UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALASKA OIL AND GAS ASSOCIATION; et al., Plaintiffs – Appellees, v. SALLY JEWELL, Secretary of the Interior; et al., Defendants – Appellants, and CENTER FOR BIOLOGICAL DIVERSITY; et al., Intervenor-Defendants.	No. 13-35619 D.C. Nos. 3:11-cv-00025-RRB, 3:11-cv-00036-RRB, 3:11-cv-00106-RRB U.S. District Court for Alaska, Anchorage **PETITION FOR REHEARING EN BANC BY ALASKA NATIVE ORGANIZATIONS, THE STATE OF ALASKA, THE ALASKA OIL AND GAS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, AND THE NORTH SLOPE BOROUGH**
ALASKA OIL AND GAS ASSOCIATION and AMERICAN PETROLEUM INSTITUTE, Plaintiffs – Appellants, and STATE OF ALASKA; et al., Plaintiffs, v.	No. 13-35662 D.C. Nos. 3:11-cv-00025-RRB, 3:11-cv-00036-RRB, 3:11-cv-00106-RRB U.S. District Court for Alaska, Anchorage

SALLY JEWELL, Secretary of the Interior; et al.,

Defendants – Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; et al.,

Intervenor-Defendants.

ALASKA OIL AND GAS ASSOCIATION; et al.,

Plaintiffs - Appellees,

v.

SALLY JEWELL, Secretary of the Interior; et al.,

Defendants,

and

CENTER FOR BIOLOGICAL DIVERSITY; et al.,

Intervenor-Defendants - Appellants.

No. 13-35666

D.C. Nos. 3:11-cv-00025-RRB,
3:11-cv-00036-RRB,
3:11-cv-00106-RRB
U.S. District Court for Alaska, Anchorage

STATE OF ALASKA,

Plaintiff - Appellant,

and

No. 13-35667

ALASKA OIL AND GAS ASSOCIATION; et al.,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; et al.,

Defendants - Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY; et al.,

Intervenor-Defendants.

D.C. Nos. 3:11-cv-00025-RRB,
3:11-cv-00036-RRB,
3:11-cv-00106-RRB
U.S. District Court for Alaska, Anchorage

ARCTIC SLOPE REGIONAL CORPORATION; et al.,

Plaintiffs – Appellants,

and

ALASKA OIL AND GAS ASSOCIATION; et al.,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior; et al.,

Defendants - Appellees,

and

CENTER FOR BIOLOGICAL

No. 13-35669

D.C. Nos. 3:11-cv-00025-RRB,
3:11-cv-00036-RRB,
3:11-cv-00106-RRB
U.S. District Court for Alaska, Anchorage

DIVERSITY; et al.,

Intervenor-Defendants.

On Appeal from the U.S. District Court for the District of Alaska
Nos. 3:11-cv-25-RRB, 3:11-cv-36-RRB, 3:11-cv-106-RRB

Jeffrey W. Leppo, ABA No. 0001003
Ryan P. Steen, ABA No. 0912084
Jason T. Morgan, ABA No. 1602010
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Tel: (206) 386-7641
Fax: (206) 386-7500

Attorneys for the Alaska Oil and Gas Association and the American Petroleum Institute

Kevin M. Cuddy, ABA No. 0810062
STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, AK 99501
Tel: (907) 263-8410
Fax: (907) 277-1920

Attorneys for Alaska Native Organizations:

Arctic Slope Regional Corporation, NANA Regional Corporation, Inc., Bering Straits Native Corporation, Calista Corporation, Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeagvik Iñupiat Corporation, Kuukpik Corporation, Kaktovik Iñupiat Corporation, and The Iñupiat Community of the Arctic Slope

Bradley E. Meyen
Sr. Asst. Attorney General
Alaska Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 269-5232

Attorneys for Plaintiff-Appellee State of Alaska

Murray D. Feldman
Holland & Hart LLP
800 W. Main Street, Suite 1750
P.O. Box 2527
Boise, ID 83702
Tel: (208) 342-5000

