

A SURVEY OF AGREEMENTS AND FEDERAL LEGISLATION PROTECTING POLAR BEARS IN THE UNITED STATES

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I. INTRODUCTION

Polar bears are found in the Arctic region and live in close association with polar ice in the countries of Canada, Greenland, Norway, Russia, and the United States.¹ The worldwide population is currently estimated at 22,000 to 25,000.² Within the United States, polar bears are found in the wild exclusively in Alaska, which has two stocks. The western Alaska stock is shared with Russia in the Chukchi/Bering Sea, and the northern Alaska stock of the Southern Beaufort Sea is shared with Canada.³ Because polar bear stocks often cross national boundaries, the five Arctic nations that share polar bears recognized decades ago that any efforts to protect and conserve polar bears would have to cross national boundaries as well. Cooperation among these nations remains the only effective means of protecting polar bears from the threats they face from global warming, habitat destruction, excessive sports hunting, and harm caused by increasing oil and gas industry in Alaska.

International concern for polar bears due to a dramatic increase in polar bear hunting in the 1950s and 1960s led the Arctic nations to negotiate the Agreement on the Protection of Polar Bears (at times referred to as “Agreement”) in 1973.⁴ Although this agreement left the implementation of its terms up to each of the respective signatory nations, its objectives and policy goals have led to federal legislation protecting polar bears in the United States, further international agreements between the United States and Russia, and recently, a cooperative management agreement between the native people of Canada and the United States. As such, the Agreement on the Conservation of Polar Bears has served as a guiding force in the continued international interest of polar bear protection.

Polar bears have no natural predators, and they do not appear to be prone to death from disease or parasites.⁵ The most significant source of mortality is from humans, which has led

¹ *Species of Special Concern*, MMC ANN. REP. 91 (2000), available at MMC, <http://mmc.gov/reports/annual>. See also Marine Mammals; Incidental Take During Specified Activities, 68 Fed. Reg. 66,744 (Nov. 28, 2003) (to be codified at 50 C.F.R. pt. 18).

² See *Marine Mammal Management: Polar Bear*, FWS, at <http://alaska.fws.gov/fisheries/mmm/polarbear/pbmain.htm>.

³ *Species of Special Concern*, *supra* note 1; and 68 Fed. Reg. 66,744, *supra* note 1.

⁴ Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 UST 3918.

⁵ 68 Fed. Reg. 66,744, *supra* note 1.

international agreements and federal legislation to focus on restricting human activities that affect polar bears.⁶ For example, since the early 1970s, the Agreement on the Conservation of Polar Bears and the Marine Mammal Protection Act (MMPA) have restricted polar bear hunting to Alaska Natives in the United States. Bears used by Alaska Natives are for subsistence purposes, as well as the traditional making of handcrafts and clothing. Recent amendments to the MMPA, however, have allowed polar bear trophies sports hunted in Canada to be imported, which remains an evolving legal issue unique to polar bears. This article will discuss the evolution of the sports trophy provisions within MMPA, as well as other provisions relevant to polar bears. It will also survey the primary international agreements that focus on polar bear protection and affect law and policy within the United States. These agreements include the Agreement on the Conservation of Polar Bears, the US-Russia Additional Agreement on the Conservation and Management of the Alaska Chukotka Polar Bear Population, as well as the Inupiat and Inuvialuit Polar Bear Management Agreement.⁷

II. AGREEMENT ON CONSERVATION OF POLAR BEARS

During the 1950s and 1960s, international concern began to grow for the welfare of polar bears due to the number of bears being killed by hunters, mainly for their hides.⁸ In September 1965, a scientific meeting was arranged at the University of Alaska in Fairbanks to discuss the conservation and protection of polar bears.⁹ Three years later, the Polar Bear Specialist Group (PBSG) was established as a division of the International Union for the Protection of Nature (IUCN).¹⁰ The PBSG presently has 12 members, and is made up of research scientists from the five nations in the Arctic that have polar bears within their borders. The group meets every 3-4 years to discuss matters pertaining to research and management of polar bears throughout their area and to issue recommendations and resolutions for further polar bear protection. The last meeting was held in Nuuk, Greenland in June 2001.¹¹

Shortly after the PBSG was established, the Agreement on the Conservation of Polar Bears was signed in Oslo, Norway in 1973.¹² The Agreement was entered into by the governments of Canada, Denmark, Norway, the former Soviet Union, and the United States. The United States Senate gave its advice and consent to the ratification of the Agreement on September 15, 1976. President Gerald Ford then ratified it on September 30, 1976 and the Agreement on the Conservation of Polar Bears entered into force for the United States on

⁶ *Id.*

⁷ Although polar bears are also listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), this article will not discuss its provisions as it is focused on the international agreements specific to Polar Bears.

⁸ MARINE MAMMALS MANAGEMENT, U.S. FISH & WILDLIFE SERVICE, CONSERVATION PLAN FOR THE POLAR BEAR IN ALASKA 6, available at <http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/THEFINALplan.pdf>.

⁹ See POLAR BEAR SPECIALIST GROUP, <http://pbsg.npolar.no>. The Bear Specialist Group (BSG) was established in 1988, in response to conservation concerns for the terrestrial bear species. In 1992 the BSG initiated an Action Plan for Bears of the World, and invited the PBSG to participate by developing the section for polar bears.

¹⁰ *Id.*

¹¹ *Id.* [Editorial note: The group met in 2005 after the writing of this article and just before publication.]

¹² Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918.

