example, those takes authorized by exceptions III.1(a) - III.1(d)). In the non-sanctuary area, any kind of take could be authorized by a Party, consistent with the other provisions of the Agreement such as the requirement that sound conservation principles be applied and take by aircraft and large motorized vessels is prohibited. This approach was used because, in 1973, the primary threats to polar bears were considered to be activities in the Arctic Ocean sanctuary zone, especially hunting. In recent years, however, it has become apparent that some of the most significant threats to polar bears are not limited to the Arctic Ocean sanctuary area.

[451] Alternatively, the MMPA would have to be amended to eliminate the incidental take authorization for polar bears under section 101(a)(5).

Instead, resource utilization and development in nearshore and onshore areas poses a potential threat to polar bears and their habitat. Pollution risks, habitat modification and destruction, alteration of bear migration and other behavioral patterns as a result of human activities, and other risks discussed above now occur throughout polar bear habitat, and possibly at even greater levels throughout the region covered by the Article III.1(e) exception and therefore not subject to the Agreement's prohibition on take.[452]

The best way to address this problem is to extend greater protection to polar bears in the zone covered by Article III.1(e). In particular, the take prohibition should extend, under the Agreement, to polar bears wherever they are located and greater protection should be provided to polar bear habitat; for example, by amending Article II. The prohibition on take should be strengthened to include harassment and attempts to take. As necessary, additional exceptions could be established to address legitimate circumstances where take should be allowed (e.g., incidental take) under this expanded approach to protection. If sport hunting is to be authorized, the Agreement should clearly spell out where and by whom. Until this action is taken, the Agreement will represent an outdated, insufficient tool for achieving its original purpose of protecting polar bears and their habitat from the most significant threats to their conservation. Accordingly, the Parties should convene a meeting to consider the need to amend the Agreement for this purpose.

5. Habitat and Ecosystem Protection

There are a variety of legal measures available to the United States to protect polar bear habitat. MMPA regulations and letters of authorization issued under section 101(a)(5) can prohibit or restrict activities involving the take of polar bears in important habitat areas. Because the greatest threat to polar bear habitat results from the harassment of bears in denning areas, taking restrictions under section 101(a)(5) might address a major concern under Article II of the Agreement. OCSLA leases, exploration permits, and development plan authorizations could be conditioned in the same way. National Environmental Policy Act assessments can identify

452 The change in the nature of the threats to polar bears is noted by Barry Lopez:

> In 1965, polar bear biologists, meeting at the University of Alaska to pool what they knew, feared that bears might need protection from excessive hunting. The greatest danger to them now, stressed every scientist I spoke with, is not hunting but industrial development and what it brings with it, including summary demands for data on polar bear biology and ecology. Uppermost in scientists' minds are three areas of concern. First is environmental poisoning. Bears feed at the top of a marine food chain that concentrates PCBs, heavy metals, and chlorinated hydrocarbons like dieldrin, all of which have been found in polar bears. The waste from drilling and mining operations has also proved lethal to bears. A second concern is the disruption of female bears at their denning sites, the result of intensive overflights and other transportation corridor development and or repeated seismic surveys. A third area of concern is what effect industrial developments will have on the distribution of seals, and therefore bears.

LOPEZ, *supra* note 47, at 104.

threats to polar bear habitats, and any resulting decisions can be appropriately tailored to avoid such impacts. Finally, the CZMA can be applied to restrict development in coastal areas that would harm such habitat.

Despite these available mechanisms, the United States lacks any legal authority that speaks specifically to polar bear habitat/ecosystem protection. All of the above-cited authorities are preventative in nature; they do not provide affirmative means or duties to protect polar bear habitat and the ecosystem of which it is part. Thus, although it cannot be said that the United States has failed to comply with the Agreement to date by allowing polar bear habitat to be adversely impacted, neither can it be said that the United States has readily available tools that would allow it to take steps to set aside polar bear habitat/ecosystems so that they are fully protected as envisioned by the Agreement.