Attorneys for Plaintiff-Appellee State of Alaska

Christina F. Gomez
Holland & Hart LLP
555 17th St., #3200
Denver, CO 80202
Tel: (303) 295-8366

Attorneys for Plaintiff-Appellee State of Alaska

Matthew A. Love
Tyson C. Kade
Van Ness Feldman, LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
Tel: (206) 623-9372
Fax: (206) 623-4986

Attorneys for Plaintiff-Appellee The North Slope Borough

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

I. RULE 35 STATEMENT

The Panel in this case reinstated a decision by the U.S. Fish and Wildlife Service ("FWS") to designate 187,000 square miles (an area larger than the size of California) as critical habitat for the polar bear, a species listed as "threatened" under the Endangered Species Act ("ESA"). Swept within that massive designation are areas in Alaska that are plainly not *critical* habitat (or even *suitable* habitat) for the polar bear. For example, the designation arbitrarily includes the areas immediately abutting and surrounding 15 Alaska Native villages, and numerous industrial facilities (including those in Deadhorse, Alaska) associated with one of the largest oil production fields in North America, even though polar bears are routinely hazed from these areas using a protocol of approved methods (*e.g.*, with vehicles, horns, and other measures if necessary) pursuant to Marine Mammal Protection Act regulations. The Appellees in this case—a coalition representing the people and entities who live, work, and own land on Alaska's North Slope—challenged the FWS's decision to designate the areas immediately outside the doors of their homes, schools, and businesses as protected critical habitat for the Arctic's top predator.

The ESA expressly and narrowly constrains "critical habitat" designations to only those areas that are truly critical to the survival and recovery of listed species. Critical habitat is defined as the "specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features . . . essential to the conservation of the species." 16 U.S.C. § 1532(5)(A) (emphases added). For the polar bear, FWS determined that the essential habitat

features include "[s]teep, stable slopes" for denning, "unobstructed, undisturbed access between den sites and the coast," and "refuge from human disturbance." 75 Fed. Reg. 76,086, 76,113, 76,115 (Dec. 7, 2010).

Based on a careful review of the record, the district court below concluded that FWS's critical habitat designation was arbitrary and capricious. The district court applied well-settled standards that agency decisions must be supported by "substantial evidence in the record," not speculation, and found that there is "no evidence in the record or cited by [FWS] that shows where" the essential habitat features are located for the vast majority of the areas designated as critical habitat within Unit 2 (denning habitat) and Unit 3 (barrier islands). *Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 999, 1001 (D. Alaska 2013) ("*AOGA*") (emphasis added). For example, the court explained that this lack of evidence and explanation "is especially stark concerning the inclusion of the areas around Deadhorse, Alaska, as such area is rife with humans, human structures, and human activity." *Id*. at 1001. In short, the areas where humans work and live (and legally harass away polar bears for the safety of bears and humans) are neither "undisturbed" nor a "refuge from human disturbance," and FWS provided no evidence or explanation in the record as to why 99 percent of the area designated as denning critical habitat possesses any of the features essential to conservation of the polar bear.

The Panel's opinion ("Opinion") reversed the district court. The Panel ignored the fact that polar bears are actively and lawfully harassed away from areas in and around Native villages and industrial operations. Further, the Panel did not

identify any evidence in the record explaining what essential habitat features exist between or adjacent to industrial structures on the North Slope. Instead, the Panel accepted FWS's post hoc litigation position that "polar bears *could* still move through the Deadhorse area" to access dens in other locations, that it was enough that the bears "are allowed to exist" in the areas between industrial structures, and that it is "unassailable" that polar bears "need room to roam." Opinion at 30-31 (emphasis added). Regarding evidence of essential features, the Panel held that the ESA only "requires use of the best available technology,[1] not perfection." Opinion 23. The Panel held that without a showing of "superior data" by Appellees demonstrating *the absence* of essential features, FWS was not required to identify specific areas where essential features are found. *Id.*

