Alaska Oil & Gas Ass'n v. Jewell: The Ninth Circuit Court of Appeals Upholds the Designation of Polar Bear Critical Habitat and Stays True to the Heart of the Endangered Species Act

I. OVERVIEW

Due to climate change and rapidly shrinking Arctic sea ice, the U.S. polar bear population is declining.[1] The 1973 Endangered Species Act (ESA)—administered through the United States Fish & Wildlife Service (FWS)—requires the Secretary of the Interior to designate critical habitat for threatened species such as the polar bear.[2] On December 7, 2010, FWS published a Final Rule designating critical habitat in Alaska for the polar bear, allocating approximately 187,000 square miles, broken down into three Units.[3] Concerned about the size and scope of the Final Rule, three separate groups, whose members included the State of Alaska, oil and gas trade associations, and Alaska native corporations and villages, brought suit against FWS.[4] The United States District Court for the District of Alaska consolidated the three cases.[5]

Substantively, the plaintiffs argued FWS acted arbitrarily and capriciously in its designation primarily because: (1) it did not identify the precise areas which contained the necessary physical and biological features for polar bears; (2) it did not use adequate science; and (3) it failed to sufficiently justify the inclusions and exclusions of certain

1. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544, 551 (9th Cir. 2016).
2. *Id.* (citation omitted).
3. *Id.*
4. *Id.* at 553.
5. *Id.*

areas.[6] Procedurally, the plaintiffs alleged FWS did not comply with Section 4(i) of the ESA because FWS failed to provide the State of Alaska with adequate justification as to why it did not fully adopt Alaska's comments on its designation.[7] The district court rejected the majority of the plaintiffs' claims, but held FWS had erred in designating Units 2 and 3 as critical habitat and that FWS had violated Section 4(i) of the ESA.[8] Granting summary judgment in part to the plaintiffs, the district court vacated and remanded the Final Rule in its entirety and FWS appealed.[9] On appeal, the United States Court of Appeals for the Ninth Circuit *held*: (1) FWS did not act arbitrarily and capriciously in its critical habitat designation of Units 2 and 3; (2) compliance with Section 4(i) was judicially reviewable and FWS did not violate Section 4(i); and (3) the district court correctly rejected the plaintiffs' other claims. *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 550 (9th Cir. 2016).

II. BACKGROUND

A. Historical Context and Purpose of the ESA

The first time Congress expressed major concern over the preservation of endangered species was in 1966, when it passed the first ESA.[10] The Act declared the preservation of endangered species a national policy and required all federal agencies to protect endangered species to the extent practicable.[11] The Endangered Species Conservation Act of 1969 broadened the original ESA by allowing for increased federal involvement in species protection.[12] Congress was worried about the unforeseeable effects of species lost and realized it needed even more expansive legislation to protect at risk species.[13] Essentially, Congress wanted to "devote whatever effort and resources were necessary" to help threatened and endangered species recover.[14] Once passed, the 1973 ESA was the most comprehensive policy governing endangered species that had ever been created by any country.[15]

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6. *See id.* at 553-54, 559.
7. *Id.* at 553.
8. *Id.*
9. *Id.* at 553-54.
10. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978) (citation omitted).
11. *Id.* at 175 (citation omitted).
12. *Id.*
13. *See id.* at 176, 178-79.
14. George C. Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D.L. REV. 315, 321 (1974).
15. *Hill*, 437 U.S. at 180.

Congressional intent and the text of the ESA show its purpose is to ensure at-risk species actually recover, not merely that the present number of animals is maintained.[16] "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[17] While critics of the ESA argue it has failed to achieve its essential purpose as the populations of many threatened and endangered species are still very low, its proponents point to the successful recoveries of notable species such as the grey wolf and bald eagle.[18] Essentially, although the success of the ESA thus far may be debatable, the purpose of the Act is not.[19]

B. The ESA's Procedural and Substantive Requirements

Species conservation under the ESA is a multi-step process with both substantive and procedural requirements.[20] Under the ESA, the Secretaries of the Interior and Commerce label certain species as threatened or endangered.[21] The Secretary of the Interior must then designate the habitat that is critical to each species' recovery.[22] The Secretary of the Interior has delegated its authority to administer the ESA to FWS.[23] The Administrative Procedure Act (APA) dictates the relevant standard of review for complaints against FWS action under the ESA.[24]

FWS's critical habitat designation is a key substantive ESA requirement.[25] The critical habitat of an endangered or threatened species includes the specific areas within the geographical region occupied by the species. The geographical region contains physical or biological features that are essential to the conservation of the species, and which may require special management considerations or protection.[26] These physical and biological features are commonly known as "primary

16. 16 U.S.C. § 1531(b) (2012); *see also Hill*, 437 U.S. at 184.