Such authority is most directly applicable to habitat impacts that cannot be regulated under the MMPA taking prohibition. These include: permanent damage or destruction to denning areas when bears are not present; long-term occupation of such areas, effectively rendering them unusable by bears; obstructions to bear movement routes that cause them to avoid or abandon preferred habitat locations; contamination of feeding areas; degradation of the ecology of the Arctic causing the contamination of prey species; cumulative impacts from development activities; and releases of contaminants that expose bears to the risk of injury or harm, such as the recently documented exposure to PCBs and other contaminants.[453]

There are several forms of legal authority that could be established to provide the United States with tools to achieve permanent habitat protection for polar bears, should a policy decision be made to pursue such a result. Although this authority could be limited to polar bear habitat/ecosystems, it also could be beneficial for other marine mammals in light of the MMPA general statements of policy that promote habitat protection for all species and stocks. The most obvious of these is the inclusion of important habitat areas in protected areas that are off limits, at least seasonally, to activities that could adversely affect polar bears. Such protection currently is provided in various locations in the Arctic by the Bering Land Bridge National Preserve, Cape Krusenstern National Monument, and the Arctic National Wildlife Refuge. Another possibility would be to enter into self-executing agreements with other countries that include affirmative habitat protection duties. Any such provisions would take precedence over the MMPA.[454]

Another possibility is to use the MMPA's rulemaking authority to designate protected zones for the purpose of preserving habitat. The basis for doing so has been strengthened by the 1994 Amendments. As discussed

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453 *See, e.g.*, Douglas Mellgren, *PCBs Suspected in Fewer Polar Bear Births*, ANCHORAGE DAILY NEWS, Jan. 24, 1993, at F1; Jack Lentfer and W. Galster, *Mercury in Polar Bears from Alaska*, *in* WILDLIFE DISEASES 338 (1987); JACK LENTFER, ENVIRONMENTAL CONTAMINANTS AND PARASITES IN POLAR BEARS, FINAL REPORT TO ALASKA DEP'T OF FISH AND GAME 7-13 (1976).

454 *See supra* part V(A)(2).

above, section 112(a) has been used for this purpose only twice by FWS: once to protect manatees by designating speed boat zones in Florida waters, and once by the National Park Service to establish cruise ship limits and restricted areas in Glacier Bay. In both instances, however, the MMPA's rulemaking power was used in conjunction with other legal authorities. Moreover, both sets of regulations were established to prevent takes from occurring, not to protect habitat itself. In the November 1993 incidental take regulations for the Beaufort Sea and adjacent coast, FWS suggests that there is authority to implement the Polar Bear Habitat Conservation Strategy, but the source of that authority is not identified.[455] More recently, FWS concedes in its 1995 Polar Bear Habitat strategy that it does have such rulemaking authority.[456]

Despite the absence of any strong precedent for areas being designated exclusively for habitat protection pursuant to section 112(a), it appears that Congress intended such authority to exist. For example, in explaining its concern over the use of herbicides that were harming manatee habitat and food resources, Congress explained that the concept of "harassment" is to be "construed sufficiently broadly to allow the regulation of excessive or wanton use of these chemical compounds, as well as the operation of powerboats."[457]

This issue also was addressed in the 1974 MMPA oversight hearings, where the House Merchant Marine and Fisheries Committee reaffirmed that FWS could and should take action under the MMPA to protect manatee habitat. As Committee Counsel Frank Potter stated: "[h]abitat destruction is probably even a more serious problem than the motorboat, and we even gave you authority to control that if you determined it was necessary."[458] From these statements, it appears that at the time of enactment Congress intended the prohibited act of harassment to cover habitat degradation and that regulations could be promulgated to prevent such degradation.

Congress made clear its intent that section 112(a) could be used for habitat protection purposes through the legislative history of the 1994 Amendments. Although Congress did not amend section 112(a), it did explain the intended scope of this provision. Noting the habitat protection goals of the MMPA, the House Merchant Marine and Fisheries Committee stated that it believes the Secretary "currently has the authority to promulgate regulations to protect marine mammals and their habitats under the general rulemaking authority of section 112 of the MMPA."[459] As an example, the Committee noted that the Secretary has the "authority to protect polar bear denning, feeding, and migration routes in order to fully comply

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455 Marine Mammals; Incidental Take During Specific Activities, 58 Fed. Reg. 60,403 (1993).

