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“BEARS NEED ROOM TO ROAM”: THE NINTH CIRCUIT’S QUESTIONABLE INTERPRETATION OF CRITICAL HABITAT DESIGNATION

Abstract: In February 2016, in *Alaska Oil & Gas Ass’n v. Jewell*, the United States Court of Appeals for the Ninth Circuit upheld a decision by the U.S. Fish and Wildlife Service to designate 187,000 square miles in northern Alaska as critical polar bear habitat. The Ninth Circuit rejected the reasoning of the District Court for the District of Alaska which found that the FWS failed to meet the “standard of specificity” required by the Endangered Species Act in determining what geographical areas constituted critical habitat. Rather, the Ninth Circuit focused on the ESA’s broad statutory purposes of species preservation and conservation, and gave great deference to the agency’s decision. This Comment argues that the Ninth Circuit created an impermissibly broad approach to critical habitat designations under the ESA. Further, this decision creates a dangerous precedent for the amount of deference lower courts may apply to agency actions in the future.

INTRODUCTION

The destruction of natural habitats is the most critical factor impacting species extinction.¹ Today, there are more than 1400 endangered or threatened species in the United States.² Protecting essential habitats for certain species of animals and plants has become increasingly difficult in recent years due to climate change.³ A 2004 study predicted that with the additional stress on species created by climate change, fifteen to thirty-seven percent of all global species could be extinct by 2050 due to climate change.⁴ Congress has recognized the threat of species extinction and in 1973 enact-

¹ Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 296 (1993).

² *Listed Animals*, U.S. FISH & WILDLIFE SERV. (“FWS”), <https://www.fws.gov/endangered/?ref=topbar> (follow “Threatened and Endangered Animals” hyperlink) [<https://perma.cc/QP7N-L7KN>].

³ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policy Makers*, in CLIMATE CHANGE 2007: IMPACTS, ADOPTION, VULNERABILITY 1, 8 (Solomon, S. et al. eds., 2007) <https://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf> [<https://perma.cc/EQ8N-624Q>] (analyzing the broad range of scientific evidence concerning climate change and its impacts).

⁴ Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 149 (2012). The World Wildlife Fund (“WWF”) has done extensive research on how climate change has negatively affected the habitats of a multitude of animal species. *Arctic*, WWF, <https://www.worldwildlife.org/places/arctic> [<https://perma.cc/XQ6L-SPDX>]. For example, the Arctic is warming twice as fast as the rest of the world due to the burning of fossil fuels. *Id.* This directly impacts the amount of ice available; many animals, such as the polar bear, depend on the ice for survival. *Id.*

ed the Endangered Species Act (“ESA”) to prevent the extinction of plant and animal species and to promote their recovery.⁵ The legislative history of the ESA highlighted major concerns of the potential loss of species.⁶ Yet, agency actions and determinations made under the ESA have often come into conflict with opposing private and economic interests.⁷

This Comment explores the U.S. Fish and Wildlife Service’s (“FWS”) critical habitat designation of polar bears as discussed in *Alaska Oil & Gas Ass’n v. Jewell*.⁸ In February 2016, the United States Court of Appeals for the Ninth Circuit held that the 187,000 square mile “critical habitat designation” made by the FWS for the polar bear was not “arbitrary and capricious” because the FWS used the best available scientific data possible.⁹ Although the ESA and its aims are incredibly important, the Ninth Circuit incorrectly decided *Jewell*.¹⁰ This Comment considers the implications of this decision and its effect on the regulatory framework going forward.¹¹ Part I of this Comment lays out the history of the ESA, the method for proposing critical habitat designations under the Act, and how courts have reviewed these types of agency decisions in the past.¹² Part II specifically examines the Ninth Circuit’s decision in *Jewell* in which the court deferred to the FWS’s reasoning and methods of designating large geographical areas

⁵ See Laurence M. Bogert, *That’s My Story and I’m Stickin’ to It: Is the Best Available Science Any Available Science Under the Endangered Species Act?*, 31 IDAHO L. REV. 85, 86, 90 (1994) (explaining that the Endangered Species Act (“ESA”) has been called the “most comprehensive piece of legislation” for species preservation by the Supreme Court and has often clashed with economic or private interests).

⁶ See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 177–78 (1978) (calling attention to how the threat to species extinction threatens our own “genetic heritage”).

⁷ See Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 210 (2000) (explaining that the ESA has been named in a number of lawsuits concerning economic interests against species and habitat protection since it was enacted in 1973); see, e.g., *Markle Interests, LLC v. U.S. Fish & Wildlife*, 827 F.3d 452, 459 (5th Cir. 2016) (addressing an action brought by private landowners against the FWS challenging a critical habitat designation of the dusky gopher frog); *N.M. Cattle Growers Ass’n v. U.S. Fish & Wildlife*, 248 F.3d 1277, 1280 (10th Cir. 2001) (addressing an action brought by the agricultural industry in New Mexico challenging the critical habitat designation of the southwestern willow flycatcher).

⁸ See *infra* notes 90–128 and accompanying text.

⁹ *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 559, 561 (9th Cir. 2016) (holding that the designation was not arbitrary and capricious even in the areas where polar bears were not actually present). The arbitrary and capricious standard has been described as a very deferential approach. *Id.* at 554. Critical habitat is defined in the ESA as geographical areas that the species inhabits at the time that the species is listed. Endangered Species Act of 1973, 16 U.S.C. § 1532 (2012). These areas must include “physical and biological features” that are imperative for the protection of said species. *Id.*

¹⁰ See *infra* notes 129–153 and accompanying text.

¹¹ See *infra* notes 129–153 and accompanying text.

¹² See *infra* notes 16–54 and accompanying text.

as critical habitat for the at-risk polar bear.¹³ Finally, Part III argues that the Ninth Court incorrectly decided *Jewell* and explores the decision's potentially harmful ramifications.¹⁴ This decision will continue to affect the administration of the ESA in regard to critical habitat designations and endorses an approach in which courts give unrestricted deference to agency action in the exercise of their statutory authority.¹⁵

I. THE STATUTORY FRAMEWORK OF THE ENDANGERED SPECIES ACT

In 1973, Congress enacted the ESA in an effort to protect the critical ecosystems upon which threatened or endangered species of fish, wildlife, and plants depend.¹⁶ Section A of this Part discusses the background of the initial implementation of the ESA.¹⁷ Section B examines the method used to determine critical habitat designations under the ESA.¹⁸

A. *Passing the Endangered Species Act*

The passing of the ESA embodied the country's newfound commitment to not only protect the survival of endangered species, but also to make sure that these species are revived.¹⁹ Congress first articulated its intent to take action to thwart the problem of declining species in the Endangered Species Preservation Act of 1966—the first environmental statute to impose a requirement to utilize science in environmental decisions made by an administrative body.²⁰ This law permitted the creation of a list of species threatened with the possibility of extinction.²¹ The ESA of 1973 is a much more comprehensive piece of legislation and calls for the use of any means necessary to bring all species to a state in which involvement of the ESA is

¹³ See *infra* notes 55–128 and accompanying text.