En banc review is urgently needed because the Panel's Opinion conflicts with numerous decisions from this Court holding that the ESA's best scientific data available standard requires decisions based on "substantial evidence," *San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014), and does not allow FWS to "base its conclusions on no evidence." *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003); *see also Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1233 (9th Cir. 2001) (invalidating decision based on "no evidence"). The Opinion also conflicts with the D.C. Circuit Court's decision in *Otay Mesa Property, L.P. v. U.S. Department*

[1] Presumably, the Panel meant "best scientific data available." 16 U.S.C. § 1533(b)(2). The ESA has no "technology" standard.

of Interior, 646 F.3d 914, 918 (D.C. Cir. 2011), which invalidated a critical habitat designation unsupported by substantial evidence because the ESA's best scientific data available requirement is not an authorization for the agency "to act without data to support its conclusions." The Panel's errors are further compounded by the Opinion's improper reliance on post hoc explanations, contrary to well-settled Ninth Circuit law. *See, e.g.*, *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010).

The consequence of the Panel's errors is that the "burden statutorily imposed on the agency" by the ESA to demonstrate the existence of essential habitat features is shifted to Alaska Natives, state and local governments, and industry to prove the *non-existence* of those features—*i.e.*, to "prove a negative." *Ariz. Cattle Growers*, 273 F.3d at 1244. The Panel's holding is contrary to the law in this Circuit, will both gravely harm the people, governments, and commercial interests represented in this litigation, and upset an important area of ESA law. En banc review is warranted because the Panel Opinion pervasively departs from the standards and intent of the ESA and from fundamental tenets governing judicial review of agency action.

II. BACKGROUND

A. Congress Amended The ESA To Establish An "Extremely Narrow" Definition Of Critical Habitat

In 1978, Congress amended the ESA to add an express definition of critical habitat in response to growing concerns that FWS had gone "too far" with critical habitat designations by "just designating territory as far as the eyes can see and the

mind can conceive."[2] What was needed, instead, was "a showing that [habitat] is essential to the conservation of the species." Legislative History at 880; *id*. at 817 (definition intended to give "some fairly rigid guidelines").

Accordingly, Congress adopted an "extremely narrow definition of critical habitat." *Id*. at 1220-21 (reprinting Conf. Rep. on S. 2988). Relevant to this appeal, critical habitat is defined to include:

> [T]he specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection[.]

16 U.S.C. § 1532(5)(A)(i). This "extremely narrow definition" is limited to those "specific areas" that are truly *critical* for the species.

B. The District Court Vacated The Critical Habitat Decision Because FWS Failed To Provide Evidence Demonstrating Compliance With Statutory Requirements

The district court below reviewed FWS's decision against the ESA's statutory criteria for critical habitat. As the district court explained, "in order for an area to be designated as critical habitat, an agency must determine that the area actually contains physical or biological features essential for the conservation of the species." *AOGA*, 916 F. Supp. 2d at 999 (citing 16 U.S.C. § 1532(5)(A)(i)).

---

[2] *See* Staff of S. Comm. on Env't and Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980, at 817 (Comm. Print 1982) at 817 ("Legislative History").

The district court recognized the deference owed to FWS, but explained that "agencies must still show substantial evidence in the record and clearly explain their actions." *Id*. (FWS "cannot simply speculate as to the existence of such features." (citing *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163-64 (9th Cir. 2010))).

The district court found that this evidence was plainly lacking with respect to FWS's designation of denning habitat (Unit 2). Unit 2 consists of a wide swath of land along the North Slope, approximately 26 percent of which is owned by the State of Alaska or Alaska Natives. 75 Fed. Reg. at 76,122. According to FWS, the features of essential land habitat for polar bears include (A) "steep, stable slopes" for den building, (B) "[u]nobstructed, undisturbed access between den sites and the coast," (C) nearby sea ice in the fall to provide access to den sites, and (D) the "absence of disturbance from humans and human activities that might attract other polar bears." *AOGA*, 916 F. Supp. 2d at 999 (brackets omitted).