17. *Hill*, 437 U.S. at 184.

18. Roddy Scheer, *Is the Endangered Species Act a Success or Failure?*, SCI. AM., http://www.scientificamerican.com/article/endangered-species-act-success-failure/#.html (discussing whether the Endangered Species Act has succeeded in its essential purpose).

19. *See Hill*, 437 U.S. at 184; *see also* Conservation Congress v. Finley, 774 F.3d 611, 615 (9th Cir. 2014) (emphasizing the broad purpose of the ESA).

20. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1976).

21. *Id.* § 1533(a)(1), (2).

22. *Id.* § 1533(a)(3)(A)(i).

23. *See* 50 C.F.R. § 402.01(b) (2012).

24. *See* 5 U.S.C. § 706 (2012).

25. *See*, *e.g.*, Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 988-90 (9th Cir. 2015).

26. 50 C.F.R. § 424.12(b) (2016).

constituent elements," or "PCEs."[27] Critical habitat may also include areas outside the geographical area presently occupied by a species, but only when a designation limited to its present range would be inadequate to ensure conservation.[28]

In determining the PCEs, FWS must use the "best scientific data available."[29] The ESA does not clarify what constitutes the "best scientific data available," which has forced courts to interpret this element.[30] In *Building Industry Ass'n of Superior California v. Norton*, the D.C. Circuit Court of Appeals made clear FWS may not ignore and disregard superior data.[31] However, FWS need only use the best scientific data available, not the best data possible.[32] Further, absent superior data, occasional imperfections are acceptable.[33] Additionally, in *San Luis & Delta-Mendota Water Authority v. Jewell*, the Ninth Circuit emphasized what constitutes the best scientific data available belongs to an agency's "special expertise" and thus the reviewing court must be deferential.[34]

In addition to illustrating a species' PCEs, the "best scientific data available" is used to show the area "occupied by the species."[35] Specifically, the phrase "occupied" is debateable.[36] The word "occupied" itself "does not provide a clear standard for how frequently a species must use an area before the agency can designate it as critical habitat."[37] In *Arizona Cattle Growers' Ass'n v. FWS* (*Arizona I*), the Ninth Circuit took a rigid approach to the concept of occupation in its discussion of the cactus ferruginous pygmy-owl.[38] The court acknowledged the owls were once found in the pertinent area in small numbers.[39] However, because FWS did not provide evidence indicating the owl was, in fact, presently

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27. *See* Cape Hatteras Access Pres. All. v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 23 (D.D.C. 2010) (citing 50 C.F.R. § 424.12(b)(5)).

28. 50 C.F.R. § 424.12(e) (2016).

29. 16 U.S.C. § 1533(b)(2) (2012).

30. San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601-02 (9th Cir. 2014); Kern Cty. Farm Bureau v. Allen, 450 F.3d 1072, 1080-81 (9th Cir. 2006); Bldg. Indus. Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1246 (D.C. Cir. 2001).

31. 247 F.3d at 1246-47 (citations omitted).

32. *Id.*

33. *Id.*

34. 747 F.3d at 602 (quoting Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983)).

35. *See* 50 C.F.R. § 424.12(a), (b) (2016).

36. *See*, *e.g.*, Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163-64 (9th Cir. 2010).

37. *Id.* at 1164 (citation omitted).

38. 273 F.3d 1229, 1244-45 (9th Cir. 2001).

