Nos. 14-35806 and 14-35811

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA; NORTH SLOPE BOROUGH; IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE; NORTHWEST ARCTIC BOROUGH; ARCTIC SLOPE REGIONAL CORPORATION; NANA REGIONAL CORPORATION, INC.,

Plaintiffs-Appellees,

v.

PENNY PRITZKER, in her official capacity as Secretary of Commerce; NATIONAL MARINE FISHERIES SERVICE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; KATHRYN D. SULLIVAN, in her official capacity as the Under Secretary of Commerce for Oceans and Atmosphere and National Oceanic and Atmospheric Administration Administrator; EILEEN SOBECK, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration,

Defendants-Appellants,

and

CENTER FOR BIOLOGICAL DIVERSITY,

Intervenor-Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Alaska
Nos. 4:13-cv-00018-RRB, 4:13-cv-00021-RRB, 4:13-cv-00022-RRB

JOINT PETITION OF THE PLAINTIFFS-APPELLEES FOR REHEARING EN BANC

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I. INTRODUCTION AND RULE 35 STATEMENT

This case presents the exceptionally important question of whether the Endangered Species Act ("ESA") places any limits on the ability to list a currently abundant species as "threatened" based exclusively on the unknown consequences of a single threat (i.e., climate change) almost 100 years in the future. The Panel, in a case of first impression, answered this question in the negative, holding that "neither the ESA nor our case law requires the agency to calculate or otherwise demonstrate the 'magnitude' of a threat to a species' future survival before it may list a species as threatened." Opinion at 26-27. This is wrong. The ESA was never intended to address speculative climate-related effects that may have some uncertain impact on species survival in the distant future. Instead, as the ESA's plan language makes clear, an identified threat must make it "likely" that a species will become "in danger of extinction" within the foreseeable future. 16 U.S.C. § 1532(6), (20). The Panel's decision renders the ESA's statutory limitations meaningless and will have significant ramifications for all listing decisions in this Circuit.

This issue is exceedingly important. The listing of a species under the ESA has immediate and significant regulatory consequences by making protection of that species a national priority and requiring the federal government to take immediate steps to "halt and reverse the trend towards species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Given these ramifications, Congress carefully limited the statute's reach, requiring a finding of serious extinction risk before a species can be listed as threatened or endangered.

But if a species can be listed simply based upon a projected threat of climate-related habitat decline, irrespective of the magnitude of the threat to the species' survival, then the statutory listing standards are rendered meaningless and the federal regulatory power becomes limitless—all without regard for the serious effects of unchecked, unprincipled species listings on States, Native interests, local governments, and others.

This issue is also exceedingly important because the Panel's decision will affect almost all listing decisions in this Circuit. In recent years, the Secretaries of Commerce and Interior (collectively, the "Secretary") have been inundated with requests to list species based upon the projected effects of climate change, and courts within this Circuit must determine whether the Secretary has demonstrated that these effects will, or will not, cause the likely endangerment of a species. There are at least three other appeals pending in this Court involving listing decisions and climate change,[1] many more such cases pending in district courts,[2] and dozens more pending petitions that will require the Secretary to decide this

[1] *See* Case Nos. 16-35380 & 16-35382 (ringed seals), 16-35866 (Arctic grayling), and 14-17513 (desert eagle).

[2] *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 16-cv-06040 (N.D. Cal. filed Oct. 19, 2016) (withdrawal of proposed listing of the Pacific fisher); *Defs. of Wildlife v. Jewell*, 176 F. Supp. 3d 975 (D. Mont. 2016) (remanding listing decision for further consideration of climate change impacts); *Desert Survivors v. U.S. Dep't of the Interior*, No. 16-cv-01165 (N.D. Cal. filed Mar. 9, 2016) (withdrawal of proposed listing of the Bi-State Sage-Grouse); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. 15-cv-05754 (N.D. Cal. filed Dec. 16, 2015) (decision not to list the coastal marten).

issue.[3] The Panel's decision in this case tips the scales on all of these decisions by holding that the magnitude of the risk presented by projected habitat loss at the end of the century is no longer a required consideration.