The problem, the district court explained, is that there is no evidence in the record showing that *any* one of those four essential features is "found" in most of the areas designated as "critical" within Unit 2. FWS established the boundaries of Unit 2 by simply drawing a line based upon arbitrary minimum five-mile increments—five miles inland along the coast from Kavik River to Barrow, and 20 miles inland from the Kavik River to Canada—that captured 95 percent of

confirmed and probable den sites (as well as multiple oil production operations).[3] Everything within that 5,657 square mile boundary, except "manmade structures," was deemed critical habitat without any analysis of the "specific areas" where essential features "are found." 75 Fed. Reg. at 76,133-34; *see* 916 F. Supp. 2d at 1000 ("[b]ased *solely* on the location of the confirmed or probable den sites, the Service concluded that the whole of Unit 2 contained *all* of the physical or biological features" essential to polar bear denning).

However, as the district court explained, the record demonstrates that the known and probable den sites, as well as all other potential denning habitat ("[s]teep, stable slopes" for den building), are instead found *only* "in roughly one percent of the entire area designated." 916 F. Supp. 2d at 999, 1000. At the same time, FWS "fails to point to the location of any features in the remaining ninety-nine percent" of the designated habitat, thereby providing no evidentiary basis to conclude that 99 percent of the designated area met the statutory definition of critical habitat. *Id*. at 1000-01. This failure is "especially stark concerning the inclusion of the areas around Deadhorse, Alaska, as such area is rife with humans, human structures, and human activity." *Id*. at 1001.

Similarly, the district court found that the evidence of physical and biological features was lacking with respect to barrier island habitat (Unit 3). Unit

[3] Tellingly, drawing the lines at 2.8 miles and 18.6 miles (rather than five miles and 20 miles) captures the exact same percentage of known and probable den sites. *AOGA*, 916 F. Supp. 2d at 1000. The Panel accepted this over-designation as "administrative convenience." Opinion at 29.

3 consists of "all barrier islands along the Alaska Coast and their associated spits, within the range of the polar bear," as well as a "no disturbance zone" that includes *everything within one mile of those islands and spits*. 75 Fed. Reg. at 76,133. According to FWS, the essential features of Unit 3 are (A) denning habitat, (B) refuge from human disturbance, and (C) access along the coast to maternal den sites and optimal feeding habitat. *Id*. Within the lines of Unit 3 (and its "no disturbance zone") are 13 Native villages, including Wainwright, Point Lay, Point Hope, Kivalina, Shishmaref, Diomede, Wales, King Island, Teller, Solomon, Shaktoolik, St. Michael, and Nunam Iqua. Here too, the designation included everything within the drawn boundaries (82 percent of which is state or Native owned), including "the water, ice, and terrestrial habitat," and excluding only "manmade structures." *Id*.

The district court found that FWS could not produce "even minimal evidence in the record showing *specifically* where all the physical or biological features are located within" Unit 3. *AOGA*, 916 F. Supp. 2d at 1002. Although FWS presented evidence that *some* of the islands were used for denning, the "explanation of the location of the other essential feature[s] is lacking." *Id*. As the district court explained, "each part of Unit 3 does not have to contain each of the three essential features," but "*every part* of the designation must have at least one." *Id*.

Because FWS failed to provide evidence or explanation in the record to show that "at least one" essential feature is "found" in all of the designated areas, the district court vacated the designation. *AOGA*, 916 F. Supp. 2d at 1002.

III. REASONS FOR REHEARING EN BANC

A. The Panel's Holding Is Contrary To Established Precedent From This Court And Others Governing Review Of ESA Agency Actions

Critical habitat is defined as the "specific areas" on which "are found" the physical and biological features essential to a species' conservation. 16 U.S.C. § 1532(5)(A). This "extremely narrow definition of critical habitat" (Legislative History at 1220-21) necessarily requires FWS to make a determination that any "specific area" designated actually contains ("are found") the essential physical and biological features.