39. *Id.* at 1245.

in the area, the court concluded the owl did not occupy the area and FWS had thus erred in issuing an Incidental Take Statement.[40]

More recently, in *Arizona Cattle Growers Ass'n v. Salazar (Arizona II)*, the Ninth Circuit advocated a broader interpretation of the term "occupy."[41] The court rejected its previous reasoning in *Arizona I* and adopted an approach toward the term which allows FWS to look to where the species is *likely* to be found.[42] The court opined that in determining whether a species occupies an area, "relevant factors may include how often the area is used, how the species uses the area, the necessity of the area for the species' conservation, [and] species characteristics such as degree of mobility or migration."[43]

The Ninth Circuit is not the only court to have addressed the issue of the scope of PCEs and the word "occupy."[44] *Alliance for Wild Rockies v. Lyder*, a case in the United States District Court for the District of Montana, involved the designation of lynx critical habitat.[45] In that case, FWS identified just one lynx PCE—boreal forest landscapes.[46] The plaintiffs challenged FWS's decision to not designate certain forests as critical habitat.[47] FWS had excluded those forests primarily because of the lack of evidence that lynx reproduction occurred there.[48] However, the plaintiffs argued while evidence of reproduction was a sufficient condition that could assure the existence of the PCE, it was not required, and other areas could also contain the PCE.[49] The court agreed with the plaintiffs, explaining, "[w]hile the science might not allow the Service to easily identify areas with the primary constituent element, this does not justify the Service using evidence of reproduction, (where there is also insufficient data), as a proxy for the primary constituent element."[50] In essence, FWS could not solely focus on the presence or absence of evidence of the lynx's current use of the area, as shown through reproduction, when defining lynx critical habitat.[51]

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40. *See id.*
41. 606 F.3d at 1163-67.
42. *See id.* at 1165-66.
43. *Id.* at 1164.
44. *See, e.g.*, Alliance for Wild Rockies v. Lyder, 728 F. Supp. 2d 1126, 1130-32 (D. Mont. 2010).
45. *See id.*
46. *Id.* at 1132.
47. *Id.* at 1133.
48. *Id.* at 1134.
49. *Id.*
50. *Id.* at 1135.
51. *See id.* at 1134-35.

In addition to the substantive requirement of critical habitat designation, the ESA contains various procedural aspects.[52] Notably, once FWS has proposed a designation, it must give notice of the proposal to the state agency in each state in which the species is believed to live, and invite the state to comment.[53] Under the ESA's Section 4(i), if an impacted state files comments which disagree with the proposed designation and FWS does not fully adopt those comments in the Final Rule, FWS is required to provide the state with a written explanation of why it did not incorporate the state's comments.[54]

Courts have been required to consider what constitutes sufficient justification by FWS.[55] For example, *In re Polar Bear Endangered Species Act Listing* involved the designation of the polar bear species as "threatened" under the ESA.[56] Among other allegations, the plaintiffs claimed FWS violated Section 4(i) of the ESA by failing to give "an adequate response to the comments submitted by the State of Alaska regarding the listing decision."[57] The D.C. Circuit first addressed the reviewability of Section 4(i) and determined FWS's compliance with the procedural requirements of the Section was reviewable, but the substance of its response was not.[58] The court, opining, "[s]ection 4(i) does not mean to ensure that the State will be satisfied with FWS's response," then held because FWS explained the reason for its differences with Alaska's opinion, it had fulfilled its Section 4(i) requirement.[59]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit Court of Appeals reversed the district court's decision, in part, holding: (1) FWS's designation of Units 2 and 3 as polar bear critical habitat was not arbitrary and capricious; and (2) FWS had sufficiently complied with Section 4(i)'s procedural requirement.[60] It affirmed it in part, by finding it had correctly rejected the remainder of plaintiffs' claims.[61] The court affirmed the rejection of the remainder of claims summarily.[62] Thus, the court's holdings on

52. *See* 16 U.S.C. § 1533(b)(5)(A)(i) (2012).
53. *Id.* § 1533(b)(5)(A)(ii).
54. *Id.* § 1533(i).
55. *See, e.g.*, *In re* Polar Bear Endangered Species Act Listing, 709 F.3d 1, 17-19 (D.C. Cir. 2013).
56. *Id.* at 2.
57. *Id.* at 7-8.
58. *Id.* at 17-18.
59. *Id.* at 19.
60. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544, 550 (9th Cir. 2016).
61. *Id.*
62. *Id.* at 564.