November 1, 1976 when the United States deposited its instrument of ratification with the Government of Norway.¹³

All of the signatory nations of the Agreement on the Conservation of Polar Bears acknowledged their special responsibilities and special interests in the Arctic Region in relation to the protection of fauna and flora found there. Specifically, they found that polar bears are a significant resource of this region that require additional protection.¹⁴ These nations agreed that polar bear protection should be achieved through coordinated national measures.¹⁵ For this reason, the Agreement on the Conservation of Polar Bears is politically important because it unites the nations within the Arctic towards the singular goal of supporting conservation programs and protecting the interests of polar bears.¹⁶

The Agreement's primary article prohibits the taking of polar bears. "Taking" is defined to include hunting, killing, and capturing polar bears.¹⁷ The signatory nations also agreed to prohibit the use of aircraft and large motorized vessels used to take polar bears, except where this prohibition is inconsistent with domestic laws.¹⁸ Further, the Agreement requires each nation to prohibit the importation, exportation, and trafficking of polar bears or any polar bear products taken in violation of the Agreement within its territory.¹⁹

Exceptions to the taking provisions of the Agreement are allowed by each nation if the taking is: (a) for bona fide scientific purposes; (b) for conservation purposes; (c) to prevent serious disturbance of the management of other living resources; (d) by local people using traditional methods in exercise of their traditional rights and in accordance with the laws of that nation; or (e) wherever polar bears have or might have been subject to taking by traditional means by its nationals.²⁰ If polar bears are taken for conservation purposes or to prevent serious disturbances of other living things under the provisions above, the skins and other items of value cannot be made available for commercial purposes.²¹

In addition to enforcing the taking prohibitions of the Agreement, each signatory nation is required to take appropriate actions to protect polar bears and their ecosystems.²² The nations agreed to focus special attention on denning and feeding sites, as well as migration patterns, and develop national research programs to facilitate the exchange of information between nations.²³ Although the actions required under the conservation provisions are not specified in the Agreement, it is specified that all conservation measures must be in accord with sound conservation practices based on the best scientific data.²⁴ It is also important to note that the

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ CONSERVATION PLAN FOR THE POLAR BEAR IN ALASKA, *supra* note 8, at 6.

¹⁷ Agreement on Conservation of Polar Bears, *supra* note 12, at art. 1, sec. 2.

¹⁸ *Id.* at art. 4.

¹⁹ *Id.* at art. 6.

²⁰ *Id.* at art. 3, sec. 1.

²¹ *Id.* at art. 3, sec. 2.

²² *Id.* at art. 2.

²³ *Id.*

²⁴ *Id.*

Agreement allows for party nations to enact more stringent requirements if they find through research and management of the species that provisions within the Agreement are inadequate.²⁵

The Agreement on the Conservation of Polar Bears is not self-enacting. Instead, it mandates that each signatory nation enact and enforce its own legislation for the purpose of giving effect to the Agreement.²⁶ Because the only term defined is “taking,” each nation has been required to define vague terms within the Agreement independently. For example, it is unclear from the text of the Agreement what constitutes “bona fide scientific purposes,” what a taking for “conservation purposes” might include, and who might qualify as a “national” allowed to take polar bears by traditional means. Originally, the Agreement was to remain in force for a period of five years, but because no signatory nation requested termination of the Agreement at the end of the five-year period, it remains in effect today.²⁷

III. MARINE MAMMAL PROTECTION ACT

A. Legislative History and Introduction to the Marine Mammal Protection Act

The United States chose to implement the terms of the Agreement on the Conservation of Polar Bears with the Marine Mammal Protection Act (MMPA) of 1972.²⁸ Before the MMPA, legal protection of polar bears in the United States was limited to the state laws of Alaska. In 1961, Alaska adopted regulations restricting the sport-hunting season and requiring hunters to present all polar bear skins and skulls for tagging and examination.²⁹ Female polar bears and cubs were also protected under the laws of Alaska, and preference was given to subsistence hunters.³⁰ Passage of the MMPA transferred the management of polar bears to the federal government.

The legislative history of the MMPA expresses Congress' deep concern for the mistreatment of marine mammals and the desire for their increased protection. This concern is expressed best as follows:

Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefited from our interest; they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.³¹

As such, Congress sought the middle ground with the MMPA, recognizing that “man's thumb” was already on the balance of nature, and to remove it altogether might be far more cruel and

²⁵ *Id.* at art. 6, sec. 2.

²⁶ *Id.* at art. 6, sec. 1.

²⁷ *Id.* at art. 5, sec. 5.

²⁸ Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h (1972).

²⁹ *Species of Special Concern*, *supra* note 1, at 91.

³⁰ *Id.*

³¹ H. R. REP. No. 707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4144.

damaging than the effects of a responsible management program.³² By enacting the MMPA, Congress intended to prevent marine mammals from diminishing beyond the point at which they cease to be a significant functioning element in their ecosystem or from becoming “depleted.”³³ A species is designated as depleted when it falls below its optimum sustainable populations (OSP).³⁴ “OSP” is defined as “the number of animals which will result in the maximum productivity of the population of the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.”³⁵ Congress found that marine mammals have proven themselves to be resources of great international significance, and that they should be protected and encouraged to develop to the greatest extent possible.³⁶ Once a species has been designated as depleted, a conservation plan is developed to guide research and management actions to restore the health of the species.³⁷

The MMPA of 1972 mandated certain measures be taken immediately to replenish any species or population stock that had already diminished. The most important of these measures is the moratorium on “taking” marine mammals, but it also includes a ban on the importation of marine mammals and marine mammal products into the country.³⁸ The importation provisions of the MMPA play a particularly important role in the protection of polar bears because hunters often wish to import polar bear trophies, hides, rugs, and full mounts from Canada into the United States. Recent amendments to the MMPA have established specific criteria to allow these types of imports.