If left in place, the Panel's decision will have significant repercussions for the State of Alaska, the Alaska Native people who have lived in the Arctic for millennia, the local governments that govern and manage Alaska's Arctic region, and the commercial entities that lease, explore, and develop natural resources within the Arctic. Importantly, the decision undermines Alaska's sovereignty with respect to the affected lands and waters and the resources used to fund State operations. Further, the Alaska Native people have long co-existed with and depended upon the bearded seal for subsistence and cultural purposes, and their ability to survive and maintain their traditional ways of life depends upon continued access to the species and use of their ancestral lands and waters free of irrational and unnecessary restrictions. Thus, rehearing by this Court is essential to ensure that those who live, work, and own land in Alaska's Arctic do not suffer the substantial regulatory and economic consequences of an ESA listing decision that lacks a statutory basis.

In sum, the Panel's holding is not faithful to Congress's intent, as expressed

[3] *See, e.g.*, 81 Fed. Reg. 70,074 (Oct. 11, 2016) (Pacific Bluefin tuna); 81 Fed. Reg. 68,379 (Oct. 4, 2016) (two stonefly species); 81 Fed. Reg. 64,414 (Sept. 20, 2016) (Iiwi); 81 Fed. Reg. 63,160 (Sept. 14, 2016) (Joshua tree); 81 Fed. Reg. 14,058 (Mar. 16, 2016) (Western bumble bee); 80 Fed. Reg. 19,259 (Apr. 10, 2015) (yellow-cedar); 80 Fed. Reg. 60,990 (Oct. 8, 2015) (Sierra Nevada red fox); 79 Fed. Reg. 78,775 (Dec. 31, 2014) (monarch butterfly).

in the plain language of the ESA. Listing a species based solely on a projected threat by the end of the century, without even evaluating the "'magnitude' of a threat to a species' future survival," Opinion at 26-27, undermines the purpose of the ESA, and will gravely harm the States, Native people, local governments, and commercial interests affected by this and pending listing decisions. En banc review is urgently needed to ensure the ESA listing process can remain true to its statutory requirements.

II. BACKGROUND

A. The ESA Requires a Determination that a Threatened Species is at Risk of Extinction.

Congress enacted the ESA to ensure the conservation of "species of fish, wildlife, and plants [that] have been so depleted in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2). Species do not receive the protection of the ESA until they are listed by the Secretary as either endangered or threatened. The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id*. § 1532(6). A "threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id*. § 1532(20). Thus, to be listed as threatened, the Secretary must determine that an identified threat will affect the future population status of the species to such a degree that it is likely to become "in danger of extinction."

The threatened determination is based upon an evaluation of five statutory threat factors. *Id*. § 1533(a)(1). This evaluation must be made "solely on the basis of the best scientific and commercial data available." *Id*. § 1533(b)(1)(A). Moreover, as the Secretary has often explained, "mere identification of factors that could impact a species is not enough to compel a finding that listing is appropriate; we require that these factors are operative threats that act on the species to the point that the species meets the definition of endangered or threatened under the Act." 79 Fed. Reg. 11,053, 11,070 (Feb. 27, 2014).[4] In short, the Secretary must determine that "the best available information" shows that the threat is of sufficient magnitude to put the species at risk of extinction, now, or in the foreseeable future, before listing is warranted. *Id*. at 11,071.

B. NMFS Listed the Bearded Seal Based Solely on Projected Habitat Declines by 2100 but Failed to Demonstrate a Corresponding Effect to the Species.