¹⁴ See *infra* notes 129–153 and accompanying text.

¹⁵ See *infra* note 133 and accompanying text.

¹⁶ 16 U.S.C. §§ 1531-44. The ESA defines a species as endangered when it is vulnerable to becoming extinct in a sizable area of its habitat, and a species is threatened when, in the immediate or near future, the species could become an endangered species within a sizable area of its habitat. *Id.* § 1532.

¹⁷ See *infra* notes 19–33 and accompanying text.

¹⁸ See *infra* notes 34–54 and accompanying text.

¹⁹ See 16 U.S.C. §§ 1531(b), 1532(3).

²⁰ Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed by 16 U.S.C. §§ 1531-44) [hereinafter ESPA]. The ESPA proposed creating and maintaining a conservation program that helped with the restoration of certain species “threatened with extinction.” *Id.* The ESPA also gave more authority to the Secretary of the Interior to administer the Wildlife Refuge System. *Id.* The ESPA was the first attempt by Congress to raise awareness for the growing concern of protecting wildlife and endangered species. *Id.*

²¹ *Id.* The ESPA did not contain any concrete provisions that restricted or monitored the activities of federal agencies. Darin, *supra* note 7, at 211.

no longer necessary.²² Protection of critical habitats flow largely from Section Seven of the ESA, which prohibits federal agencies from taking, permitting, or funding any action that is likely to result in the negative alteration of a critical habitat.²³

The ESA directs the Secretaries of the Interior and Commerce to list endangered and threatened species for federal protection.²⁴ The FWS then uses the best scientific and commercial data available to determine whether a species needs be listed.²⁵ Within a year of listing a species as threatened, the ESA requires the FWS to designate habitats as critical to the conservation of the species.²⁶ Section Three of the ESA defines a “critical habitat” as including both the occupied and unoccupied habitats that the species needs for recovery and that, therefore, should be protected.²⁷ In 1978, the ESA was amended to redefine “critical habitat” as the first statutory definition did not explicitly indicate that the designation of a critical habitat included a protected species’ “entire range,” or the area where a particular species could be found in their lifetime, including areas of migration or hibernation.²⁸ The 1978 amendments also required the Secretary of the Interior to consider the economic impact of the critical habitat designation on its ef-

²² See 16 U.S.C. §§ 1531(b), 1532 (asserting that the purpose of the ESA is to create a comprehensive plan to protect and preserve the environments in which threatened or endangered species depend, so much so that the protections of the ESA will eventually no longer be required).

²³ *Id.* § 1536. Federal agencies are expected to participate in the conservation of endangered or threatened species. *Id.* Agencies are not allowed to act in a way that would “jeopardize” or harm designated critical habitats in any way. *Id.*

²⁴ *Id.* § 1533(a)(1)(2) (explaining that a species cannot be removed or have its status changed without approval from the Secretary of Commerce). Currently, there are five species that are under review to determine if they are worthy of federal protection under the ESA. Brian Hires, *Petitions to Federally Protect Five Wildlife Species Move Forward to Next Review Phase*, FWS (Dec. 19, 2017), https://www.fws.gov/news/ShowNews.cfm?ref=petitions-to-federally-protect-five-wildlife-species--move-forward-to-n&_ID=36201 [<https://perma.cc/ZXK4-GYRA>]. These species include the oblong rocksnail, tricolored bat, sicklefin chub, and Venus flytrap. *Id.*

²⁵ 50 C.F.R. § 424.12 (2016).

²⁶ 16 U.S.C. § 1533(a)(3)(A), 1533(b)(6)(C). The year deadline can be extended to acquire additional scientific data with respect to the proposed regulation. *Id.* § 1533(d)(6)(a)(iii).

²⁷ *Id.* § 1532 (5)(A)(i) (specifying that that Secretary of the Interior has the discretion to consider areas as “critical habitat” that are “outside the geographical area occupied by the species”).

²⁸ See James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 320 (1990) (explaining other significant 1978 amendments to the ESA, such as the requirement of the FWS to consider economic impacts of critical habitat designation and to engage in a cost-benefit analysis). A species can be delisted or deemed to be “recovered” when the available science purports that the species is no longer endangered or threatened. 50 C.F.R. § 424.11. The process of deciding to delist a species is very similar to the process of adding a species to the list; it is a very scientific and involved analysis. FWS, *DELISTING A SPECIES 1* (2011), <https://www.fws.gov/endangered/esa-library/pdf/delisting.pdf> [<https://perma.cc/33S7-YJ96>]. After a species is delisted, the FWS continues to monitor the species for a period of five years to make sure that the species is able to survive without the measurements taken under the ESA. *Id.* at 2.

fectured territory.²⁹ Areas may not be included in the critical habitat designation if the impact on the economy is greater than the advantage of including that area.³⁰ This amendment came about in reaction to the Supreme Court's decision in *Tennessee Valley Authority v. Hill*, which prioritized the protection of the endangered snail darter over the construction of the Tellico Dam on the Little Tennessee River.³¹ This was a project on which Congress had spent large sums of public money, but yet the Court was willing to halt the project in favor of the survival of the snail darter.³² This decision marked not only the first interpretation of the ESA by the Court, but it also exemplified a heightened level of significance placed on endangered and threatened species due to the fact that the Court's holding had interpreted the ESA to prioritize species conservation over the aims of another federal project.³³

B. The Critical Habitat Designation Under the ESA

The regulations under the ESA lay out specific procedures and methods that the FWS must follow in determining a critical habitat designation for any threatened or endangered species.³⁴ When considering the designation of critical habitat, the FWS must focus on physical and biological features essential for the species' success.³⁵ The FWS can designate areas that are currently unoccupied by the species in question, as long as it can show that the area would be considered essential for conservation.³⁶ Furthermore,

²⁹ See Salzman *supra* note 28 at 320 (describing how this 1978 amendment now required the Secretary of the Interior to consider social implications of critical habitat designation).

³⁰ 16 U.S.C. § 1533(b)(2). The Secretary will also examine a critical habitat's impact on national security. *Id.*

³¹ *Hill*, 437 U.S. at 172–73; see also ZYGMUNT J.B. PLATER, THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER 4 (2013) (explaining that the media and the public erroneously portrayed the case as a hindrance to an important federal project).

³² *Hill*, 437 U.S. at 174. More than \$110 million had been spent on the dam before it was halted due to litigation. *Id.* at 200. Congress had spent ample resources on the dam from 1967 to 1977. *Id.* at 158. The project intended to bring a large number of jobs and economic benefits to the region. PLATER, *supra* note 31, at 18.

³³ *Hill*, 437 U.S. at 194. The Court focused on Congress's "plain intent" and the clear language set out in the statute that prioritized endangered species conservation over the goals of other federal agencies. *Id.* at 196. The Court noted that Congress anticipated that Section Seven of the ESA would possibly require agencies to change the course of their projects in order to fulfill the primary aim of species conservation. *Id.* at 186–87.