B. Taking Provisions under the MMPA

The term “take” under the MMPA “means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”³⁹ What constitutes a “taking” and how to interpret this term in light of the statute and agency regulations has evolved through the years. On one hand, courts have limited the taking provisions by allowing sometimes violent measures to be used to deter marine mammals from property. Congress affirmed this finding by specifically authorizing deterrence measures in certain circumstances under the 1994 amendments to the MMPA. On the other hand, the taking provision has been strengthened over time by including feeding as a form of taking by harassment. The harassment provisions of the MMPA distinguish it from the Agreement on the Conservation of Polar Bears, as well other international agreements, that limit “taking” to hunting, killing, or capturing polar bears.

The moratorium on taking has never been absolute. For example, an exemption from the taking provisions of the MMPA was created for Alaska natives.⁴⁰ Indians, Aleuts, or Eskimos who live on the North Pacific Ocean or the Arctic Ocean may take marine mammals, including polar bears, if the taking is done for subsistence purposes, or for the purposes of creating and

³² *Id.* at 4152.

³³ 16 U.S.C. § 1362, sec. 3(1).

³⁴ 16 U.S.C. § 1362, sec. 3(9).

³⁵ *Id.*

³⁶ Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027. *See also* 16 U.S.C. § 1361.

³⁷ 16 U.S.C. § 1383(b), sec. 115(b)(1)(C)

³⁸ 16 U.S.C. § 1371, sec. 101(a).

³⁹ 16 U.S.C. § 1362(11)A.

⁴⁰ 16 U.S.C. § 1371, sec. 101(b).

selling authentic native articles of handcrafts and clothing. In each case, the MMPA requires that the taking not be done in a wasteful manner.⁴¹

The MMPA does not grant any federal power to regulate the taking of polar bears under the Alaska Native exception to the moratorium unless it has been determined that the species is depleted.⁴² Even if the species becomes depleted, the only thing the MMPA provides is that regulations may be established by the Secretary of the Interior or Commerce consistent with the purposes of the Act.⁴³ However, a 1994 amendment to the MMPA included provisions for the development of cooperative agreements between United States Fish and Wildlife Service (FWS) and Alaska Native organizations to conserve marine mammals and to provide for the co-management of subsistence use by Alaska Natives.⁴⁴ Agreements entered into under this section may include grants to Alaska Native organizations for collecting and analyzing data on marine mammal populations, monitoring the harvest of marine mammals for subsistence use, research, and for developing co-management structures with Federal and State agencies.⁴⁵

Exceptions to the moratorium are also allowed through the issuance of permits, and may be granted for scientific research, public display, or photography for educational or commercial purposes.⁴⁶ Permits have also been recently issued to oil and gas industry for exploration, development, and production in Alaska for the nonintentional, "incidental" taking of polar bears and walrus.⁴⁷ The power to issue permits is relegated to the Secretary of Commerce and the Secretary of the Interior. The Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), is responsible for the management and protection of whales, dolphins, porpoises, and seals under the MMPA.⁴⁸ The Secretary of the Interior, through the FWS, is responsible for the remaining animals protected by the MMPA, namely walrus, sea otters, polar bears, and manatees.⁴⁹ An important role of the both agencies is that they are required under the MMPA to report periodically on the status of marine mammal stocks within their jurisdiction.⁵⁰ Each stock assessment includes a description of the stock's geographic range, a minimum population estimate, current population trends, current and maximum net productivity rates, optimum sustainable populations levels, and estimates of annual human-caused mortality and serious injury through interactions with commercial fisheries and subsistence hunters.⁵¹

The MMPA encourages the public to participate fully in the agency decision-making process for permit applications.⁵² Each Secretary is required to publish notice in the Federal Register to invite comment by interested parties before a permit is issued.⁵³ Under certain

⁴¹ *Id.*

⁴² 16 U.S.C. § 1371, sec. 101(b)(3)

⁴³ *Id.*

⁴⁴ 16 U.S.C. § 1388, sec. 119.

⁴⁵ *Id.*

⁴⁶ 16 U.S.C. § 1371, sec. 101(a)(1).

⁴⁷ 68 Fed. Reg. 66,744, *supra* note 1.

⁴⁸ *Id.*

⁴⁹ *See* 1972 U.S.C.C.A.N 4144, *supra* note 31, at 4146.

⁵⁰ 16 U.S.C. § 1386, sec. 117.

⁵¹ *Id.*

⁵² Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027, 1035; *see also* 1972 U.S.C.C.A.N. 4144, *supra* note 31, at 4151.