Agency decisions under the ESA, like every other agency decision, cannot be arbitrary or unexplained and must be supported by "substantial evidence." *San Luis*, 747 F.3d at 601. Thus, "[w]hile the FWS can draw conclusions based on less than conclusive scientific evidence, *it cannot base its conclusions on no evidence*." *Home Builders*, 340 F.3d at 847 (citation omitted; emphasis added). Judicial review of ESA decisions "is meaningless" without a careful review of the record to "'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'" *Ariz. Cattle Growers*, 273 F.3d at 1236. As detailed above, the district court faithfully applied these principles, holding that "there is no way to know" if the designated areas contain the essential features "because there is no evidence in the record or cited by the Service that shows where such features are located." *AOGA*, 916 F. Supp. 2d at 1001.

The Panel's Opinion did not apply these basic standards. Rather than identify substantial evidence in the record showing where those features "are

found," the Panel cites the ESA's "conservation purposes" and lowers the bar for critical habitat designations. Opinion at 23. According to the Opinion, the ESA "requires use of the best available technology," and that standard does not require FWS to demonstrate that the physical and biological features are found within designated areas so long as the regulated community cannot produce evidence proving the *absence* of essential features. *Id.*[4] Indeed, the FWS need only pick a zone that somewhere includes den habitat and that is "appropriate" for "administrative convenience." *Id*. at 29.

The Opinion significantly conflicts with the established precedent of this Court and others. The ESA's "best scientific data available" standard (not "best available technology") does not excuse the agency's obligation to provide evidentiary support and a rational explanation in the record; it "merely prohibits an agency from disregarding available scientific evidence that is in some way better than the evidence it relies on." *San Luis*, 747 F.3d at 602 (internal quotations and brackets omitted).

Accordingly, in *Home Builders*, this Court rejected the government's effort to use the ESA's best scientific data available standard to justify a decision that had no evidentiary support. 340 F.3d at 847. In that case, FWS justified the listing

[4] Much of the Panel's discussion on this point mischaracterizes the district court as requiring "accurate scientific data . . . establishing existing use by current polar bears," or "requiring proof of existing polar bear activities." Opinion at 23. The district court did not require current use; it simply held that the "record does not contain evidence" that the designated areas actually contain the "required physical or biological features." *AOGA*, 916 F. Supp. 2d at 1002.

of the Arizona pygmy owl as endangered (a decision subject to the ESA's "best scientific and commercial data available" standard) by arguing that the Arizona owl was genetically distinct from the Mexico pygmy owl. *Id*. This Court rejected that reasoning because there was "no evidence" in the final rule to support it, relying on the Supreme Court's admonition that "[t]he obvious purpose of the requirement that each agency 'use the best scientific and commercial evidence available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Id*. (quoting *Bennett v. Spear*, 520 U.S. 154, 176 (1997)).

The Panel's apparent reliance on the ESA's best scientific data available standard to excuse the need for substantial evidence and rational explanation also conflicts with the D.C. Circuit decision in *Otay*, 646 F.3d 914. In that case, the plaintiff challenged FWS's designation of his property as critical habitat for the San Diego fairy shrimp, claiming that there was insufficient evidence to show that his property was "occupied by the species, at the time it is listed" as required by the ESA's critical habitat definition. *Id*. at 915. The district court affirmed the decision, but conceded that the evidence was "distinctly thin." *Id*. at 916. The D.C. Circuit reversed, explaining that although the "substantial evidence" standard is deferential, it "is not abdication." *Id*. The court further explained that although the best scientific data available standard may relieve FWS of an obligation to "conduct its own research to supplement existing data," it is not "an authorization [for FWS] to act without data to support its conclusions." *Id*. at 918. Accordingly,

the court vacated the designation, concluding that the evidence was "simply too thin to justify the action the [FWS] took." *Id*.

The decision in *Otay* aligns with decisions from this Circuit.[5] For example, in *Arizona Cattle Growers,* this Court addressed the best scientific data available standard in the context of an ESA Section 7(a)(2) consultation for grazing allotments. 273 F.3d 1229. In that case, FWS issued an incidental take statement for the razorback sucker "[d]espite the lack of evidence" that the fish was present on the allotment. *Id*. at 1243-44. FWS speculated that small numbers of juveniles "likely survived" undetected. *Id*. at 1244. However, this evidence was "not supported by the record" and "woefully insufficient to meet the standards imposed by the governing statute." *Id*. Moreover, the Court rejected FWS's argument that the plaintiffs had the burden to produce contrary evidence, which would improperly require plaintiffs "to meet the burden statutorily imposed on the agency" as well as require plaintiffs to "prove a negative." *Id*.