FWS's designation of Units 2 and 3 and on FWS's compliance with Section 4(i) are most worthy of analysis.[63] By relying on the legislative intent behind the ESA, on the decisions of other courts, on the methodology used by FWS, on the facts in the record, and by expanding its own precedent, the court first determined the district court erred in rejecting the designation of Units 2 and 3 because FWS, *inter alia*: (1) did not need to prove precisely where PCE sub-elements were located; (2) used acceptable science; and (3) did not act arbitrarily in including and excluding various areas with human activity.[64] Next, in assessing whether FWS had provided sufficient written justification to Alaska under Section 4(i), the court primarily relied on both the plain text of the Section, as well as the D.C. Circuit's reasoning in a similar case.[65]

On appeal, the plaintiffs argued FWS acted arbitrarily and capriciously by failing to specify where, precisely, all components of the polar bear PCEs were located.[66] FWS's Final Rule had identified terrestrial denning habitat as a PCE.[67] FWS found this habitat needed to consist of bluffs and riverbanks containing four components: "(1) steep, stable slopes for the den sites themselves; (2) access between den sites and the coast; (3) sea ice in proximity to the denning habitat prior to the onset of denning season in the fall; and (4) freedom from human disturbance."[68] FWS also identified "barrier island habitat" as a PCE.[69] This PCE was made up of the barrier islands off Alaska's coast, and a buffer zone.[70] The purpose of this PCE was to allow the bears to den free from disturbance and to have the freedom to move along the coast.[71]

In concluding that FWS's precise identification of the location of the PCE elements—such as the steep slopes in the terrestrial denning habitat—was unnecessary, the court relied on a number of factors.[72] First, the court focused on the text of and legislative and policy intent behind the ESA.[73] The court emphasized, "[t]he Act is concerned with protecting the future of the species, not merely the preservation of

63. *See id.*
64. *Id.* at 555-62.
65. *Id.* at 562-63.
66. *Id.* at 557.
67. *Id.* at 556.
68. *Id.*
69. *Id.* at 560.
70. *Id.*
71. *Id.*
72. *Id.* at 555-58.
73. *Id.* at 555-56.

existing bears."[74] Thus, by requiring actual proof of polar bear activity, the district court wrongly shifted the focus away from the PCEs.[75] The court reasoned, "[s]ince the point of the ESA is to ensure the species' recovery, it makes little sense to limit its protections to the habitat that the existing, threatened population currently uses."[76] Essentially, the district court acted contrary to legislative intent in concluding evidence of the exact location of PCE elements, shown through current polar bear use, was imperative.[77]

In addition to concentrating on the text of and intent behind the ESA, the court relied on rulings from other courts, as well as its own precedent, in concluding evidence of PCE element locations, shown through current polar bear use, was unnecessary.[78] For example, the court referenced *Alliance for the Wild Rockies* to make the point FWS cannot prohibit a given area from being critical habitat simply because there is no proof of the species' use.[79] The court agreed with the District of Montana that FWS's reasoning that critical habitat only existed where there was evidence of reproduction was flawed, and that such logic took the focus away from PCEs.[80] Further, the court explained its own precedent dictated FWS must not simply look at evidence of actual presence, but at where the species is likely to be found.[81]

The court also incorporated both its own precedent from *San Luis* and the D.C. Circuit's ruling in *Norton* to emphasize in determining the location of PCE elements, FWS need only use the best scientific data available, not the best data possible.[82] Applying this more lenient standard, the court found FWS had fulfilled its duty.[83] For example, the facts in the record demonstrated despite the district court's failure to mention FWS's use of radio-telemetry data tracking over twenty years of female bear movements, FWS utilized this comprehensive data set to make its determination.[84] Additionally, FWS worked with the United

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74. *Id.* at 555.
75. *Id.* at 555-56.
76. *Id.* at 556.
77. *See id.* at 555-56.
78. *Id.* at 556.
79. *Id.*; Alliance for Wild Rockies v. Lyder, 728 F. Supp. 2d 1126, 1134-35 (D. Mont. 2010).
80. *Alaska Oil*, 815 F.3d at 556 (citing *Lyder*, 728 F. Supp. 2d at 1134-35).
81. *Id.* (citing Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1165-67 (9th Cir. 2010)).
82. *Alaska Oil*, 815 F.3d at 555; San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 602 (9th Cir. 2014); Bldg. Indus. Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1246-47 (D.C. Cir. 2001).
83. *Alaska Oil*, 815 F.3d at 557.
84. *Id.*

States Geological Survey (USGS) to do its best to map the extent and location of dens.[85] Within Unit 2, FWS's demarcation covered 95% of the probable or confirmed den sites, and allowed for potential changes likely to occur from climate change induced erosion.[86] The court adopted the D.C. Circuit's reasoning in *In re Polar Bear*, and concluded that FWS did not err in considering future climate change as a factor affecting critical habitat designations.[87] The court concluded the findings in *In re Polar Bear*, along with the numerous studies FWS relied upon, clearly showed FWS's consideration of climate change was proper.[88] Thus, the Court held FWS had, in fact, used the best scientific data available in its designation.[89]