⁵³ *Id.*

circumstances, the Secretary may also grant an interested party the opportunity for a hearing.⁵⁴ To assist the Secretaries with policy, the MMPA created a three-member panel called the Marine Mammal Commission. The Marine Mammal Commission is charged with monitoring the implementation of the MMPA, recommending policies to the two secretaries, and undertaking research as necessary.⁵⁵

In 1994, the Ninth Circuit Court of Appeals considered the definition of “taking” under the MMPA in *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994). In this case, the Court found a fisherman who shot at porpoises with a rifle did not constitute a taking under the MMPA. The defendant Hayashi and his son were fishing when a group of porpoises began to eat tuna off their fishing lines.⁵⁶ In an attempt to scare the porpoises away, Hayashi fired two rifle shots into the water.⁵⁷ The animals were not hit by the rifle shots, but Hayashi was subsequently charged with knowingly taking a marine mammal in violation of the MMPA.⁵⁸

Under the definition of “taking,” the Court of Appeals concluded that “to harass” was the only action that could possibly apply to Hayashi’s case.⁵⁹ At the time of Hayashi’s conduct, however, harassment was not defined in the MMPA or any other regulation.⁶⁰ The Court of Appeals interpreted harassment under the MMPA to involve a “direct and significant intrusion” upon normal marine mammal behavior.⁶¹ It found that the MMPA did not reach Hayashi’s action because it did not disrupt “normal” or “natural” behavior.⁶² Namely, it was not natural for the porpoises to feed off fishing lines.⁶³

The Court of Appeals also concluded that the MMPA’s prohibition against taking by disturbing is not extended to marine mammals acting in ways that endanger human life or property, an important provision included in other international agreements as well.⁶⁴ According to the Court:

Under such a broad interpretation, anyone who acted to prevent or in any way interfered with any marine mammal activity would face potential criminal prosecution. Nothing could legally be done to save a modern-day Jonah from the devouring whale, or to deter a rampaging polar bear from mauling a child. Neither could a porpoise intent on swimming into severely contaminated waters, or into the propellers of a motor boat, be diverted by the selfless actions of a Good Samaritan.⁶⁵

In the 1994 Amendments to the MMPA, Congress created authorization for persons who found themselves in the same position as Mr. Hayashi to deter marine mammals from damaging

⁵⁴ *Id.*

⁵⁵ 16 U.S.C. § 1401, sec. 201

⁵⁶ *United States v. Hayashi*, 22 F.3d 859, 861 (9th Cir. 1994)

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 864.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

property. While these amendments include a statutory definition of “harassment,” they do not incorporate the Ninth Circuit’s strict requirement of “significant intrusion” in all cases. The prohibitions of the MMPA as amended do not apply to the use of measures: (a) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch; (b) by the owner of other private property, or agent, bailee, or employees of such owner, to deter a marine mammal from damaging private property; (c) by any person, to deter a marine mammal from endangering personal safety; or (d) by a government employee, to deter a marine mammal from damaging public property, so long as such measures do not result in the death or serious injury of a marine mammal.⁶⁶

Under the MMPA, intentional killing continues to be prohibited and acts of deterrence may not cause serious injury or death to marine mammals. Intentional lethal taking is explicitly prohibited, except if such taking is “imminently necessary in self-defense or to save the life of a person in immediate danger.”⁶⁷ Congress also added an exception to the taking provision which addressed the concern of the Ninth Circuit in *Hayashi* that absurd results could result from such a broad interpretation. The “Good Samaritan” exception allows a taking where it will avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris as long as reasonable care is exercised and the animal is released safely.⁶⁸ The definition of “harassment” was also clarified in the 1994 Amendments and:

means any act of pursuit, torment, or annoyance which- (i) has the potential to injure a marine mammal or marine mammal stock in the wild [the MMPA calls this Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption off behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].⁶⁹

C. Incidental Takings of Polar Bears by Oil and Gas Industry

The MMPA gives the Secretary of the Interior, through the FWS, the authority to allow the incidental, but not intentional, taking of a small number of marine mammals in response to requests by U.S. citizens engaged in a specified activity, other than commercial fishing, in a specified geographical region.⁷⁰ Since 1993, the oil and gas industry has sought and obtained authorization from the FWS for the incidental taking of marine mammals in relation to its year-round exploration, development, and production operations in the Beaufort Sea and northern coast of Alaska.⁷¹

In order to permit incidental takings by industry, the FWS evaluates each request to determine, based on the best available scientific evidence, whether the total taking will have a “negligible impact” on polar bears.⁷² This type of taking may also not have an “unmitigable

⁶⁶ 16 U.S.C. § 1371(a)(4)(A).

⁶⁷ 16 U.S.C. § 1371(c).

⁶⁸ 16 U.S.C. § 1371(d).

⁶⁹ 16 U.S.C. § 1362.

⁷⁰ 16 U.S.C. § 1371(a)(5)(A).

⁷¹ 68 Fed. Reg. 66,744, *supra* note 1.

⁷² 54 Fed. Reg. 40,338, sec. 18.27(c).

adverse impact” on the availability of such species or stock for subsistence uses.⁷³ “Negligible impact” has been defined as “an impact resulting from specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates or recruitment of survival.”⁷⁴ “Unmitigable adverse impact” means:

an impact resulting from the specified activity (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.⁷⁵

If the FWS cannot make a finding that the total taking will have a negligible impact on polar bears or will have an unmitigable adverse impact on polar bear availability for subsistence uses, a negative finding will be published in the Federal Register along with the basis for denying the request.⁷⁶

The most recent of these incidental taking authorizations was issued to the Alaska Oil and Gas Association (AOGA) on behalf of its members, which include various pipeline and oil companies. The FWS issued its Letter of Authorization for industry activities on November 23, 2003 and the authorization remains in effect through March 28, 2005.⁷⁷ The request by the AOGA was for regulations on the nonlethal incidental taking of a small number of polar bears and walruses. After a detailed assessment of noise disturbances, potential physical obstructions to the movement of polar bears, the potential for polar bear-human interactions, and oils spills, the FWS concluded that any taking likely to occur would have a negligible impact on polar bears.⁷⁸ The regulations do not authorize any intentional taking of polar bears and note that the industry activities may be restricted to specific locations to protect pregnant polar bears during denning activities.⁷⁹ Each activity covered by the authorization also requires a site-specific polar bear interaction plan.⁸⁰