³⁴ See 50 C.F.R. § 424.12 (requiring the FWS to use the "best available science" when identifying what constitutes a critical habitat).

³⁵ See *id.* § 424.12(b)(1)(ii) (noting that the findings of the physical and biological features essential for the species are not solely limited to the region occupied by the species when it was originally listed).

³⁶ See *id.* § 424.12 (deciding whether an area is essential for conservation is a determination that is impacted by the life history of the species, the current endangered status of the species, and other scientific data).

the FWS must take into consideration the economic implications of defining a particular area as a critical habitat before making its final designation.³⁷ The agency must also look beyond evidence of actual presence of certain species to areas where those species are likely to be found.³⁸

When the FWS proposes a critical habitat designation, it must comply with the rulemaking procedures laid out in the ESA.³⁹ Once the FWS has decided on a critical habitat, the agency must give general and specific notice of the proposed rule.⁴⁰ General notice is satisfied when the FWS publishes a map of the proposed designation in the Federal Register and requests public comments in accordance with the Administrative Procedure Act (APA).⁴¹ This notice and comment process provides an opportunity to inform affected parties of potential critical habitats in order to gain feedback and afford them the opportunity to participate in the rulemaking process.⁴² Further, the FWS is required to give state agencies specific notice of the proposed regulation.⁴³ These affected parties may then submit written comments that are considered before the Final Rule of the habitat designation is made effective.⁴⁴ After taking public comments into consideration, the agency publishes the final rule in the Federal Register and must include a statement explaining the rule's basis and purpose.⁴⁵ In the event that the approved des-

³⁷ See *id.* § 424.19 (explaining that the Secretary of the Interior has discretion to engage in a cost benefit analysis, considering if the economic benefit of excluding an area from a critical habitat outweighs the benefit of including the portion as part of a critical habitat). For example, in *Jewell*, the plaintiffs primarily raised concerns that the critical habitat designation for the polar bear would impact oil and gas development. INDUS. ECONS., INC., ECONOMIC ANALYSIS OF CRITICAL HABITAT DESIGNATIONS FOR THE POLAR BEAR IN THE UNITED STATES ES-5 (2010), https://www.fws.gov/alaska/fisheries/mmm/polarbear/pdf/polar_bear_dea.pdf [<https://perma.cc/CR3J-4XRA>]. Oil and gas associations feared that the designation would influence decisions to invest in the region, which would be problematic considering that oil and gas development is the predominant economic activity in this remote area of Alaska. *Id.* Oil and gas industries are subject to regulations that would restrict them from engaging in projects that were within one mile of a polar bear den. *Id.* at ES-8.

³⁸ See *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1165–67 (9th Cir.2010) (holding that the large area designated for the Mexican spotted owl was legitimate because the ESA does not intend to exclude “unoccupied” areas from critical habitat designations).

³⁹ 16 U.S.C. § 1533(b).

⁴⁰ *Id.* § 1533(b)(5)(A).

⁴¹ *Id.* Additional notice can come in the form of general newspaper circulation or a public hearing. *Id.* § 1533(b)(5)(D).

⁴² See *id.* § 1533(b)(4) (referencing the informal rulemaking statute in the Administrative Procedure Act (APA)). The APA's informal rulemaking procedures applies when an agency is engaging in informal rulemaking under congressionally delegated power. 5 U.S.C. § 553 (2012). All agencies must engage in a notice and comment period and call for the public to participate in the rulemaking process. *Id.*

⁴³ 16 U.S.C. § 1533(b)(5)(A). The ESA provides additional procedures beyond the APA by requiring the FWS to specifically give actual notice to state agencies. *Id.*

⁴⁴ 5 U.S.C. § 553.

⁴⁵ *Id.*

ignation of a critical habitat conflicts with what the state's desired designation, the Secretary of the Interior must provide the state with a written justification for its decision to designate a habitat as "critical."⁴⁶ Once an area is designated as a critical habitat, Section Seven(a) of the ESA creates regulatory protections that require federal agencies to take extra precautions to protect the conservation of the species and to avoid negatively impacting the characteristics of the habitat.⁴⁷

The ESA requires that the methodology for determining what constitutes a critical habitat be grounded in "the best available scientific data."⁴⁸ The Endangered Species Conservation Act of 1969 (the "1969 Act") introduced the "best available scientific data" requirement, which has been largely unaffected by the passage and implementation of the ESA only a few years later.⁴⁹ The "best available scientific data" standard, however, was not more specifically defined by either the 1969 Act or the ESA.⁵⁰

The standard has been debated in light of decisions regarding the ESA, with the Ninth Circuit weighing in on the issue in its recent decisions.⁵¹ In *San Luis & Delta-Mendota Water Authority v. Locke*, the Ninth Circuit noted that an agency decision should only be rejected when the court cannot infer a rational relationship between the decision and the utilized science.⁵² The court gave great deference to an agency decision under the ESA, upholding the National Marine Fisheries Service determination concerning water projects and endangered species fish; the court held that the highest deference to agencies should be given when reviewing an agency decision

⁴⁶ 16 U.S.C. § 1533(i) (stating that if the Secretary of the Interior does not want to follow the state's proposed comments it must provide its reasons in writing for doing so).

⁴⁷ Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes in Regulations for Designating Habitat, 81 Fed. Reg. 7413, 7414–15 (Feb. 11, 2016) (later codified at 50 C.F.R. pt. 424).

⁴⁸ See 50 C.F.R. § 424.12 (stating that "this analysis will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of life history, status, and conservation needs of the species").

⁴⁹ Elizabeth Kuhn, Note, *Science and Deference: The "Best Available Science" Mandate Is A Fiction in the Ninth Circuit*, GEO. ENVTL. L. REV. 1 (Oct. 23, 2016), https://gelr.org/2016/10/23/science-and-deference/#_ftn1 [<https://perma.cc/X47D-BGFQ>] (questioning the role of the "best available science mandate" considering the great deference the Ninth Circuit gives to agency decisions that are based on scientific findings).

⁵⁰ See *id.* (noting that Congress may not have defined "critical habitat" further because it wanted to continue to retrieve input from scientists before making an endangered or threatened species listing decision).

⁵¹ See *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (reasoning that the intent of the best available science standard is to prohibit an agency from jumping to a conclusion based on unfounded evidence).