The Panel's holding ignores these standards with very significant ramifications for future critical habitat designations (as well as for the people who live and work in areas now designated as polar bear "critical habitat"). The "[d]esignation of private property as critical habitat can impose significant costs on

[5] FWS elsewhere concedes this point, seeking remand of another critical habitat designation because *Otay* and cases from this Circuit "imposed a 'higher burden' on the agency to provide a more detailed explanation of how designated areas meet the statutory definition of critical habitat." *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 41 (D.D.C. 2013).

landowners." *Otay*, 646 F.3d at 915. For this reason, Congress imposed an "extremely narrow definition of critical habitat" (Legislative History at 1220-21) and shielded private property owners from "needless economic dislocation" and restrictions imposed "on the basis of speculation or surmise," *Bennett*, 520 U.S. at 176. The Panel's Opinion inverts those protections, using the best scientific data available provision to *shield agency decision-making from judicial review*, and to eliminate FWS's obligation to make required statutory findings based on evidence and a rational explanation *in the record*. In so doing, the Panel allows FWS to achieve precisely the result Congress sought to avoid: the designation of "**a large swath of land . . . as 'critical habitat' based entirely on one essential feature that is located in approximately one percent of the entire area set aside**." *AOGA*, 916 F. Supp. 2d at 1001-02.

Equally problematic, the Panel's holding, if left in place, allows FWS to designate massive land areas and places the burden on the regulated community, the State of Alaska, and Alaska Native entities, to come forward with evidence to prove such vast areas are *not* critical habitat. This wrongly forces landowners "to meet the burden statutorily imposed on the agency" and puts them in the untenable position of having to "prove a negative." *Arizona Cattle Growers*, 273 F.3d at 1244; *see also Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 123 (D.D.C. 2004) ("[O]ver-designation wrongfully shifts the burden of initiating designation decisions from the Service to future stakeholders."). The Opinion's pervasive departure from the language and intent

of the ESA, and fundamental tenets governing judicial review of agency action, warrant en banc review.

B. The Panel's Holding Improperly Relies On *Post Hoc* Reasoning

The Panel's Opinion further conflicts with applicable law by predicating its holding on post hoc justifications for the critical habitat designation that are not found in the record. The Court has "forbidden" reviewing courts from "relying upon litigation affidavits and '*post hoc*' rationalizations for agency action." *Presido Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1164 (9th Cir. 1998) (citation omitted). Moreover, courts may not "gloss over the absence of a cogent explanation by the agency by relying on the post hoc rationalizations offered by defendants in their appellate briefs." *Humane Soc'y,* 626 F.3d at 1049.

Here again, the D.C. Circuit decision in *Otay* is directly on point. There, FWS argued that the designated habitat was "occupied" on the "theory" that "wherever adult San Diego fairy shrimp are observed, one can assume that the shrimp have left behind eggs." 646 F.3d at 917. The court rejected this post hoc argument because "the theory cannot be found in the final rule." *Id*. Likewise, the court rejected post hoc arguments that the area qualified (under a separate subsection of the ESA) as unoccupied habitat. If that was the actual reason, then FWS "must say so in its agency decision and justify that determination." *Id*. at 918; *see also Home Builders*, 340 F.3d at 847 (rejecting genetic variability argument as "a *post hoc* rationalization").

The Panel's decision here conflicts with *Otay*, and the established law of this Circuit, by accepting numerous justifications that appear nowhere in the record.