The authorization also found that oil and gas industry activities would not have an unmitigable adverse impact on the availability of polar bears for subsistence purposes. Not only did the FWS find that the Beaufort polar bear population is distributed throughout this range, but that they typically occur in low numbers in coastal and near shore areas where most industrial activities occur.⁸¹ Additionally, because the native people of Alaska who hunt polar bears generally limit hunting to the ice-covered season, industry activities were expected to have a negligible impact on the distributions, movement, and numbers of polar bears for these local

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 68 Fed. Reg. 66,744, *supra* note 1, at 66,745.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

users.⁸² Since oil and gas industry activities are likely to increase their presence and activities in the Arctic in the future, it is likely that these incidental take permits will continue to be issued and the effects of industry on polar bears and their environment need to be further evaluated.

D. Importation of Polar Bear Sports Trophies

Along with the taking provisions of the MMPA, Congress sought to protect marine mammals by restricting importation of marine mammals and marine mammal products into the United States. The importation restrictions reflect the congressional decision that a denial of import privileges is an effective method of protecting marine mammals in other parts of the world.⁸³ In 1994, the MMPA was amended to allow the Secretary of the Interior to issue permits to import sport-hunted polar bear trophies from Canada, provided that certain findings were made.⁸⁴ The permits limited importation to polar bear parts (other than internal organs) that were taken, but not imported, prior to the date of enactment of the MMPA amendments of 1994.⁸⁵

A primary requirement for an applicant under the 1994 amendments was a showing of proof that the polar bear was legally harvested in Canada. After this showing was made by the applicant, the Secretary could issue the permit if it was found that: (a) Canada had a monitored and enforced sport hunting program consistent with the purposes of the Agreement on the Conservation of Polar Bears; (b) Canada had a sport hunting program based on scientifically sound quotas ensuring the maintenance of the affected population stock at a sustainable level; (c) the export and subsequent import were consistent with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and other international agreements and conventions; and (d) the export and subsequent import were not likely to contribute to illegal trade in bear parts.⁸⁶ According to a congressional report, the specific criteria in the 1994 amendments for polar bear imports were promulgated to ensure that imports of polar bear trophies would not increase hunting demand in Canada, which ultimately would result in unsustainable harvest levels.⁸⁷

On February 18, 1997 the FWS established application requirements, permit procedures, and a fee for the issuance of permits to import trophies of polar bears sport hunted in Canada, including bears taken before the enactment of the 1994 amendments.⁸⁸ The FWS found that five of the twelve Canadian polar bear management programs met the MMPA requirements and the Agreement on the Conservation of Polar Bears and could be imported.⁸⁹ An important feature of this final rule was the establishment of a \$1000 permit issuance fee, in addition to a \$25 processing fee, to be used for polar bear conservation activities.⁹⁰

⁸² *Id.*

⁸³ *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1010 (D.C. Cir. 1977).

⁸⁴ 16 U.S.C. § 1371(a)(1).

⁸⁵ *See* Marine Mammal Protection Act Amendments of 1994, 103 Pub. L. No. 238, sec. 4, 108 Stat. 532.

⁸⁶ *Id.*

⁸⁷ H.R. REP. NO. 439 (1994).

⁸⁸ *Importation of Polar Bear Trophies From Canada Under the 1994 Amendments to the Marine Mammal Protection Act*, 62 Fed. Reg. 7,302 (February 18, 1997) (to be codified at 50 C.F.R. pt. 18).

⁸⁹ *Id.*

⁹⁰ *Id.* at 7,303.

Criticism of the FWS regulations by hunters as well as animal welfare groups led Congress to once again amend the MMPA in 1997 to allow imports of all polar bear trophies taken in Canada before the amendments of 1994 without the restrictions on stocks as contained in the 1997 FWS regulations.⁹¹ On November 10, 2003, Congress amended the MMPA once again to allow hunters to import their polar bear trophies legally taken after the enactment of the 1994 amendments, but prior to the finalization of the FWS implementing regulations on 1997.⁹² Presently, the FWS is accepting application from hunters for permits to import polar bear trophies legally taken prior to February 18, 1997, from Nunavut or Northwest Territories, Canada. With the 2003 amendments, Congress essentially extended the grandfathered trophies taken prior to the amendments to the MMPA in 1994 to February 18, 1997. Importation of polar bear trophies after February 18, 1997, continues to be allowed, but only from approved populations.⁹³

FWS regulations define "sport-hunted trophy" in order to specify what parts of the polar bear may be imported. They also stipulate that the permit holder may only import such items for personal, noncommercial use.⁹⁴ The FWS considered congressional findings in order to develop the definition. These findings state that, "Trophies normally constitute the hide, hair, skull, teeth, and claws of the animal that can be used by a taxidermist to create a mount of the animal for display or tanned for use as a rug. This provision does not allow the importation of any internal organ of the animal, including the gall bladder."⁹⁵ The definition in the FWS regulations include parts that are traditionally considered trophy items for personal display and excludes items such as clothing and jewelry. Since the definition includes skull, teeth, bones, and baculum (penis bone), the FWS points out that these items must be marked in accordance with marking requirements for loose parts under the laws and regulations of Canada and the United States.⁹⁶

In order to import a polar bear trophy, one must take the following steps. First, the applicant must legally take a polar bear in Canada from the permitted populations of the Southern Beaufort Sea, Northern Beaufort Sea, M'Clintock Channel (only for bears lawfully taken on or before May 31, 2000), Viscount Melville Sound, Western Hudson Bay, Lancaster Sound, and Norwegian Bay. Second, an applicant must apply for a permit from the NWS using the official publication form and pay the \$25 processing fee and \$1,000 permit issuance fee. Third, an applicant must obtain an export permit from the Canadian Management Authority under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁹⁷ Fourth, polar bears may only be imported through a U.S. port designated for wildlife, although an exception to this requirement may be granted for full mounts. Finally, a wildlife inspector at the port must inspect the sports trophy.⁹⁸

⁹¹ 1997 emergency Supplemental Appropriations Act for Recovery from Natural Disasters, and for Overseas Peacekeeping Efforts, including those in Bosnia, 105 Pub. L. 18, 111 Stat. 158.