In addition to arguing FWS needed to specify where PCE elements were located, and that FWS was required to use more precise science, the plaintiffs contended FWS did not provide a reasonable explanation for why it included some areas near human activity and excluded others.[90] Specifically, in Unit 2, FWS excluded the Native Alaskan communities of Barrow and Kaktovik and man-made infrastructure such as roads from its final designation.[91] However, FWS included the industrialized area of Deadhorse.[92] In upholding FWS's justification for excluding certain areas with human activity while including others, the court focused on the facts in the record.[93] The record, for example, reflected Deadhorse had very few permanent residents.[94] Additionally, the record showed polar bears often moved through the area and had been known to den nearby.[95] Thus, the court concluded the inclusion of Deadhorse was not arbitrary and capricious.[96] Similarly, the court found the record reflected equally legitimate reasons FWS decided to not exclude certain areas around the Native towns.[97] For example, FWS did not exclude an additional one-mile radius around the town of Kaktovic because "(1) polar bears routinely pass through that area; (2) the developed

85. *See id.* at 558.
86. *Id.*
87. *Id.* at 558-59 (citing *In re* Polar Bear Endangered Species Act Listing, 709 F.3d 1, 4-6 (D.C. Cir. 2013)).
88. *Id.*
89. *Id.* at 555, 558-59.
90. *Id.* at 553, 558-59.
91. *Id.* at 559.
92. *Id.*
93. *See id.* at 559-60.
94. *Id.* at 559.
95. *Id.*
96. *See id.* at 559-60.
97. *Id.*

communities make up only a small part of the legally defined boundaries of Kaktovic, so a buffer zone essentially already existed; and (3) the exclusion of the legally defined boundaries already eliminated some potential polar bear denning habitat."[98]

Essentially, the plaintiffs disagreed with the scope of FWS's designation of critical habitat in both Units 2 and 3.[99] However, being careful to adhere to a narrow and deferential standard in evaluating the FWS's decision, the court held FWS's designation of Units 2 and 3 was not arbitrary and capricious because: (1) it was not necessary to prove precisely where elements of PCEs were located; (2) FWS used the requisite science; and (3) FWS had legitimate justifications for including and excluding various areas with human activity.[100]

After addressing FWS's designation of Units 2 and 3, the court moved to the issue of whether FWS sufficiently complied with the procedural requirements of Section 4(i), which directed FWS to provide written justification to Alaska explaining discrepancies between the State's comments and the Final Rule.[101] Before reaching the merits of this issue, the court had to determine as a threshold matter whether the Section 4(i) justification requirement was judicially reviewable.[102] The Ninth Circuit had not previously addressed this question.[103] The court looked to the D.C. Circuit's ruling in *In re Polar Bear* for guidance.[104] In that case, similar to the noted case, FWS argued its compliance with Section 4(i) was not subject to judicial review.[105] In the noted case, the court adopted the D.C. Circuit's approach and surmised judicial review was appropriate as long as the review was limited to the procedural requirements of the Section and not the substance of FWS's response.[106] Essentially, Section 4(i) is "a procedural step that becomes reviewable upon review of the final agency action."[107] The court agreed with the D.C. Circuit that because the ESA did not specify what the substance of the written justification should be, the substance of FWS's response was

98. *Id.* at 560.
99. *Id.* at 562.
100. *See id.* at 554-62.
101. 16 U.S.C. § 1533(i) (2012); *Alaska Oil*, 815 F.3d at 562.
102. *Alaska Oil*, 815 F.3d at 562.
103. *Id.*
104. *Id.*
105. *Id.*; *In re* Polar Bear Endangered Species Act Listing, 709 F.3d 1, 17 (D.C. Cir. 2013).
106. *Alaska Oil*, 815 F.3d at 562 (citing *In re Polar Bear*, 709 F.3d at 17-19).
107. *In re Polar Bear*, 709 F.3d at 17 (quoting *In re* Polar Bear, 794 F. Supp. 2d 65, 115 n. 54 (D.D.C. 2011)).