⁵² See *id.* at 994 (noting that rejection of an agency decision should really only occur when there is absolutely no reasonable relationship between the decision and the data for which the science is being used).

with a high level of “expertise.”⁵³ This deferential approach will be explained more thoroughly later in this Comment.⁵⁴

II. AGENCY DEFERENCE: THE NINTH CIRCUIT UPHOLDS POLAR BEAR CRITICAL HABITAT DESIGNATION

When an agency action is challenged by an interested party, courts will often give a great amount of deference to the agency’s determination.⁵⁵ This Part of the Comment will explore the idea of agency deference and how it applies to the Ninth Circuit’s decision in *Alaska Oil & Gas Ass’n v. Jewell*.⁵⁶ Section A will discuss why courts apply deference to agency decisions under the ESA.⁵⁷ Section B will explain the FWS’s decision to designate 187,000 square miles as critical polar bear habitat.⁵⁸ Section C will examine the court’s review of the FWS’s critical habitat designation, particularly the analysis of the terrestrial and denning habitats and the procedural question of whether the FWS provided adequate written justification to the State of Alaska in their Final Rule.⁵⁹

A. Deference to Agency Decisions Under the APA

The FWS has great deference in interpreting the ESA.⁶⁰ Under the APA, the review of any agency action by the courts should be deferential and narrow.⁶¹ The deferential and narrow standard courts use is rooted in the Supreme Court’s 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁶² Under a *Chevron* analysis, the court reviewing an

⁵³ *Id.* at 996.

⁵⁴ See *infra* notes 55–89 and accompanying text.

⁵⁵ *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016); *Cascadia Wildlands v. Thraillkill*, 806 F.3d 1234, 1241 (9th Cir. 2015).

⁵⁶ See *infra* notes 60–128 and accompanying text.

⁵⁷ See *infra* notes 60–89 and accompany text.

⁵⁸ See *infra* notes 90–103 and accompany text.

⁵⁹ See *infra* notes 104–126 and accompanying text.

⁶⁰ Bogert, *supra* note 5, at 128; see also *Chevron Deference*, BLACK’S LAW DICTIONARY (10th ed. 2014). *Chevron* deference requires the court to engage in a two-part test when reviewing agency action. *Chevron Deference*, BLACK’S LAW DICTIONARY (10th ed. 2014). The court will defer to the agency’s decision if the statute is (1) unclear, and (2) the interpretation of the statute by the agency was reasonable. *Id.*

⁶¹ 5 U.S.C. § 701(2) (2012) (requiring the court to adhere to an agency decision unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or is “contrary to constitutional right, power, privilege, or immunity”).

⁶² *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). The case involved assessing an interpretation of the words “stationary source” in amendments to the Clean Air Act. *Id.* at 840. At the time of the decision, there was little to no evidence that the Court believed the case to be a pivotal administrative law decision. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 569 (7th ed. 2016) (noting that both the briefs and arguments in the case did not

agency determination must consider (1) whether Congress specifically addressed the question at issue and (2) if it was not addressed by Congress, whether the agency's interpretation of the statute was reasonable.⁶³ After *Chevron*, courts generally give deference to the agency decision and presume it to be valid upon review.⁶⁴ When a court does overturn an agency decision, that decision must have been "arbitrary and capricious," or an action that was clearly contrary to law.⁶⁵ The question of how to interpret the "arbitrary and capricious" standard under the APA has been repeatedly examined by the Court.⁶⁶ The Court has held that the standard is highly deferential; yet, the review should still ensure that the agency has taken relevant factors into consideration and come to a reasonable conclusion.⁶⁷ The Court has also stated that an agency action would only be set aside in extreme circumstances, such as when the agency had altogether failed to consider an important factor in its analysis or failed to provide a reasonable relationship between its decision and the discovered facts.⁶⁸ Alternatively, deference to an agency decision is most crucial when a court is inquiring about a decision that is exceedingly technical and requires expertise only specific agencies can provide.⁶⁹

discuss scope of review broadly but rather focused on the smaller dispute concerning the Clear Air Act).

⁶³ *Chevron*, 467 U.S. at 842–43; see also Brandon Curtin, Comment, *Deference to the Agency Is the Best Policy: The D.C. Circuit Applies Chevron in Denying Additional Medicare Reimbursements to Provider Hospitals* in Washington Regional Medicorp, 58 B.C. L. REV. E. SUPP. 289, 295 (2017), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3585&context=bcrl> [https://perma.cc/PU8S-Y7TF] (arguing that the D.C. Circuit correctly applied *Chevron* by deferring to the Secretary of Health and Human Service's calculation of medical reimbursements).

⁶⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 218 (2001) (emphasizing that *Chevron* deference applies when Congress has delegated rulemaking authority by statute to the agency).

⁶⁵ 5 U.S.C. § 706(2)(A); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir.2010).

⁶⁶ See *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (holding that a federal agency is not required to prepare a supplemental Environmental Impact Statement each time new information is brought forth that could impact the agency action in some manner). An Environmental Impact statement is required by the National Environmental Policy Act when an agency wants to take on a major project and requires that the agency set forth how the proposed project could negatively or positively affect the environment. See *Environmental-Impact Statement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶⁷ *Environmental-Impact Statement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶⁸ See, e.g., *Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that the National Highway Traffic Safety Administration did not provide a rational basis for rescinding a requirement of "passive restraints" in automobiles such as airbags or seatbelts). The Court focused on the fact it could not defer to the agency because the agency jumped to a conclusion regarding the safety benefits of the "passive restraints" too quickly without taking important factors into consideration that were imperative to a reasoned analysis. *Id.*

⁶⁹ *Marsh*, 490 U.S. at 377. The Court points out that even when the situation is highly technical, courts should carefully examine the record in order to determine if the agency has made a reasonable decision. *Id.*

Many recent cases before the Ninth Circuit have required the court to review agency decisions under the APA.⁷⁰ The Ninth Circuit has described the arbitrary and capricious standard as deferential and narrow, with a high threshold for setting aside agency action.⁷¹ Additionally, the Ninth Circuit has indicated that so long as the agency looks at relevant factors and identifies a connection between the situation and the choices made, the court should defer to the expertise of the agency and uphold the designation.⁷² For example, in *River Runners for Wilderness v. Martin*, the court examined whether the National Park Service acted arbitrarily or capriciously in deciding to allow the continued use of motor rafts in the Grand Canyon National Park.⁷³ The court found that the agency's evaluation of relevant factors such as the impact on the environment (soil, water, and vegetation) and the impact on the management of the national park (visitor experience and park operations) was sufficient; the agency had also appropriately taken the alternative options into adequate consideration.⁷⁴

Due to its large geographic scope, the Ninth Circuit hears the majority of appeals related to ESA determinations of critical habitat designations.⁷⁵ The states within the Ninth Circuit contain over one-hundred endangered or threatened species listed by the FWS.⁷⁶ One notable decision, *Arizona Cattle Growers' Ass'n v. Salazar*, exemplifies how the Ninth Circuit has consistently given deference to agencies in determining both the scope of the area set aside for critical habitat designation and the economic impacts worthy of consideration.⁷⁷ The Ninth Circuit specifically addressed a challenge to the

⁷⁰ See *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1067 (9th Cir. 2010) (highlighting the high threshold required for setting aside agency action); *Or. Env'tl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) (reasoning that agency action is only set aside by a reviewing court if there is a clear "abuse of discretion").

⁷¹ See *Martin*, 593 F.3d at 1070 (underscoring the importance of giving deference to the agency).