⁹² Department of the Interior and Related Agencies Appropriations Act, 2004, 108 Pub. L. 108, 117 Stat. 1241.

⁹³ See *International Affairs Permit Section*, U.S. FISH AND WILDLIFE SERVICE, available at <http://www.fws.gov/international/permits/dmapermits.html>

⁹⁴ 16 U.S.C. § 1362(11)A.

⁹⁵ H.R. REP. NO. 439 (1994).

⁹⁶ 16 U.S.C. § 1362(11)A.

⁹⁷ Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, April 30, 1942, 1940 U.S.T. Lexis 85.

⁹⁸ See *Importing your Polar Bear Sport-hunted Trophy*, FWS, <http://international.fws.gov/pdf/polarbearsportthunted.pdf>.

E. Penalties

The MMPA establishes both civil and criminal penalty provisions.⁹⁹ A person who violates any provision of the MMPA, including a permit or regulation, may be assessed a civil penalty of \$10,000 for each violation.¹⁰⁰ A person who *knowingly* violates any provision of the MMPA may be charged criminally. Upon conviction, a person may be fined up to \$20,000 for each violation, imprisoned for up to one year, or both.¹⁰¹

Under section 1376, any vessel subject to the jurisdiction of the United States is also subject to seizure and forfeiture of its entire cargo if it is employed in the unlawful taking of any marine mammal.¹⁰² A vessel can also be assessed a civil penalty in the amount of \$25,000 for any unlawful taking.¹⁰³ To encourage the public's participation in enforcing the MMPA, the Secretary of the Treasury is authorized under the MMPA to pay up to \$2,500 to any person who furnishes information which leads to the conviction for a violation of the MMPA.¹⁰⁴

IV. US/RUSSIA ADDITIONAL AGREEMENT ON THE CONSERVATION AND MANAGEMENT OF THE ALASKA CHUKOTKA POLAR BEAR POPULATION

On October 16, 2000, the United States and Russia entered into the Agreement Between the Government of the United States of America and the Government of the Russian Federal on the Conservation and Management of the Alaska-Chukotka for Polar Bear Population (US-Russia Agreement) for the conservation of polar bears shared between the two countries.¹⁰⁵ The area covered by the US-Russia Agreement is limited to the waters and adjacent coastal areas in the jurisdiction of Chukchi, East Siberian and Bering Seas on the west extending north from the mouth of the Kolyma River and on the east, north of Point Barrow.¹⁰⁶ It also encompasses the southern portion of these areas to the southernmost annual formation of ice drift.¹⁰⁷ Within these areas, the two nations agreed to undertake all efforts necessary to conserve polar bear habitats, with particular attention to denning areas and areas of polar bears during feeding and migration.¹⁰⁸

The US-Russia bilateral agreement strengthens the goals of the 1973 Agreement on the Conservation of Polar Bears and affirms the mutual interest and responsibility the United States and Russia have for the Alaska-Chukotka polar bear population.¹⁰⁹ On July 11, 2002, after

⁹⁹ 16 U.S.C. § 1375.

¹⁰⁰ 16 U.S.C. § 1375 (a)(1).

¹⁰¹ 16 U.S.C. § 1375 (b).

¹⁰² 16 U.S.C. § 1376(a).

¹⁰³ 16 U.S.C. § 1376(b).

¹⁰⁴ 16 U.S.C. § 1376(c).

¹⁰⁵ Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population [hereinafter "Alaska-Chukotka Polar Bear Agreement"], Oct. 16, 2000, S. TREATY SOC. NO. 107-10 (2002).

¹⁰⁶ *Id.* at art. 3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at art. 4.

¹⁰⁹ See generally Alaska-Chukotka Polar Bear Agreement, *supra* note 105.

lengthy negotiations, President George W. Bush submitted the US-Russia Agreement to the Senate for advice and consent to ratification.¹¹⁰ On July 31, 2003, the Senate gave advice and consent, provided that the Secretary of State promptly notify the Committee on Environment and Public Works and Committee on Foreign Relations if the United States and Russia modify the areas to which the agreement applies.¹¹¹

Like the 1973 Agreement on the Conservation of Polar Bears and the MMPA, the US-Russia Agreement allows the taking of polar bears for subsistence purposes by native people.¹¹² As such, the US-Russia Agreement attempts to strike a balance between the subsistence needs of the native people and the protection of polar bears.¹¹³ Unlike the 1973 Agreement, the US-Russia Agreement provides specific mechanisms for strengthening the capabilities of the United States and Russia to implement coordinated conservation measures by including specific definitions for “sustainable harvest,” and more importantly, by creating the US-Russia Polar Bear Commission.¹¹⁴ It also calls upon and welcomes the native people of Alaska and Chukotka to continue their involvement in the management of this polar bear population and requests their involvement in the implementation of the Agreement.¹¹⁵ Furthermore, the agreement recognizes that the illegal taking, habitat loss and degradation, pollution, and other human-caused threats could compromise the continued viability of the Alaska-Chukotka polar bear population as well.