456 *See supra* note 25.

457 H.R. REP. No. 707, *supra* note 5, at 18.

458 *Oversight Hearings, supra* note 167, at 183.

459 H.R. REP. No. 439, *supra* note 193, at 29.

with the United States' obligations under Article II of the Agreement on the Conservation of Polar Bears."[460]

Subsequent to the issuance of the House Report containing this information, Congress did amend section 112 to add a new section 112(e) which expressly authorized the implementation of "conservation or management measures" to protect habitat areas that will address impacts "causing the decline" or "impeding the recovery" of "a strategic stock."[461] This provision would not apply to polar bears, because this species does not qualify as a strategic stock; this would change if take of polar bears increased to a level that exceeds "the potential biological removal level" for the stock involved.[462] Congress made it clear, however, that by adding this provision it was in no way diminishing the authority under section 112(a) to protect polar bear or other non-depleted stock habitat, as discussed in House Report No. 439. As stated by Congressman Studds, Chair of the Merchant Marine and Fisheries Committee:

> The new language supplements the Secretary's existing authority to protect habitats for species such as polar bears under section 112, as noted in the Merchant Marine and Fisheries Report. Since we have created a new process under this act for assessing risks to marine mammal stocks, the new subsection is also intended to assure that the information gained through that process is also applied to habitat protection.[463]

Thus, the addition of section 112(e) strengthens the Secretary's hand under section 112(a) by evidencing an intent to create new authority to protect habitat for strategic stocks that parallels the authority for other stocks under the MMPA's general rulemaking authority. Nevertheless, an additional amendment to the MMPA would be helpful to state clearly that habitat protection regulations are within the Secretary's rulemaking authority.

An additional measure of habitat protection could be provided by amending the taking prohibition of the MMPA. This could be done by making it unlawful to destroy or adversely affect polar bear habitat under that prohibition. As noted above, it appears that Congress intended to cover habitat degradation under the MMPA taking prohibition. Rather than attempting to have such actions covered by the term "harass," as suggested by the MMPA legislative history, but which would be a new interpretation of this term, an alternative approach would be to spell out in the Act itself that adverse habitat impacts of a certain magnitude would constitute a take. As discussed below, this approach was attempted unsuccessfully by Congress during the 1994 MMPA reauthorization. Its lack of success is attributable primarily to the controversy associated with a simi-

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460 *Id.* The Committee also noted that "[t]his amendment does not give the Secretary new authority to impose regulations on state or private lands." *Id.* This statement does not indicate what authority previously existed for this purpose.

461 16 U.S.C. § 1382(e) (1994).

462 This level is defined as the "maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population." 16 U.S.C. § 1362(20).

463 140 CONG. REC. H2721, 2724 (daily ed. Apr. 26, 1994) (statement of Rep. Studds).

lar approach under the Endangered Species Act. If other approaches of achieving habitat protection prove unsuccessful, consideration could be given to this approach in a manner that does not embroil the MMPA in the controversy that has arisen under the Endangered Species Act.

Under the Endangered Species Act, the debate has focused on whether the prohibited act of causing "harm" to listed species includes habitat destruction or modification.[464] The leading case construing the meaning of "harm" under the Endangered Species Act is the Supreme Court decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon.*[465]

In its first consideration of the case, the D.C. Circuit held in a *per curiam* opinion that the Fish and Wildlife Service properly construed "harm" to endangered species to include habitat modification.[466] In his concurring opinion, Judge Mikva observed that "[i]t is hard to construct a legislative scenario in which Congress would have avoided the problem of habitat modification when it crafted the [Endangered Species Act]."[467] As noted above, the legislative history indicates that Congress intended to reach habitat degradation and destruction under the MMPA take prohibition as well, but did not provide any clear statutory term to provide such protection.