For example, FWS's justification for including Unit 2 within the critical habitat designation in the final rule was, as the district court explained, that 95 percent of the dens occurred within the selected area. *AOGA*, 916 F. Supp. 2d at 1000. But the denning habitat data only demonstrated that the essential features identified by FWS were found in approximately 1 percent of Unit 2. *Id*.[6] Regarding the areas near human activity, such as Deadhorse, the district court expressly rejected FWS's after-the-fact rationalization in its litigation brief that "'the Service *could* find that these areas adjacent to human activity provide access between den sites and the sea ice . . . .'" *Id*. at 1001.

Yet, the Panel *accepted* this same after-the-fact rationale, holding that "it was reasonable for FWS to conclude that despite some human activity, polar bears *could* still move through the Deadhorse area to access and locate den sites free from disturbance." Opinion at 31 (emphasis added). If that was FWS's reasoning when issuing the final rule, then it "must say so in its agency decision and justify that determination" with evidence in the record, not with unsupported statements in its litigation briefs. *Otay*, 646 F.3d at 918; *accord Home Builders*, 340 F.3d at 847 (rejecting explanation that appears "[n]owhere in the Listing Rule"). No such

[6] The Opinion faults the district court because it supposedly "did not make reference to radio telemetry data tracking female polar bear movements." Opinion at 27. The district court plainly reviewed and discussed those "telemetry" studies (identifying them by name and record number), explaining that those "studies only confirm that the first feature is found in roughly one percent of the entire area designated." *AOGA*, 916 F. Supp. 2d at 1000 & nn.162-167.

determination or explanation appears in the final rule, and no record evidence is cited by the Panel.

Likewise, the Panel improperly relied on the "unassailable fact that bears need room to roam." Opinion at 30. This explanation also appears only in FWS's litigation briefs, and not in the final rule or the record. In fact, the need for "room to roam" is not an identified essential physical and biological feature for Units 2 or 3. And even if it were, there is no evidence or explanation in the final rule as to how the areas in and around industrial areas and Native villages, where bears are actively and lawfully deterred or hazed away, provide "room to roam." Nonetheless, contrary to the law of this Circuit and other circuits, the Panel upheld the designation.

IV. CONCLUSION

Appellees respectfully request this Court to order this matter reheard en banc.

DATED this 6th day of May, 2016.

STOEL RIVES LLP

/s/ Jeffrey W. Leppo
Jeffrey W. Leppo
Ryan P. Steen
Jason T. Morgan

Attorneys for Plaintiffs-Appellees and Cross-Appellants Alaska Oil and Gas Association and American Petroleum Institute

STOEL RIVES LLP

/s/ Kevin M. Cuddy (w/consent)
Kevin M. Cuddy

Attorneys for Arctic Slope Regional Corporation, NANA Regional Corporation, Inc., Bering Straits Native Corporation, Calista Corporation, Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeagvik Iñupiat Corporation, Kuukpik Corporation, Kaktovik Iñupiat Corporation, and The Iñupiat Community of the Arctic Slope

/s/ Murray D. Feldman (w/consent)
Murray D. Feldman
Christina F. Gomez
Holland & Hart LLP

Bradley E. Meyen
Alaska Department of Law

Attorneys for Plaintiff-Appellee State of Alaska

VAN NESS FELDMAN, LLP

/s/ Tyson C. Kade (w/consent)
Matthew A. Love
Tyson C. Kade

Attorneys for Plaintiff-Appellee The North Slope Borough

CERTIFICATE OF COMPLIANCE

The undersigned certifies, pursuant to Circuit Rules 35-4 and 40-1, that the foregoing petition for rehearing en banc is proportionally spaced, has a typeface of 14 points or more, and contains 4,200 words.

DATED: May 6, 2016.

By: */s/* Jeffrey W. Leppo
Jeffrey W. Leppo

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I electronically filed the PETITION FOR REHEARING EN BANC BY ALASKA NATIVE ORGANIZATIONS, THE STATE OF ALASKA, THE ALASKA OIL AND GAS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, AND THE NORTH SLOPE BOROUGH, with attached Opinion, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

Kristen L. Gustafson
U.S. Department of Justice
Environment & Natural Resources Div.
PO Box 7369
Washington, DC 20044-7369

/s/ Jeffrey W. Leppo
Jeffrey W. Leppo