Among other things, the US-Russia Agreement allows polar bears to be taken by native people, for scientific research, for the purpose of rescuing or rehabilitating orphaned, sick, or injured animals, or when human life is threatened.¹¹⁶ Further, animals held in captivity may only be placed on public display if the animals are not releasable to the wild.¹¹⁷ “Native people” are defined in the US-Russia Agreement as native residents of Alaska and Chukotka as represented by the Alaska Nanuuq Commission and the corresponding Union of Marine Mammal Hunters. These residents may take polar bears for subsistence purposes, provided that: (a) the take is consistent with the 1973 Agreement on the Conservation of Polar Bears; (b) the taking of females with cubs, cubs less than one year of age, and bears in dens, including bears preparing to enter dens or who have just left dens, is prohibited; (c) the use of aircraft, large motorized vessels and large motorized vehicles for the purposes of taking polar bears is prohibited; and (d) the use of poisons, traps, or snares for the taking polar bears is prohibited.¹¹⁸

The US-Russia Agreement advances the goals of the 1973 Agreement on the Conservation of Polar Bears, but it additionally provides for implementation of its provisions through the establishment of the US-Russia Polar Bear Commission (The Commission).¹¹⁹ The Commission is composed of two national sections, consisting of two members appointed by their respective nations, in order to provide for inclusion of each section a representative of the native

¹¹⁰ Letter of Transmittal, Alaska-Chukotka Polar Bear Agreement, *supra* note 105.

¹¹¹ S. REP. NO. 108-7, sec. 2 (2003).

¹¹² Alaska-Chukotka Polar Bear Agreement, *supra* note 105, at art. 5.

¹¹³ *Id.* at arts. 5-6.

¹¹⁴ *Id.* at art. 8.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at art.6, sec. 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at art. 6, sec. 1.

¹¹⁹ *Id.* at art. 8, sec. 1.

people and the contracting nation.¹²⁰ Each section will have one vote and any decisions or recommendations require approval by both sections.¹²¹

The Commission will carry out the following tasks under the US-Russia Agreement: (a) promote cooperation between the United States and Russia, between the native people, and between the United States and Russia and the native people; (b) determine, on the basis of reliable scientific data, including traditional knowledge of the native people, the polar bear population's annual sustainable harvest level; (c) determine the annual taking limits not to exceed the sustainable harvest; (d) adopt measures to restrict the taking of polar bears for subsistence purposes within the framework of the established annual taking limits, including restrictions based on sex and age; (e) work to identify polar bear habitats and develop recommendations for habitat conservation measures; (f) consider scientific research programs, including jointly conducted programs, for the study, conservation, and monitoring of polar bears, and prepare recommendations for implementing such programs, in order to determine criteria for reporting polar bears taken; (g) participate in the examination of disagreements between the native people of Alaska and Chukotka on questions regarding subsistence use of polar bears, as well as their conservation, and facilitate their resolutions; (h) issue recommendations concerning the maintenance of captive, orphaned, and rehabilitated polar bears; (i) examine information and scientific data about polar bears, including information on harvested polar bears and those taken in cases where human life is threatened; (j) prepare and distribute conservation materials and reports of each Commission meeting; and finally (k) perform such functions as are necessary and appropriate for the implementation of the US-Russia Agreement.¹²²

In his Letter of Submittal to the Senate for its advice and consent, President Bush explains that the United States will implement the habitat components of the US-Russia Agreement through the MMPA and other federal statutes.¹²³ He also states his belief that the US-Russia Agreement is consistent with current practice, but that some legislative amendments will be necessary to ensure its full implementation. He added that he is working with federal agencies to identify appropriate legislation that will be submitted separately to Congress.¹²⁴ Under its terms, the US-Russia Agreement will enter force 30 days after the two parties have exchanged written notification that they have completed their respective domestic legal procedures to bring the agreement into force.¹²⁵ For the United States, this will require ratification by the President, with the advice and consent of the Senate. However, President Bush explains that the United States will present the instrument of ratification, only after the necessary legislation is in place.¹²⁶

¹²⁰ *Id.* at art. 8, secs. 1-2.

¹²¹ *Id.* at art. 8, sec. 3.

¹²² *Id.* at art. 8, sec. 7.

¹²³ Letter of Transmittal, Alaska-Chukotka Polar Bear Agreement, *supra* note 105.

¹²⁴ *Id.*

¹²⁵ *Id.* at art.13.

¹²⁶ Letter of Transmittal, Alaska-Chukotka Polar Bear Agreement, *supra* note 105

V. INUVIALUIT AND INUPIAT POLAR BEAR MANAGEMENT AGREEMENT IN THE BEAUFORT SEA

While the MMPA prohibits the taking of polar bears within the United States, unless it is for the subsistence purposes by the native people of Alaska, it sets no limits on the number of polar bears that may be taken for this purpose. Unless a stock becomes depleted, the federal government cannot prevent populations from being over harvested. In recognition of this fact and because of their mutual historic and cultural interest in maintaining healthy polar bear populations, the Inupiat of Alaska and the Inuvialuit of Canada developed a conservation agreement for the polar bear population of the Southern Beaufort Sea.¹²⁷ The Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea (Inuvialuit-Inupiat Agreement) is unique in that it actually provides more stringent rules than the MMPA. More importantly, the Inuvialuit-Inupiat Agreement is a cooperative management agreement between local native peoples who took it upon themselves to take action to protect polar bears from being over harvested. The Inuvialuit-Inupiat Agreement is enforced among the native groups, but otherwise unenforceable. For example, the Alaskan signatories of the Inuvialuit-Inupiat Agreement acknowledge that they have no authority to bind their group to any agreement that violates the exclusive federal treaty power established by the United States Constitution.¹²⁸ Instead, they state that they are simply acting as representatives of their traditional local user group of polar bears in Alaska to assist in the goals of the 1973 Agreement on the Conservation of Polar Bears.¹²⁹