The D.C. Circuit panel accepted the *Sweet Home* case on rehearing, however, and reversed its earlier decision.[468] Judge Sentelle, the dissenter in the original decision was joined by Judge Williams, who changed his earlier stance upholding the regulation. Judge Mikva adhered to his earlier views and wrote a dissenting opinion. Judge Williams held that the context in which the term "harm" is used in the Act indicates an intent to prohibit only the "direct application of force" against the animal taken.[469] A broad definition of the term "harm" to include habitat modification has an "improbable relation to congressional intent."[470] Judge Mikva disagreed, noting that the majority had failed to give due deference to the agency's interpretation under the *Chevron*[471] standard and by rebutting the analysis of the contractual usage of the term harm in the Act.[472]

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464 The term "take" is defined under the Endangered Species Act to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

465 115 S. Ct. 2407 (1995) (Sweet Home III).

466 1 F.3d 1,3 (D.C. Cir. 1993), *rev'd on reh'ng*, 17 F.3d 1463 (D.C. Cir. 1994) (Sweet Home I). FWS regulations define "harm" as:

> [a]n act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering.

50 C.F.R. § 17.3 (1994).

467 *Id.* at 8. (In a dissenting opinion, Judge Sentelle stated that harm should not be construed to include habitat modification.)

468 17 F.3d 1463 (D.C. Cir. 1994) (Sweet Home II).

469 *Id.* at 1465.

470 *Id.*

471 Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984).

472 17 F.3d at 1473-78.

A different result on this question was reached by the Ninth Circuit in *Palila v. Hawaii Department of Land & Natural Resources*,[473] where the Sierra Club sought to prevent Hawaii's state wildlife agency from allowing feral sheep and goats to forage in the designated critical habitat area of the Palila bird, an endangered species. Although no documented injury or killing of the Palila had occurred, the Sierra Club alleged that the destruction of forest vegetation which provides the Palila's food, shelter, and nest sites by such foraging was a "taking." The district court agreed.

> "Take" is defined in the [Endangered Species Act] to include "harm" which in turn is defined in regulations propounded by the Secretary of the Interior to include "significant environmental modification or degradation" which actually injures or kills wildlife. . . I conclude that there is an unlawful "taking" of the Palila.[474]

The Ninth Circuit affirmed the district court's decision, finding it "consistent with the Act's legislative history, which shows that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat."[475]

In 1986, the District Court of Hawaii again addressed the issue of harm resulting from the State's maintaining destructive animals in the critical habitat of the Palila.[476] In that case (Palila II), the action at issue was the maintenance of mouflon sheep in Palila critical habitat. The mouflon sheep feed on mamane-naio woodlands, upon which the Palila is totally dependent. In determining that a prohibited "take" had occurred, the district court found that the presence of the mouflon sheep harmed the Palila in two ways. First, harm resulted from the eating habits of the mouflon sheep which destroyed the mamane woodlands. Second, if the mouflon sheep continued to eat the mamane, the woodland would not be able to regenerate itself and the Palila population would not be able to recover and be delisted.[477]

On appeal, the Ninth Circuit affirmed the lower court's decision.[478] The Hawaii Department of Land & Natural Resources argued that the lower court's definition of "harm" was too broad. The Ninth Circuit disagreed and found the lower court's decision consistent with the policies and purposes of the Endangered Species Act.[479] The court noted that while promulgating the regulation defining the term "harm" the Secretary included not only direct physical injury, but also injury caused by the impairment of essential behavioral patterns as a result of habitat modification which could have a significant and permanent effect on a listed

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473 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

474 *Id.* at 995.

475 Palila v. Hawaii Dep't of Land & Natural Resources, 639 F.2d at 495, 498, citing TVA v. Hill, 437 U.S. 153, 179 (1979).

476 Palila v. Hawaii Department of Land & Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986).

477 *Id.* at 1078-1080.