⁷² See *Nw. EcoSystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (holding that a decision to deny a petition to classify western gray squirrels as an endangered population segment was not arbitrary or capricious).

⁷³ *Martin*, 593 F.3d at 1067.

⁷⁴ *Id.* at 1078. After considering alternatives that would have forbid motor rafts, the agency decided that these options would undermine the agency's overall goal of providing a range of recreational activities for visitors. *Id.*

⁷⁵ See Plaintiff's Petition for Writ of Certiorari at 33, *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016) *cert. denied*, __ S. Ct. __ (2018) (No. 17-133) [hereinafter Plaintiff's Petition for Writ of Certiorari] (noting that since the FWS is based in Washington, D.C., the D.C. Circuit is next in line for the number of cases heard regarding critical habitat designations).

⁷⁶ *Listed Species Believed to or Known to Occur in Each State*, FWS (Oct. 15, 2017), <https://ecos.fws.gov/ecp0/reports/species-listed-by-state-totals-report> [<https://perma.cc/7UL6-BRUU>]. The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. *Map of the Ninth Circuit*, U.S. CTS. FOR NINTH CIR., https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 [<https://perma.cc/VQW6-G88X>].

⁷⁷ See *Salazar*, 606 F.3d at 1165, 1172.

FWS's critical habitat designation for the Mexican spotted owl.⁷⁸ The plaintiffs challenged the designation as overbroad and argued that the FWS failed to sufficiently consider the economic impacts of the designation.⁷⁹ The FWS argued that the ESA's definition of critical habitat includes geographical areas that are used with such frequency by a listed species that the species is considerably likely to be there, not just the area where the species "resides."⁸⁰ The Ninth Circuit upheld the District Court for the District of Arizona's grant of summary judgment in favor of the FWS.⁸¹ The court noted that whether a species "occupies" an area is dependent on the specific facts of each individual case and should be evaluated on a case-by-case basis.⁸² Additionally, the court reasoned that limiting occupied areas to those in which a species "resides" focuses too narrowly on survival and ignores the broader statutory purpose of the critical habitat designation, which includes conservation.⁸³

Other circuits have refused to give as much deference to the agency in regard to critical habitat designations.⁸⁴ For example, in *Otay Mesa Property, L.P. v. United States Department of Interior*, the United States Court of Appeals for the District of Columbia Circuit held that there was not "substantial evidence" provided by the FWS to support a critical habitat designation for the San Diego fairy shrimp.⁸⁵ The FWS had based the proposed habitat designation on eight surveys of the plaintiff's land.⁸⁶ Seven of the

⁷⁸ *Id.* at 1161.

⁷⁹ *Id.* at 1162.

⁸⁰ *Id.* at 1165. The court specified that the FWS has the authority to designate an area as occupied when the owl uses the area regularly and when the species could be spotted there within a reasonable time period. *Id.*

⁸¹ *Id.* at 1171. The court found that the FWS properly used a "baseline approach" to analyze the economic effect of the critical habitat designation. *Id.* The court found it to be correct to disregard any economic impacts that would occur even if the critical habitat designation had not been put in place. *Id.* at 1173. The plaintiff's argument rested on a "co-extensive approach" that had been applied in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277, 1283 (10th Cir. 2001). *Id.* at 1172. The Tenth Circuit held that the FWS should look at any and all economic impacts of a critical habitat designation "regardless of whether the impacts are co-extensive with other causes." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1284. The court in *Salazar* believed this was too narrow and held that the FWS permissibly applied the "baseline approach." *Salazar*, 606 F.3d at 1173–74.

⁸² *Salazar*, 606 F.3d at 1164. The court cautioned against situations where the FWS relies on inconclusive data, such as when a species uses an area of critical habitat sporadically. *Id.* at 1166–67.

⁸³ *Id.* at 1166. The court also held that the FWS did not arbitrarily or capriciously treat unoccupied areas as occupied and that the amount of land designated as critical habitat for the owl was not disproportionate to the amount of land occupied by the owl. *Id.* at 1170–71.

⁸⁴ *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 916 (D.C. Cir. 2011).

⁸⁵ *Id.* at 918. The San Diego fairy tale shrimp was listed by the FWS as an endangered species in 1997. *Id.* The fairy shrimp is found in southern California and northern Mexico and is a small water animal about the size of an ant. *Id.* at 916.

⁸⁶ *See id.* at 915 (noting that in 2001, there was a just single sighting of four fairy shrimp on the plaintiff's property).

surveys did not find any fairy shrimp on the plaintiff's property; yet, the FWS still included the property in the critical habitat designation based on the fact that the fairy shrimp had been identified there on one occasion.⁸⁷ The court held that this was not enough to show that the shrimp "occupied" the land in question.⁸⁸ The substantial evidence standard applied by the D.C. Circuit is still a deferential standard, but the court noted that deference should not result in "abdication."⁸⁹

B. The Designation of Critical Polar Bear Habitat

On May 15, 2008, the FWS listed the polar bear as a species threatened under the ESA.⁹⁰ Polar bears are native to the ice-covered waters of the Arctic Circle.⁹¹ Polar bears rely on this icy landscape for their survival, but the extent and quality of the Arctic Sea ice is declining, along with the polar bear population.⁹² In 2008, the FWS studied how the decline in sea ice would negatively impact the polar bear population and determined that it would reduce the abundance of available sea-ice prey, leading to nutritional stress issues.⁹³

In 2009, the FWS proposed to designate the northern area of Alaska's coast and waters as a critical habitat for the polar bear.⁹⁴ In 2010, after proposing a rule and holding two public comment periods, the FWS designated

⁸⁷ *Id.* at 918. During oral argument, the FWS used maps to show that the property in question was part of a "complex" of pools of water that were essential for fairy shrimp conservation efforts. *Id.*

⁸⁸ *See id.* (highlighting that the court was unwilling to defer to the agency action because the record was "too thin" to support the designation).

⁸⁹ *Id.* at 916.

⁹⁰ *See* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28,211, 28,212 (May 15, 2008) (later codified as 50 C.F.R. pt. 17) (explicitly stating that based on the best-available science, the polar bear is likely to become an endangered species throughout "all of its range" due to the decline in sea ice habitats if action is not immediately taken).

⁹¹ *Id.* Polar bears evolved to utilize the Arctic Sea ice and spend most of the year on sea ice and travel to land infrequently. *Id.* at 28,213.

⁹² *See* FWS, POLAR BEAR 1 (2014), https://www.fws.gov/alaska/fisheries/endangered/pdf/polarbear_factsheet_v2.pdf [<https://perma.cc/U82L-BWUE>] (emphasizing that the decline of sea ice has the ability to impact the overall health of the polar bear and can adversely impact groups of the population within their most prominent geographical regions).

⁹³ *See* Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28211, 28259-60 (May 15, 2008) (later codified at 50 C.F.R. pt. 17) (indicating that the lack of availability of prey could result in competition between dominant and inferior polar bear populations).