The Inuvialuit-Inupiat Agreement was signed on March 4, 2000 in Inuvik, North West Territories, Canada.¹³⁰ It superseded a previous agreement between the two groups signed in January 1988.¹³¹ The objectives of the 2000 agreement include encouraging the “wise use” of the polar bear populations in the Southern Beaufort Sea, as well as specific intentions to protect female polar bears.¹³² To maintain a healthy population of polar bears, the two groups agree to collect adequate scientific, traditional, and technical information on them in order to facilitate management decisions.¹³³

To meet their conservation goals, the Inuvialuit and Inupiat agreed to: (a) protect polar bears in dens of constructing dens; (b) protect polar bears with cubs; (c) establish annual sustainable harvests, defined as harvests that do not exceed net annual recruitment from all forms of removal from the population, based on the best available scientific data; (d) prohibit the use of aircraft or large motorized vessels for the purpose of taking polar bears; and (e) deter polar bears from villages during closed hunting season (the hunting season is established as being from

¹²⁷ Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea, *available at* <http://pbsg.npolar.no/ConvAgree/inuvi-inup.htm>.

¹²⁸ *Id.* at art. 5, sec. c.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at art. 3.

¹³² *Id.* at art. 2.

¹³³ *Id.* at art. 2, sec. d.

August 1 to May 31 in Canada and September 1 to May 31 in Alaska).¹³⁴ Like the US-Russia Agreement, the Inuvialuit and Inupiat agreed to establish a Joint Commission represented by each side to negotiate and ratify annually what allocation of takings apply to the next hunting season.¹³⁵ Each signatory to the Inuvialuit- Inupiat Agreement is to determine for itself the distribution of the harvest within its jurisdiction when these allocations are made for hunting seasons. Both sides also agreed that quotas will not be reduced from one year to the next if the full, allocated quota is not taken.¹³⁶ Additionally, polar bears threatening life or safety, including those killed in research activities, may be taken at any time of the year, but will be counted as part of the total quota allocation by the Joint Commission.¹³⁷

In order to monitor the allocations for subsistence taking, the Inuvialuits and Inupiats agreed lastly to a system of data collection and information sharing for polar bears takings.¹³⁸ In addition to basic information regarding the sex, date, location of the taking, and the hunter's information, they agreed to collect the lower jaw or an undamaged post-canine tooth for age determination, ear tags, lip tattoos, and radio collars if present, the baculum from each male, and/or other specimens for further studies.¹³⁹ In order to conduct these studies, the groups agreed that they will first notify and consult with the other side first.¹⁴⁰

VI. CONCLUSION

Polar bear protection has evolved from the Agreement on the Conservation of Polar Bears, the first international treaty specifically for the species, to include federal legislation within the United States, as well as local cooperative management agreements between native people in the Arctic. To date, legislation within the United States has focused primarily on the threats to polar bears from direct takings, including sport hunting and takings for subsistence purposes, in addition to incidental takings from oil and gas industry. In the 1970s when the Agreement on the Conservation of Polar Bears and the MMPA came into force, mention of habitat protection and the more globally harmful effects of human activities in the Arctic were acknowledged, but they have yet to be specifically addressed with protective legislation in the United States.

At the most recent meeting of the PBSG, the group noted that future challenges for conserving polar bears and their Arctic habitat will be greater than at any time in the past because of the rapid rate at which environmental change appears to be occurring.¹⁴¹ The complexity and global nature of the issues will require a great degree of international cooperation and development of diverse and new approaches to address these issues. Perhaps the recent US-Russia Agreement, which includes further provisions to study and develop recommendations for polar bear habitat conservation measures, will provide the necessary changes in the MMPA or other environmental legislation to implement these programs.

¹³⁴ *Id.* at art. 3, secs. a-k.

¹³⁵ *Id.* at art. 3, sec. d.

¹³⁶ *Id.* at art. 3, secs. d, j.

¹³⁷ *Id.* art. 3, sec. h.

¹³⁸ *Id.* at art. 5.

¹³⁹ *Id.* at art. 5, sec. b.

¹⁴⁰ *Id.*

¹⁴¹ See Press Release from 13th Meeting of the PBSG in Nuuk, Greenland, 2001, PBSG, available at <http://pbsg.npolar.no>.

The PBSG also suggests that native people throughout the Arctic are uniquely positioned to observe changes in the environment. A combination of their traditional knowledge and western science might aid polar bear conservation.¹⁴² For example, ongoing efforts to collect traditional knowledge of polar bear habitat use in Chukotka, Alaska, Canada, and Greenland are being encouraged and the results will be incorporated into future research and management.¹⁴³ If politics prevents further federal legislative change in the United States, additional cooperative agreements among native groups, like the Inuvialuit-Inupiat Agreement, might continue to develop habitat conservation and further polar bear protections that governments themselves cannot.

¹⁴² *Id.*

¹⁴³ *Id.*