478 Palila v. Hawaii Department of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988).

479 *Id.* at 1110-1111.

species. The court concluded that the "inclusion of habitat destruction that could result in extinction" of the Palila fell within the Secretary's interpretation of "harm" and followed the plain language of the Endangered Species Act.[480]

Ultimately, the Supreme Court agreed with the Ninth Circuit's *Palila* decisions and the D.C. Circuit's *Sweet Home I* opinion, which held that habitat degradation could constitute "taking" of a listed species. In *Sweet Home III*, in a 6-3 opinion, the Supreme Court noted three reasons for concluding that habitat degradation is prohibited by the Act. First, the ordinary meaning of the term "harm" encompasses habitat modification that results in actual death or injury.[481] Second, the Act's broad purpose of providing comprehensive protection for listed species supports such an approach.[482] Third, the existence of incidental take permits under the Act to legalize takes demonstrates that Congress understood the law to prohibit indirect as well as deliberate takings.[483]

The controversy over whether habitat degradation and destruction should constitute a prohibited take spilled over into the 1994 MMPA reauthorization process. At the time when the D.C. Circuit, through its first *Sweet Home* decision, and the Ninth Circuit, through its *Palila* decisions, were in accord that harm included habitat modification, Congress included in its MMPA bills an amendment that would have added the term "harm" to the definition of "take" and defined "harm" to mean "an act which is likely to kill or injure a marine mammal, significantly reduce its reproductive potential, or result in habitat modification or degradation that is likely to significantly impair essential behavior patterns."[484] This definition was even broader than the regulatory definition of "harm" under the Endangered Species Act, as it did not require the actual death or injury of the animal caused by the habitat modification.

This definition was accepted by all of the principal parties involved in the MMPA reauthorization process. It drew the attention, however, of parties involved in Endangered Species Act issues who were concerned that it would be interpreted as congressional ratification of an interpretation of the term "harm" to include habitat modification. As a result, they objected to the inclusion of this definition in the MMPA, and Congress responded by deleting this provision. The congressional sponsors of the MMPA noted that this action had no relevance on the future litigation of the *Sweet Home* decision.[485]

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480 *Id.* at 1108. *See also* Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), *rev'd on other grounds*, 926 F.2d 429 (5th Cir. 1991).

481 Sweet Home III, 115 S.Ct. 2407, 2412 (1995).

482 *Id.* at 2413.

483 *Id.* at 2414.

484 H.R. 2760, 140 CONG. REC. H1592,1599 (daily ed. Mar. 21, 1994). The D.C. Circuit's second *Sweet Home* decision was issued on March 11, 1994, shortly before H.R. 2760 was introduced.

485 This action was necessitated by a statutory deadline that could have resulted in the shutdown of numerous commercial fisheries. Because other provisions in the MMPA bill were directed at that issue, Congress deleted the harm definition to avoid the extended controversy and delay that would have resulted. *See* 140 CONG. REC. H2721, 2724 (daily ed.

These principles established in implementing the term "harm" under the Endangered Species Act are on point for protecting polar bear habitat. One of the greatest threats to polar bear habitat is the disturbance of denning sites. Activities which impair such habitat interfere with important denning behavior, which would be covered under these cases construing the term "harm" under the Endangered Species Act. Other forms of habitat degradation discussed in this report also would be likely to impair other essential polar bear behavior patterns, including feeding and reproduction. An alternative for including "harm" in the definition of take is to expressly prohibit destruction or adverse modification of polar bear habitat under that term.

Finally, to make it clear that the United States must take an active role to protect polar bear habitat, the MMPA should be amended to set forth an affirmative duty to achieve the objectives set forth in section 2 of the MMPA. Achievement of the duties established by the Polar Bear Agreement, not to mention the goals of the MMPA, requires more than a reaction to problems after they arise. The federal government could be charged with the duty to protect polar bear (marine mammal) populations, habitat, and the ecosystems of which they are a part and empowered with the authority to carry out those duties. In addition, amendments could be made to the Congressional Findings and Declaration of Policy and Definitions sections to clarify that polar bear habitat protection is an express purpose of the MMPA.

With respect to the Agreement, stronger language on habitat protection is desirable. The existing language of Article II is generalized and vague. It fails to give direct guidance to the parties on what habitat and ecosystem measures are necessary. It also fails to establish any multiparty initiatives. Because of the migratory nature of the species and the fragile nature of the Arctic marine ecosystem, it is not possible to protect polar bear habitat adequately by unilateral actions. The agreement should recognize this fact by establishing multiparty mechanisms and duties to protect polar bear habitat and the ecosystem of which the species is a part.