⁹⁴ *Jewell*, 815 F.3d at 552. Once an agency proposes a rule, it requests feedback from the public in the form of publically submitted comments and conducts additional research. Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 722 (1999). The agency then publishes a Final Rule in the Federal Register which responds to the comments it has received and also creates a specific date when the rule is enforceable. *Id.*

an area of approximately 187,157 square miles as critical polar bear habitat.⁹⁵ The FWS identified three areas containing elements essential to polar bear conservation: sea ice habitat (“Unit 1”), terrestrial denning habitat (“Unit 2”), and barrier island habitat (“Unit 3”).⁹⁶ Unit 1 included the sea ice that polar bears use as a platform for hunting and resting, comprising almost ninety-six percent of the total area designated.⁹⁷ Units 2 and 3 comprised the remaining four percent.⁹⁸

The designation raised concerns with oil and gas trade associations, several of Alaska Native corporations and villages, and the State of Alaska.⁹⁹ These groups wanted to make use of the natural resources in Alaska’s waters and North Slope.¹⁰⁰ In 2011, these three groups filed complaints challenging the designation and claiming that the FWS made numerous errors in the critical habitat designation, both substantive and procedural.¹⁰¹ The plaintiffs claimed that the entire designation was improper under the ESA because the FWS arbitrarily designated large land and sea ice masses, but it did not identify specific areas containing the physical and biological features essential for polar bears.¹⁰² The plaintiffs also argued that by not adequately justifying its

⁹⁵ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (*Ursus maritimus*) in the United States, 75 Fed. Reg. 76,085, 76,086 (Dec. 7, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Designation for Polar Bear 2010]. The Federal Register gave notice of the critical habitat designation that was to become effective on January 6, 2011. *Id.*

⁹⁶ *Jewell*, 815 F.3d at 552.

⁹⁷ *See id.* (noting that within each unit, the FWS pointed to essential physical and biological features that were critical to polar bear habitat conservation).

⁹⁸ *Id.*

⁹⁹ *Id.* at 553. The district court later consolidated the three cases. Plaintiff’s Unopposed Motion to Consolidate Related Polar Bear Critical Habitat Litigation at 2, Alaska Oil & Gas Ass’n v. Salazar, 916 F. Supp. 2d 974 (D. Alaska 2013) (No. 3:11-cv-00025-RB) [hereinafter Plaintiff’s Unopposed Motion].

¹⁰⁰ *See* Plaintiff’s Unopposed Motion, *supra* note 99, at 4. (noting that while all groups had separate interests, it made logical sense to combine the cases considering each claimed that the critical habitat designation violated the ESA and the APA, and all sought declaratory and injunctive relief).

¹⁰¹ *Id.* The objecting parties filed a separate action under the ESA and the APA. *Id.* Alaska Oil and Gas Association is a private, non-profit trade organization that represented fifteen oil and gas companies. *Id.* They identified themselves as the “principal industry stakeholders” operating within the critical habitat for polar bears in Alaska. Complaint for Declaratory and Injunctive Relief at 3, *Salazar*, 916 F. Supp. 2d 974 (No. 11CV00025). The State of Alaska also sued as a sovereign state with an interest in regulating the wildlife in its jurisdiction. Plaintiff’s Unopposed Motion, *supra* note 99, at 3. The Arctic Slope Regional Corporation, a group of ten native Alaskan corporations, an Alaskan tribal government, and the North Slope Borough, sued as well. *Id.* This group filed because they owned a substantial amount of land located within the critical habitat designation. *Id.*

¹⁰² Plaintiff’s Unopposed Motion, *supra* note 99. The FWS defined “physical or biological features” for purposes of the definition of critical habitat as follows:

failure to incorporate the State of Alaska's comments into the Final Rule, the FWS violated the procedural requirements laid out in the ESA.¹⁰³

C. Judicial Review of the Critical Habitat

The district court agreed with the FWS's habitat designation for Unit 1 (the sea ice habitat) as critical polar bear habitat.¹⁰⁴ The court did not endorse the FWS's designation for Units 2 and 3 (dens and barrier islands).¹⁰⁵ Unit 2, the terrestrial denning habitat, was intended to provide a protected area for the birth and acclimation of young cubs.¹⁰⁶ The court found that the method used by the FWS in identifying which den sites to use was arbitrary and capricious because it used a five mile inland measurement, without specifically identifying where within that area all elements of a denning habitat were located.¹⁰⁷ Unit 3, the portion of "barrier island habitat", was used for denning, refuge, and migration along the coast to access dens and feeding locations.¹⁰⁸ The district court held that that the area should only consist of places where current populations of polar bears exist; consequently, Unit 3 was too broad.¹⁰⁹ The court also held that the FWS violated the rulemaking requirements under the ESA because the agency did not provide an ade-

The features that support the life-history needs of species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

50 C.F.R § 424.02 (2016).

¹⁰³ See Plaintiff's Unopposed Motion, *supra* note 99; see also 16 U.S.C. § 1533(i) (2012) (requiring the FWS to provide a written justification when a state agency disagrees with the proposed regulation).

¹⁰⁴ *Jewell*, 815 F.3d at 553.

¹⁰⁵ *Id.* The district court concluded that there was not enough evidence put forth by the FWS to show that these areas had required physical and biological features of a critical habitat, and that the FWS did not meet the standard of proof required under the statute. *Id.*

¹⁰⁶ Designation for Polar Bear 2010, *supra* note 95, at 76,099 (explaining that polar bears must be able to get to potential den sites or geographical areas that assist them in raising young cubs).

¹⁰⁷ *Jewell*, 815 F.3d. at 557. The FWS has used a five-mile increment measurement inland from the coast to define the area of designation. *Id.* The FWS used a U.S. Geological Survey as a means for creating the map. *Id.* at 558.

¹⁰⁸ Designation for Polar Bear 2010, *supra* note 95, at 76,115. The barrier island habitat is defined in broad terms and includes not only the barrier islands themselves but also the water and ice surrounding the islands and any habitats on shore within one mile. *Id.*

¹⁰⁹ *Jewell*, 815 F.3d at 561.

quate justification for why it did not incorporate all of the State of Alaska's comments into the Final Rule.¹¹⁰

In February 2016, the Ninth Circuit reversed the district court's decision, upholding the habitat designation entirely.¹¹¹ The court held that the standard the FWS followed in the creation of the Final Rule was in accordance with the statutory purpose of promoting the recovery of the species which it seeks to protect.¹¹² In reviewing Units 2 and 3, the court rationalized the FWS's approach by relying on the polar bear's nomadic nature.¹¹³ The Ninth Circuit disagreed with the lower court's narrow focus on the locations of where actual and probable den sites of polar bears were located, noting that bears need "room to roam."¹¹⁴ The lower court erred in believing that the area should only consist of places where current populations of polar bears exist.¹¹⁵ Instead, the focus should be on species preservation, and the FWS's broad definitions of the barrier islands were permissible.¹¹⁶ While the plaintiffs disagreed with the breadth and scope of the designation, they could not specifically ascertain the evidence the FWS failed to consider.¹¹⁷