The National Marine Fisheries Service ("NMFS") listed the bearded seal as a threatened species, even though the species (a) is highly abundant (about 155,000 individuals) and not in decline, (b) has shown no contraction in its Arctic range and no adverse effects from existing sea ice loss, and (c) has shown historic resilience to changes in sea ice conditions. 77 Fed. Reg. 76,740 (Dec. 28, 2012). To support the listing, NMFS relied upon a "foreseeable future" extending almost 100 years based upon projections of climate-related sea ice declines by the end of the

[4] Many other listing decisions use identical language. *See, e.g.*, 79 Fed. Reg. 8656, 8665 (Feb. 13, 2014); 79 Fed. Reg. 10,236, 10,257 (Feb. 24, 2014); 79 Fed. Reg. 7136, 7150 (Feb. 6, 2014).

century. *Id.* at 76,741. NMFS projected that, in typical or average years, the bearded seal would have sufficient ice concentrations in current habitat areas during the relevant months of the year (April-June) until mid-century, and thereafter, sea ice would decline or be absent in the Bering Sea but would continue to exist throughout the remainder of the species' range (the Beaufort, Chukchi, and East Siberian Seas) through the end of the century. *Id.* at 76,744. In previous listing decisions, NMFS made the contradictory factual conclusion that these same climate projections were too variable and too divergent for reliable use beyond 2050. 73 Fed. Reg. 79,822, 79,823 (Dec. 30, 2008) (ribbon seal); 75 Fed. Reg. 65,239, 65,240 (Oct. 22, 2010) (spotted seal).

Although NMFS identified the potential threat associated with extended projections of climate-related habitat declines, NMFS did not demonstrate how these projections would actually affect the status and population of the bearded seal or that any impacts would be of such magnitude that the species would likely become endangered in the future. NMFS repeatedly stated that it lacked the ability to determine how the species would respond to projected declines in sea ice.[5] NMFS also acknowledged that it had no ability to determine the magnitude of any

[5] *E.g.*, 77 Fed. Reg. at 76,758 ("[d]ata were not available to make statistically rigorous inferences about how these DPSs will respond to habitat loss over time") (emphasis added); *id.* at 76,747 ("The degree of risk posed by the threats associated with the impacts of global climate change on bearded seal habitat is uncertain due to a lack of quantitative information linking environmental conditions to bearded seal vital rates, and a lack of information about how resilient bearded seals will be to these changes.") (emphasis added); *id.* at 76,755 ("There is little or no similar consensus about the biological responses that are most likely to follow the physical habitat changes. . . .") (emphasis added).

impact on the species, let alone any population trends that could occur in the future.[6] Thus, although NMFS projected that the bearded seal would lose a portion of its habitat by 2100, it had no ability to predict the future status of the species.

C. The District Court Vacated the Listing Decision Because the Bearded Seal Is Not "Likely" to Become an Endangered Species within the "Foreseeable Future."

The district court vacated the bearded seal listing because of "the lack of any articulated discernable, quantified threat of extinction within the reasonably foreseeable future." *Alaska Oil & Gas Ass'n v. Pritzker*, No. 13-cv-00018, 2014 WL 3726121, at *16 (D. Alaska July 25, 2014) (emphasis in original). First, the court found that sea ice will be sufficient through mid-century to sustain the species at current population levels, and "that no significant threat to the Beringia DPS is contemplated before 2090." *Id*. at *15. Second, the court found it "troubling" that no "serious threat of a reduction in the population of the Beringia DPS, let alone extinction, exists prior to the end of the 21st century." *Id*. As the court noted, NMFS itself acknowledged "that it lacks any reliable data as to the actual impact on the bearded seal population as a result of the loss of sea-ice." *Id*. Thus, the court correctly concluded that "an unknown, unquantifiable population

[6] *E.g.*, *id*. at 76,743 (habitat projections "can be reasonably used as a proxy for predicting years of reduced survival and recruitment, though not the magnitude of the impact.") (emphasis added); *id*. at 76,742 ("data on bearded seal abundance and trends of most populations are unavailable or imprecise") (emphasis added); *id*. at 76,757 ("Defining an extinction threshold for bearded seals and attempting to assess the probability of reaching such a threshold within a specified time frame is not possible using existing data . . . .") (emphasis added).

reduction, which is not expected to occur until nearly 100 years in the future, is too remote and speculative to support a listing as threatened." *Id*. at *15 n.69.