6. *Sound Conservation Practices*

Article II of the Polar Bear Agreement requires that the parties "shall manage polar bear populations in accordance with sound conservation practices based on the best available scientific data."[486] As discussed above, the parties to the Agreement determined by resolution in 1973 that there should be a non-binding prohibition on the taking of females with cubs and their cubs.[487] In 1988, the Polar Bear Specialist Group passed a resolution reaffirming the concern over this practice. This prohibition should be incorporated into the text of the Agreement.

Apr. 29, 1994) (statement of Rep. Studds); 140 CONG. REC. S4933, 4934 (statement of Sen. Kerry).

[486] Polar Bear Agreement, *supra* note 17, art.II.

[487] *Id.*, app. res.

An additional question that arises under Article II is whether self-regulation is adequate or whether the take of polar bears by Alaska Natives until a species or stock is depleted before the Secretary can regulate such hunting conflicts with sound management practices.[488] Currently, the level of Native take from the Beaufort Sea stock is thought to be at or near the maximum level that this population can sustain. Thus, if additional takes occur, such as from oil and gas activities, or if Native take levels increase, a population decline could occur. If sustained over time, such a decline could result in depletion of this stock. There is not enough information about the Chukchi Sea stock to assess whether problems are being caused by current and anticipated take levels.

Two threshold questions must be addressed to determine if Native take causing a population decline would violate the "sound conservation practices" requirement of Article II. First, it is necessary to determine what is meant by "sound conservation practices." The Agreement does not contain a definition of this term. Second, it must be determined whether the Polar Bear Agreement adopts the MMPA's understanding of "depletion."

Regarding the first questions, one possibility is that the term "sound conservation practices" is limited to the "practices"—the methods and means of take—actually used in the taking of bears, such as the use of aircraft and large motorized vessels. The other possible definition is a broad one that encompasses all aspects of a management program for polar bears, including habitat and ecosystem protection, essential habitat determinations, quotas on take levels, time and place taking restrictions, population surveys, marking and tagging, and other forms of scientific research and data gathering aimed at ensuring that the affected stock is not reduced below its maximum net productivity level.

Of these two possibilities, the latter seems more likely to reflect the intent of the parties. Other provisions of the Agreement include specific prohibitions on the "methods and means" of taking, such as the prohibition on the use of aircraft and large motorized vessels, and the resolution banning the hunting of females with cubs and their cubs. If "sound conservation practices" were intended to be limited to "methods and means" of taking issues, these terms would merely be redundant when considered together with other provisions of the Agreement. In addition, the "sound conservation practices" provision is set forth in Article II, which enumerates the broad management obligations established under the Agreement. Methods and means of taking restrictions are included in other provisions of the Agreement. It is therefore likely that the parties intended this term to apply in its broadest sense. Nevertheless, the meaning of "sound conservation practices" is not clear, and implementation of the Agreement would benefit from clarification of this term by the parties.

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488 *See* Ian Stirling, *Management of Shared Populations of Polar Bears*, Proceedings 56th North American Wildlife & Natural Resources Conference, 469 (1991); IAN STIRLING, POLAR BEARS 206 (1988).

The second question is whether the Polar Bear Agreement adopts the MMPA's concept of "depletion," which means that a species is either endangered or threatened under the Endangered Species Act or is below the lower end of its optimum sustainable population level. There is no indication that the parties had any particular population level in mind as the management goal of the Agreement.[489] This is, therefore, a question that would also benefit from clarification by the parties.[490]

Obviously, it would violate the intent of the parties to allow taking to occur at levels that cause a species to become endangered or threatened. Preventing polar bears from becoming endangered was certainly one of the primary goals of the parties. What is less clear is whether a population decline that stops short of endangerment would violate the Agreement. While it seems likely that a population decline that causes a polar bear stock to fall below the lower end of its optimum sustainable population level also would be inconsistent with the intent of the parties, the Agreement does not provide a definitive answer. In the absence of a clearly stated population goal, however, it is not possible to draw a line as to the population level that the parties regarded as the minimal number of polar bears that would be consistent with sound conservation practices.