Finally, the court discussed the issue of whether the FWS had provided adequate written justification in the Final Rule to the State of Alaska.¹¹⁸ This was the first time that this question of written justification adequacy had been addressed by the Ninth Circuit.¹¹⁹ The district court had originally faulted the FWS for only incorporating the its response to the State of Alaska by refer-

¹¹⁰ *Id.* The Ninth Circuit found that the procedure was still correct, even though under the statute, the FWS should have specifically sent the letter to the Alaska Department of Fish and Game, rather than to Alaska's governor. *Id.* The letter also did not specifically include verbatim responses. *Id.*

¹¹¹ *Id.* at 550. The court focused on deferring to an agency using a narrow standard, especially when the action is "considered and rational." *Id.* at 554. The threshold was considered very high by the court to discredit a decision made by an agency. *Id.*

¹¹² *Id.* at 556. The court looked closely at the critical habitat designations by the FWS for Units 2 and 3. *Id.* at 556–61. Specifically, for Unit 2, the Ninth Circuit stated that the FWS used a rational mapping methodology in determining which denning areas were used by the polar bear. *Id.* at 558. The five-mile demarcation from the coast used by the FWS was considered by the Ninth Circuit to be a rational and well-supported method, considering that some bears den as far as fifty miles away from the coastline. *Id.*

¹¹³ *Id.* at 559. The FWS's argument was largely based on the nomadic nature of the species. *Id.*

¹¹⁴ *See id.* (focusing on the fact that polar bears are mobile and that while they may tend to stay loyal to particular denning areas, they do not always stay in one particular den).

¹¹⁵ *Id.* at 561.

¹¹⁶ *See id.* (stating that the designation aligned with the underlying purpose of the ESA).

¹¹⁷ *Id.* at 562. The court did not require any more specificity in their determinations than they had already made. *Id.*

¹¹⁸ *See* 16 U.S.C. § 1533(b)(5)(A)(ii) (requiring the FWS to give state agencies notice of a proposed regulation and to provide an explanation to the state if they decide to provide input).

¹¹⁹ *Jewell*, 815 F.3d at 562. The court adopted the D.C. Circuit's approach that reviews only whether the FWS satisfied § 4(i) of the ESA from a procedural standpoint and will not substantively look at the written justification itself. *Id.*

ence to a letter to the governor after the Final Rule was adopted; the district court stated that this was inadequate.¹²⁰ The Ninth Circuit, however, took a more permissive approach in interpreting what was required under the ESA.¹²¹ The court concluded that including the response by reference was sufficient under the ESA.¹²² By stating its positions clearly in the Final Rule, rather than specifically addressing each of the State of Alaska's comments, the court found that the FWS had still satisfied the statutory standard.¹²³

The court's decision highlights that considering the statutory purpose of species protection, it would be unreasonable to limit protections for polar bears only to areas used by existing, threatened populations of polar bears.¹²⁴ The Ninth Circuit agreed with the FWS' assertion that the district court held the agency to a level of precision that was not required by the ESA.¹²⁵ The Ninth Circuit reasoned that the method used was not arbitrary, capricious, or contrary to law because the agency provided a rational relationship between the scientific facts available and the decision made.¹²⁶ Therefore, the Ninth Circuit deferred to the agency's evaluation of what was necessary for species conservation.¹²⁷ The Ninth Circuit stated that the lower court had held the FWS to an unnecessarily high standard of specificity.¹²⁸

III. POTENTIAL ISSUES WITH THE NINTH CIRCUIT'S PERMISSIVE CRITICAL HABITAT STANDARD

This Part explains why the permissive standard applied by the Ninth Circuit could be a problematic interpretation of the ESA.¹²⁹ At the time that the critical habitat designation was created for the polar bear, the FWS con-

¹²⁰ *Id.* at 563. The district court found that the FWS should have specifically incorporated all its comments into the Final Rule, but it failed to do so and thereby violated § 4(i) of the ESA. *Id.*

¹²¹ *Id.*

¹²² *Id.* The court found that it was clear from the record that all comments were responded to in some shape or form, and that the statute does not require that the state is content with the provided justifications. *Id.*

¹²³ *Id.* Due to the fact that this was a procedural question, the Ninth Circuit decided not to specifically consider the content of the answers provided by FWS in addressing the concerns of the State of Alaska. *Id.* at 563–64.

¹²⁴ *Id.* at 556.

¹²⁵ *Id.* at 555. The district court required the FWS to provide specific and tailored evidence of areas the polar bears used throughout Units 2 and 3. *Id.* For example, for Unit 2, the district court believed the FWS should have identified specific den sites. *Id.* The Ninth Circuit said that this was too specific; the FWS should not use such a narrow construction. *Id.* Specifically, the Ninth Circuit noted that the ESA "requires the use of best available technology, not perfection." *Id.*

¹²⁶ *Id.* at 556.

¹²⁷ *See id.* at 554, 562 (highlighting that the FWS acted reasonably under what the ESA required).

¹²⁸ *Id.* at 556.

¹²⁹ *See infra* notes 130–153 and accompanying text.

sidered the designation to be a fairly inconsequential action.¹³⁰ The FWS believed that no additional regulatory changes, minor economic impacts, or slight changes to polar bear conservation requirements would occur.¹³¹ Consequently, the decision in *Alaska Oil & Gas Ass'n v. Jewell* arguably embodies a change in law that raises questions of how the FWS may approach critical habitat designations going forward.¹³²

The Ninth Circuit created a permissive standard for the FWS to make critical habitat designations using the best available science.¹³³ The court in *Jewell* found that the FWS used the best possible methodology in determining the critical habitat designation because they used the scientific data that was available to them.¹³⁴ The court made a point of stating that the broad geographical scope of the designation was consistent with the statutory purpose of sustaining the preservation of polar bears; therefore, the designation was not arbitrary or capricious.¹³⁵ Potential problems arise from the fact that currently the best available science requirement is met as long as the agency takes the available data into account.¹³⁶ In 1992, the Ninth Circuit held that even if the data is weak, the reliance on that questionable data would not automatically render an agency decision arbitrary or capricious.¹³⁷ Further, *Jewell* is not the latest Ninth Circuit case to give such deference to the FWS when examining the utilized scientific methodology.¹³⁸ The Ninth Circuit has also continued to apply such a permissive standard in its more recent decisions.¹³⁹

¹³⁰ See *INDUS. ECONS., INC.*, *supra* note 37, at ES-4 (noting that the foreseeable economic impacts of a critical habitat designation would be considered minor and that they were “limited to additional administrative costs”). The Plaintiff’s Petition for Writ of Certiorari outlines the harmful impacts on the economy this decision could have for the State of Alaska, especially considering that the oil and gas reserves are important resources for the state and national economies. Plaintiff’s Petition for Writ of Certiorari, *supra* note 73, at 32.

¹³¹ *INDUS. ECONS., INC.*, *supra* note 37, at ES-4.