not reviewable.[108] Instead, the court was only required and permitted to review whether FWS took Alaska's concerns and interests into account.[109]

Once it established the degree and extent of review necessary, the court analyzed whether FWS had, in fact, provided the requisite justification.[110] The district court determined FWS's justification was insufficient for two reasons.[111] First, it held FWS erred in incorporating by reference "its responses to Alaska's comments contained in the Final Rule rather than including all of those responses verbatim in the letter to the Governor."[112] It determined FWS needed to have included the full responses in the letter itself.[113] Next, the district court concluded FWS should have submitted the letter to Alaska's Governor, rather than the Alaska Department of Fish and Game (ADFG).[114]

In rejecting the first conclusion, the Court looked to the text of Section 4(i).[115] The court explained nothing in the Section seemed to prevent FWS from referencing other documents to support its justification.[116] The court also relied on *T-Mobile South, L.L.C. v. City of Roswell* to support its view.[117] In that case, the Supreme Court held a city was permitted to reference multiple documents when it sent a letter denying permission to build a cell phone tower to a telecommunications company.[118] The Ninth Circuit, echoing the Supreme Court's reasoning, and underscoring the fact that Section 4(i) includes nothing dictating a "one document" requirement, held the district court erred in imposing this non-existent rule.[119]

The court then turned to the question of whether FWS permissibly sent the letter to the Governor of Alaska rather than ADFG.[120] The court held that because the comment letters from Alaska and ADFG stated they represented the comments of the State and because the letters themselves asked FWS to provide justification "to the State" rather than to ADFG or any specific department, FWS did not err.[121]

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108. *Alaska Oil*, 815 F.3d at 562 (citing *In re Polar Bear*, 709 F.3d at 17-19).
109. *Id.*
110. *Id.* at 562-63.
111. *Id.* at 563.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. T-Mobile S., L.L.C. v. City of Roswell, 135 S. Ct. 808, 811-12 (2015).
119. *Alaska Oil*, 815 F.3d at 563 (citing *T-Mobile S.*, 135 S. Ct. at 811, 815-18).
120. *Id.*
121. *Id.*

Finally, relying on both *In re Polar Bear* and the text of Section 4(i) itself, the court rejected Alaska's assertion that FWS did not offer sufficient responses.[122] The court noted FWS clearly responded to each of the substantive comments, which is all that is required by Section 4(i).[123] The court underscored that the substantive sufficiency of the responses was not reviewable.[124] Thus, the court concluded FWS had, in fact, complied with Section 4(i).[125]

IV. ANALYSIS

The decision in the noted case leaves some questions unanswered. For example, while the court clearly stated the level of scientific data needed is the best scientific data available, rather than the best data possible, it remains somewhat unclear precisely what the best scientific available standard entails.[126] In the noted case, FWS's use of radio-telemetry data and USGS mapping, combined with the fact that data on polar bears was limited, was held to be sufficient.[127] However, the court did not articulate a bright-line rule—if the radio-telemetry data had covered a span of ten years, rather than over twenty, would that have been adequate?

Despite such minor outstanding questions, *Alaska Oil* has significant implications for critical habitat designations under the ESA for a couple of reasons. First, the issue of whether FWS sufficiently complied with the requirements of Section 4(i) was a matter of first impression in the Ninth Circuit.[128] The Ninth Circuit utilized the D.C. Circuit's reasoning to come to its conclusion that FWS's Section 4(i) justification was judicially reviewable.[129] The court clarified that the judicial review must be limited to solely FWS's procedural compliance and not the substantive aspects of the justification.[130] Thus, the court was careful to clearly define and limit the scope of reviewability.[131] As such, the court made sure to qualify its holding on this issue.[132] Still, the court created binding precedent which will be followed in the future with

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122. *See* 16 U.S.C. § 1533(i) (2012); *Alaska Oil*, 815 F.3d at 563-64 (citing *In re* Polar Bear Endangered Species Act Listing, 709 F.3d 1, 19 (D.C. Cir. 2013)).
123. 16 U.S.C. § 1533(i); *Alaska Oil*, 815 F.3d at 563-64.
124. *Alaska Oil*, 815 F.3d at 562.
125. *Id.* at 564.
126. *See id.* at 558.
127. *Id.* at 556, 558, 562 (citing 16 U.S.C. § 1533(b)(2)).
128. *Id.* at 562.
129. *Id.*
130. *Id.* at 562, 564.
131. *See id.*
132. *Id.*

regard to Section 4(i) reviewability.[133] In future Ninth Circuit cases, FWS will not be able to successfully argue against judicial review of its Section 4(i) compliance.[134]