These ambiguities make it difficult to say whether the United States would be in violation of the Agreement if Native take alone, or combined with other forms of take, caused polar bears in the Chukchi or Beaufort Sea stocks to experience a population decline and fall below the lower end of their optimum sustainable population levels. Even if such an occurrence would not be a violation of the Agreement's specific terms, however, it would be contrary to the Agreement's general policy goals.

Concern over the potential for Native take to cause a species to decline to depleted status can be addressed through a variety of measures, ranging from encouraging self-regulation of take levels to repeal of the native take exemption.

Alaska natives have demonstrated, in a number of different contexts, that they can effectively control taking for subsistence and handicraft purposes in a manner consistent with the MMPA's policy goals without federal regulation. An obvious example of such self-regulation, which conforms to the Polar Bear Agreement in most respects, is the F&GMC/IGC Agreement for the conservation and management of polar bears from the Beaufort Sea stock. Self-regulation initiatives also have been employed for bowhead whales, walrus, and other non-marine mammal species. The F&GMC/IGC Agreement specifically prohibits the take of cubs and females with cubs and hunting by means of aircraft and large motor-

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489 It is likely that, at a minimum, the parties would have opposed any take causing a population to fall below its maximum sustained yield, which was generally regarded by wildlife managers at the time as the baseline where absolute species protection should apply through restrictions on taking and other measures.

490 To satisfy the MMPA provision that international agreements relating to marine mammals be made to conform to the MMPA, the United States should seek to have the depletion concept incorporated into the Agreement itself, unless it is established that the Agreement currently applies a higher threshold.

ized vessels. In this respect, it is more protective than the MMPA.[491] In addition, harvest quotas are set and allocated to ensure that allowable takes do not adversely affect the status of the Beaufort Sea stock. During the last two hunting seasons, take levels have been below these quotas. Thus, it is clear that the F&GMC/IGC Agreement is being successfully applied and it serves as an example of how self-regulation by Alaska Natives is working. Self-regulation also is consistent with the intent of Congress in enacting the Native take exception to avoid federal regulation of native harvest practices except for the purposes specified in section 101(b) of the MMPA.

Two concerns have been raised over Native self-regulation of polar bear harvests. First, no formal mechanism similar to the F&GMC/IGC Agreement exists for the Chukchi Sea population. Although such a formalized mechanism does not exist, it does not follow that self-regulation does not occur. To the contrary, nonwasteful hunting practices are integral to most Alaska Native hunting. Nevertheless, a formalized self-regulation mechanism can be beneficial, and it would be desirable to encourage and support Eskimos in western Alaska to establish such a program to supplement their traditional concern for nonwasteful hunting. This could be done by providing financial assistance and, as needed, biological and administrative support for the development and implementation of a self-regulation program for the Chukchi Sea stock. The April 1994 Protocol entered into between Native hunters of Russia and Alaska to pursue a self-regulation management agreement offers considerable promise in this regard. Authority to assist Alaska Natives in pursuing such approaches is provided by section 119 of the MMPA, added by the 1994 Amendments, which authorizes the Secretary to enter into cooperative agreements with Alaska Native organizations for research, monitoring, and management purposes.

The second concern that has been mentioned is that an agreement such as the one developed by the F&GMC and IGC has "no legal status in Alaska or Canada and does not provide for enforcement and penalties in Alaska."[492] This criticism assumes that "enforcement and penalties" are in fact necessary to accomplish the underlying conservation objectives of self-regulation. There is no clear indication that such is the case. Peer pressure and voluntary compliance by Native hunters should be adequate to ensure that "sound conservation practices" are not violated by excessive takes. Although every Alaskan Native who fails to comply with the F&GMC/IGC Agreement may not be subject to enforceable penalties, it is highly unlikely that noncompliance by individual hunters would be so widespread as to compromise the integrity of the Agreement as a management tool. A more significant concern is whether self-regulation will be effective when other sources of polar bear takes occur, such as may be

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491 The F&GMC/IGC AGREEMENT does not regulate or prohibit the hunting of bears in denning areas or female bears when they are moving into denning areas, as required by the 1973 Resolution.