¹³² See Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 *ENVTL. L. REP. NEWS & ANALYSIS* 10,121, 10,134 (2017) (noting that *Jewell* gives nod to the importance of recognizing the future impact of climate change as a relevant portion of critical habitat designation determinations).

¹³³ See Kuhn, *supra* note 49 (noting that the Ninth Circuit tends to give a large amount of deference to an agency, especially in the context of a scientific or technical question).

¹³⁴ *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 562 (9th Cir. 2016). The FWS also consulted with polar bear experts in its determination. *Id.* at 552.

¹³⁵ See *id.* at 556 (stressing the importance of the statutory purpose of conservation and indicating that it would make “little sense to limit its protections”).

¹³⁶ Kuhn, *supra* note 49. The agency is free to use data that may be considered unreliable if there is no other data available. *Id.*

¹³⁷ See *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) (holding that the FWS’s “Finding of No Significant Impact” was supported by sufficient evidence to fulfill the statutory requirement).

¹³⁸ *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016). The Alaska Oil and Gas Association brought an action against the National Maritime Fisheries Service (“NMFS”) due to its decision to add a subspecies of Pacific bearded seals to the endangered list under the ESA,

It is possible that the Ninth Circuit would continue to approve critical habitat designations on remarkably large geographic areas with a minimal supportive scientific data.¹⁴⁰ This could set a precedent for even more problematic decisions in the future.¹⁴¹ Such a lax standard may promote forum shopping and an increase in venue disputes in order for aggrieved parties to avoid a ruling under the permissive Ninth Circuit standard.¹⁴² Plaintiffs may attempt to bring suit in the D.C. Circuit where the FWS is based.¹⁴³ As previously discussed, the D.C. Circuit's "substantial evidence" standard arguably raises the bar for agency deference and, therefore, could result in more favorable results for plaintiffs than if they brought suit in the Ninth Circuit.¹⁴⁴ Further, these types of decisions could have significant and lasting effects on state economies.¹⁴⁵ In Alaska, the approval of the polar bear critical habitat designation creates a regulatory burden on oil and gas exploration efforts, which could adversely impact job creation and economic growth.¹⁴⁶ If the Ninth Circuit's permissive approach continues to control the review of critical habitat designations by the NWS, the implementation of the ESA will have little judicial oversight.¹⁴⁷

arguing that the population of seals was "plentiful" and that the scientific data used by the agency was questionable in nature. *Id.* at 675.

¹³⁹ *Id.* at 675. The NMFS used two distinct approaches to determine the impact of water temperatures on seals and sea ice. *Id.* at 672. Their findings estimated that certain types of sea ice would be completely eliminated by 2050. *Id.* at 679. An independent reviewer opined that seals would continue to disappear. *Id.* at 680.

¹⁴⁰ Plaintiff's Petition for Writ of Certiorari, *supra* note 75, at 32.

¹⁴¹ *See id.* (arguing that the *Jewell* decision creates a dangerous precedent that allows for the continued designations of vast regions as critical habitats, even though this may directly contradict with Congress' original intent in creating the ESA).

¹⁴² *Forum Shopping*, BLACK LAW'S DICTIONARY (10th ed. 2014). Forum shopping is defined as follows:

The practice of choosing the most favorable jurisdiction or court in which a claim might be heard. A plaintiff might engage in forum shopping for example by filing a suit in a jurisdiction with a reputation for high jury awards or by filing several similar suits and keeping the one with the preferred judge.

Id.

¹⁴³ *See* Plaintiff's Petition for Writ of Certiorari, *supra* note 75 (noting that since the FWS is based in Washington, D.C., the D.C. Circuit is next in line for the number of cases heard regarding critical habitat designations).

¹⁴⁴ *See* *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 916, 918 (D.C. Cir. 2011) (holding that the FWS did not provide enough scientific evidence to support a critical habitat designation and that the reasoning provided by the FWS was "too thin to justify the action").

¹⁴⁵ Plaintiff's Petition for Writ of Certiorari, *supra* note 75, at 28. Other courts have rejected the Ninth Circuit's standard and are arguably more stringent in their review of critical habitat designations. *See Otay Mesa Prop.*, 646 F.3d at 916, 918–19 (holding that substantial evidence did not support the FWS determination that property was occupied by shrimp).

¹⁴⁶ *INDUS. ECON.S., INC.*, *supra* note 37, at 3-15–17.

¹⁴⁷ Plaintiff's Petition for Writ of Certiorari, *supra* note 75, at 31.

The Supreme Court will soon be able to provide insight into the administration of the ESA and the deference given to agency determinations.¹⁴⁸ On January 22, 2018, the Court granted certiorari to a case from the Fifth Circuit, *Weyerhaeuser Co. v. United States. Fish & Wildlife Service*, involving the FWS's designation of private Louisiana land as critical habitat for the dusky gopher frog.¹⁴⁹ The private land at issue, however, currently contains no gopher frogs, and the FWS concedes that the designation could result in major economic loss for the landowners.¹⁵⁰ The FWS argues that the area is essential because it could provide an important breeding site for species recovery in the future.¹⁵¹ The Court will address the question of whether the ESA prohibits private land as being designated for critical habitat if it is currently unoccupied by the species.¹⁵² The Court will have an opportunity to strike a greater balance between species preservation and economic or private interests.¹⁵³

CONCLUSION

The Ninth Circuit decision in *Alaska Oil & Gas Ass'n v. Jewell* creates an impermissibly broad standard in approaching critical habitat designations. While the ESA was created with the intent to protect and conserve the numerous populations of threatened species in the United States, the Ninth Circuit has overly broadened the scope of the FWS's discretion. Aggrieved parties would be wise to avoid the Ninth Circuit if they hope to find any relief under the ESA. It is up to the other circuits to provide a framework for answering these questions in the face of impending climate change and continued rates of species extinction. Other circuits should avoid the broad and lenient view taken by the Ninth Circuit that considerably undermines the plain language of the ESA.

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Preferred cite: Katherine Lee, Comment, "*Bears Need Room to Roam*": *The Ninth Circuit's Questionable Interpretation of Critical Habitat Designation*, 59 B.C. L. REV. E. SUPP. 206 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/206/>.

¹⁴⁸ *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452 (5th Cir. 2016), *cert granted sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, No. 17-71, 2018 WL 491540 (2018).

¹⁴⁹ *Markle Interests, LLC*, 827 F.3d at 458.

¹⁵⁰ *See id.* at 459 (noting that even though there are currently no gopher frogs on the land in question, the land contains possible breeding sites and "clustered ephemeral ponds"). The plaintiffs argue that this designation could result in an economic loss of up to \$33.9 million over a twenty-year period. *Id.* at 472.

¹⁵¹ *Id.* at 466.

¹⁵² Plaintiff's Petition for Writ of Certiorari, at i, *Markle Interests*, 827 F.3d 452, *cert granted sub nom. Weyerhaeuser Co.*, 2018 WL 491540 (No. 17-71).

¹⁵³ *Id.* at 12.