While in the noted case, the Section 4(i) issue was the only matter of first impression for the Ninth Circuit, the court's holding that FWS was not required to specifically identify where each PCE element was located, through evidence of current polar bear use, is significant.[135] In coming to the conclusion FWS did not need to precisely identify the locations of PCE sub-elements, the court expanded on its finding in *Arizona II*.[136] In *Arizona II*, the court primarily focused on the term "occupied" within the meaning of the ESA and concluded a broad interpretation of the phrase was necessary.[137] In the noted case, the court reached a similar conclusion as it did in *Arizona II*, but took its explanation a step further.[138] Rather than simply interpreting the term "occupied" within the meaning of the ESA as it did in *Arizona II*, the court honed in on the PCEs.[139] The court devoted a significant amount of its opinion to explaining not only why FWS must look beyond actual species presence, but also why the plaintiffs' focus on specific unproven PCE element locations was misguided.[140]

In delving into the details regarding PCEs and repeatedly emphasizing the lack of requirement to prove actual species presence, the court made its position on critical habitat designations exceptionally clear.[141] Despite strong opposition from powerful interests, the court strictly adhered to the law and made a decision consistent with the statutory language of and legislative intent behind the ESA, with the deferential APA standard, with judicial precedent, and with the public policy favoring species recovery.[142] While the court could have chosen to analyze FWS's designation summarily, it instead dissected the issues carefully and provided an in-depth analysis explaining why FWS's designation was sufficient under the law.[143] In doing so, the court

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133. *See id.*
134. *See id.*
135. *Id.* at 555-56, 562.
136. *See id.* at 556.
137. *See* Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1165-67 (9th Cir. 2010).
138. *See Alaska Oil*, 815 F.3d at 555-56.
139. *Id.* at 555-57, 560-62; *Arizona II*, 606 F.3d at 1165-67.
140. *Alaska Oil*, 815 F.3d at 555-57, 560-62.
141. *See id.*
142. *See id.* at 554, 555-57, 560-62.
143. *See id.* at 552-63.

implicitly recognized the importance of critical habitat designation under the ESA.[144]

Additionally, in its thorough coverage of the legislative intent behind the ESA and its rigid application of the ESA to the facts in the record, the court was careful to not overstep its judicial boundaries.[145] Thus, this decision serves as a reminder that the judiciary's ultimate purpose is to ensure the wishes of the people, as voiced and enacted through Congressional legislation, are followed.

Alaska Oil was decided on February 29, 2016.[146] On March 14, 2016, FWS's revisions to the ESA's implementing regulations on critical habitat became effective.[147] Many of the revisions were not substantive; rather, they clarified and perfected the regulatory language.[148] Two changes, however, are particularly notable. First, the revised regulation removed all references to PCEs.[149] Now, FWS need not list the PCEs.[150] While much of *Alaska Oil* focused on PCEs, the new regulations do not render the decision moot on this issue because the removal of the language of PCEs was merely a change in semantics.[151] In response to comments on the revised regulations, FWS explained:

> Removing references to "primary constituent elements" from the regulation will not result in expansion of the scope of critical habitat. Removing this phrase is not intended to substantively alter anything about the designation of critical habitat, but to eliminate redundancy in how we describe the physical or biological features. The phrase "primary constituent element" is not found in the [ESA] and the regulations have never been clear as to how primary constituent elements relate to or are distinct from physical or biological features essential to the conservation of the species, which is the phrase used in the Act.[152]

Essentially, the comment illustrates that PCEs are equivalent to physical and biological features, and that purpose of removing the PCE language was simply to make the regulation more clear, not to substantively change the meaning.[153]

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144. *See id.*
145. *See id.* at 550-52.
146. *Id.* at 546.
147. 50 C.F.R. § 424.12 (2016).
148. *Compare* 50 C.F.R. § 424.12(a) (2016) (describing the Secretary's role with active voice) *with* 50 C.F.R. § 424.12(a) (2012) (describing the Secretary's role using passive voice).
149. 50 C.F.R. § 424.12 (2016).
150. *See id.*
151. Final Rule, 81 Fed. Reg. 7414, 7426 (Feb. 11, 2016) (response to Comment 70).
152. *Id.*
153. *Id.*