492 MMC 1995 Annual Report, *supra* note 59, at 82.

caused by oil and gas activities, or resumption of sport hunting, which could require Eskimo hunters to reduce their hunting activities to avoid a population decline.

At this time, the United States has not violated the sound conservation practices requirement of Article II as a result of the Native take exemption.[493] Ultimately, it will be a policy decision for the responsible federal government agencies and Congress as to whether additional action should be taken to restrict Native take or provide a management tool that could be applied to prevent such a violation from occurring. The three options are: 1) take the steps necessary to assist and fund Alaska Natives in establishing and implementing effective self-management programs; 2) repeal or, as suggested in the past by the FWS Alaska Regional Office, modify the MMPA Native take exemption to allow federal regulation before a species or stock becomes depleted, at least as it applies to polar bears; and 3) take no legislative action, but continue to monitor population levels and work informally with Alaska Eskimos to prevent population declines from occurring.

It cannot be said, as a matter of law, that any one of these options must be pursued to ensure compliance with Article II of the Agreement. The decision on what action, if any, should be taken will have to be based upon a balancing on one hand of the risks to polar bear population stocks in Alaska from present and foreseeable levels of taking, and on the other hand of the political, social, cultural, and administrative consequences of increasing federal involvement in Native take activities. Whatever option is selected should be based upon a full consultation with affected Alaska Natives and affected interest groups and a detailed assessment of the biological justification for the preferred course of action. Based upon the success of past Native self-regulation efforts, the progress being made toward a Russia/Alaska Native agreement, and the new authority to enter into cooperative agreements with Alaska Natives, this approach appears to be preferable. Pursuing an MMPA amendment to allow regulation of native take is not warranted at this time and would send a negative and unnecessary signal to Native organizations that the federal government is not willing to support their self-regulation efforts.

VII. Conclusion

The question of consistency between United States laws relevant to polar bear conservation and management and the Polar Bear Agreement is a matter of degree. Under the combined effect of the MMPA and the Polar Bear Agreement, this species has the benefit of strong, albeit incomplete, protection. Federal agencies, the State of Alaska, Alaska Natives, the oil and gas industry, and environmental groups all have devoted considerable attention and resources to the management and protection needs of polar bears and their habitat. The biennial meetings of the Polar Bear Specialist Group provide an excellent mechanism for the parties to the Agreement to

[493] The take of cubs and females with cubs is dealt with separately in this article.

promote international research and cooperative management actions, and the possibility of a new agreement with the Russian Federation could further enhance international protection. The FWS Conservation Plan and Habitat Strategy identify numerous measures that can be taken to protect polar bears and their habitat. Discussions now underway between indigenous peoples in Russia and Alaska hold out the promise of additional self-regulation among subsistence users. Finally, co-management of the species pursuant to the 1994 MMPA Amendments offers the potential for better data gathering and research through increased use of local traditional knowledge, and increased protection for bears through self-regulation of subsistence harvest. What remains to be seen, however, is how well these measures will be implemented.

As this article demonstrates, despite the actions that have been taken, the Polar Bear Agreement has not been fully implemented in the United States. Similarly, the Agreement does not reflect all of the desirable protections established under the MMPA. Moreover, the nature of the threats to polar bears has changed dramatically since 1973.

With such a strong foundation for species conservation as already exists, it would be unfortunate not to take the remaining steps necessary to provide polar bears with the full protection they were intended to receive. This is particularly important in the two key areas of habitat/ecosystem protection and prohibiting or otherwise addressing those methods and means of taking that are known to be detrimental to the species. There are a variety of tools available to accomplish these results. The mandatory review of the Agreement required under section 113(b) of the MMPA, as amended in 1994, provides the vehicle for undertaking these efforts. The essential next step is to convene a meeting of the parties to the 1973 Agreement to assess the need for further action.[494] After twenty-three years, it is time to revisit the international polar bear protection program to bring it into line with the current needs of this species.

[494] The Agreement itself anticipates that such consultative meetings will be held periodically. Article IX requires the parties to continue to consult with one another "with the object of giving further protection to polar bears." Article X.6 allows any party to trigger consultations to amend the Agreement. Thus, the United States could take the initiative to convene this needed meeting.