Second, the old regulation provided FWS could only designate habitat outside the geographical area occupied by the species if a designation limited to the present area would be inadequate to ensure conservation.[154] The new regulation does not contain this requirement; instead, it states that where designation of habitat is "prudent and determinable," FWS may identify areas both within and outside the area occupied by the species for designation.[155] Thus, the new regulation makes it easier for FWS to designate areas outside the occupied range.[156] Hence, some judicial decisions made since this updated regulation became effective have allowed FWS even more flexibility in designating habitat.[157]

In essence, the revisions to the regulation and the decision in the noted case mirror each other.[158] The Ninth Circuit found the ESA did not require FWS to precisely identify locations of PCE elements and emphasized proof of occupation was not necessary; the revised regulation clarifies that occupation truly is not needed.[159] While the revised regulation and the decision in *Alaska Oil* reach the same result, *Alaska Oil* is still important in that it represents one side in a fight over the level of deference to be afforded to FWS.[160] In fact, multiple courts have relied on *Alaska Oil* in deciding issues regarding FWS's identification of physical and biological features for critical habitat designations, demonstrating *Alaska Oil's* continued relevance.[161]

V. CONCLUSION

The Ninth Circuit decided *Alaska Oil* correctly. First, in finding FWS's designation of Units 2 and 3 was not arbitrary and capricious, the court carefully applied the ESA to the facts in the record.[162] In upholding

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154. 50 C.F.R. § 424.12(e) (2012).

155. 50 C.F.R. § 424.12 (2016).

156. *Compare* 50 C.F.R. § 424.12(b) (2016) *with* 50 C.F.R. § 424.12(e) (2012).

157. *See, e.g.*, Markle Interests, L.L.C. v. FWS, 827 F.3d 452, 469 (5th Cir. 2016) (concluding, *inter alia*, FWS properly designated dusky gopher frog critical habitat in areas which the frog did not presently occupy, and would likely not occupy in the "foreseeable future."); *but see* Permian Basin Petroleum Ass'n v. Dep't of the Interior, 127 F. Supp. 3d 700, 711 (W.D. Tex. 2015) (concluding FWS is only afforded "some" deference in applying its Policy for Evaluation of Conservation Efforts When Making Listing Decisions to a rangewide plan).

158. *See* 50 C.F.R. § 424.12 (2016); Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544, 554-57, 560-62 (9th Cir. 2016)

159. *Id.* § 424.12(b); *Alaska Oil*, 815 F.3d at 554-57, 560-62.

160. *Compare Alaska Oil*, 815 F.3d at 554-57, 560-62 *with Permian Basin*, F. Supp. 3d at 711.

161. *See, e.g.*, Wildearth Guardians v. Dep't of the Interior, 2016 WL 4688080, at *3-4 (D. Mont. Sept. 7, 2016).

162. *See Alaska Oil*, 815 F.3d at 555-62.

the critical habitat designation and rejecting the contention that evidence of the exact location of PCE elements, shown through current polar bear use, was necessary, the court adhered to the deferential APA standard of review and the legislative intent of the ESA, which supports the goal of species recovery.[163] Second, given the ESA does not specify what an agency response to comments under Section 4(i) must consist of, the court properly limited its review to whether FWS had complied with the Section 4(i) procedural requirements.[164] If climate changes proceed as expected, one in six species could face extinction.[165] Hence, the ESA and critical habitat designations are of extreme importance.[166] As the branch of government which reviews contentious critical habitat designations, courts have influenced and will continue to influence the future survival and recovery of threatened and endangered species.[167] The Ninth Circuit should be commended for deciding the noted case with a significant level of deference to the true heart and intent of the ESA. Hopefully, courts will look to the Ninth Circuit's decision in the noted case in the future when reviewing critical habitat designations.

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163. *See* 16 U.S.C. § 1531(b) (2012); 5 U.S.C. § 706 (2012); *Alaska Oil*, 815 F.3d at 554-56.

164. 16 U.S.C. § 1533(i); *Alaska Oil*, 815 F.3d at 562-63.

165. Mark C. Urban, *Accelerating Extinction Risk from Climate Change*, SCI., May 1, 2015, at 571.

166. *See Alaska Oil*, 815 F.3d at 554-57, 560-62.

167. *See id.*

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