Contrary to NMFS's misleading arguments, the district court did not require NMFS to quantify the potential population reduction, establish an extinction threshold, or conduct additional scientific studies. Instead, the court merely recognized and reiterated the existing scientific deficiencies that NMFS itself acknowledged in its final rule. *E.g.*, *id*. at *15 n.64 (noting that NMFS "conced[ed] that a more thorough assessment of seal habitat and population response to the climatic changes was needed before the threat of extinction could be assessed with any level of certainty"). The adequacy of the science is not at issue here; the court simply held that the administrative record and NMFS's explanations were insufficient to support the listing under the applicable standard of review.

III. REASONS FOR REHEARING EN BANC

A. The Panel's Holding Endorsed an Impermissibly Expansive Interpretation of the ESA Listing Requirements in Contravention of the Plain Language and Purpose of the Statute.

In reversing the district court and upholding the listing decision, the Panel stated that "neither the ESA nor our case law requires the agency to calculate or otherwise demonstrate the 'magnitude' of a threat to a species' future survival before it may list a species as threatened." Opinion at 26-27. This holding conflicts with both the plain language and history of the ESA, and renders the statutory limitations on listing meaningless.

Starting with the plain language, the ESA defines a threatened species as one that is "likely to become an endangered species," 16 U.S.C. § 1532(20), and requires that determination to be made by evaluating specified threat factors. *Id.* § 1533(a)(1). As the Panel correctly stated, "most dictionaries define 'likely' to mean that an event, fact, or outcome is probable." Opinion at 27. But there is no plausible way to determine that it is "probable" that a species will face extinction in the foreseeable future without determining the significance or magnitude of a threat to that species' survival.

The legislative history of the ESA confirms this common sense result. In 1973, Congress amended the ESA to add the "threatened species" designation in order to afford imperiled species additional protection depending upon the temporal proximity of the risk of extinction. While an endangered species is currently "in danger of extinction," a threatened species is "likely to become [in danger of extinction] within the foreseeable future." 16 U.S.C. § 1532(6), (20). As noted during debate on the ESA amendment:

> An animal's continued existence must actually be in peril before it may be considered endangered. It is absolutely essential that a species of wildlife be afforded protection before it reaches the endangered list and thereby the brink of extinction. . . . The endangered list will be composed of those species which are in danger of extinction. The threatened list will be composed of those species which are not presently in danger of extinction, but which are likely to become endangered if protective measures are not taken.

119 Cong. Rec. 25,675 (1973) (Statement of Sen. Williams) (emphasis added); *see also* S. Rep. No. 93-307, at 3 (1973) (the threatened classification is intended to

"give[] effect to the Secretary's ability to forecast population trends…") (emphasis added).

Obviously, to determine that a species is likely to become "in peril" or on "the brink of extinction," the Secretary must do more than merely identify a projected threat to the species. Rather, the Secretary's assessment of the future likelihood of endangerment necessarily entails an evaluation of the magnitude of the risk posed by the particular threat in order to determine the future status of the species. By obviating the need to consider the magnitude of a threat to future survival, the Panel reads the terms "likely" and "in danger of extinction" out of the statute. With its decision, the Panel has authorized the Secretary to list a species based solely on projections of future habitat declines for which the impacts to the species are unknown and uncertain.[7]

Courts in this Circuit have required a more exacting analysis of risk to a species. For example, in *Defenders of Wildlife v. Norton*, this Court held that:

> [I]t simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing. A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat. Similarly, a species with an exceptionally small historical range may quickly become endangered after the loss of even a very small percentage of suitable habitat. . . . [T]he percentage of habitat loss that will render a

[7] The Panel incorrectly suggests that NMFS did not rely on habitat loss alone, but drew upon existing research to explain how habitat loss would likely endanger the species. Opinion at 25. As noted above, the final rule (and the underlying administrative record) is replete with statements disclaiming the ability to make this determination. Petition, *supra* notes 5 & 6.

> species in danger of extinction or threatened with extinction will necessarily be determined on a case by case basis.

258 F.3d 1136, 1143 (9th Cir. 2001) (rejecting argument that projected loss of 82% of a species' range warranted listing). District courts within this Circuit have reached the same result, concluding that simply identifying a threat (i.e., the loss of habitat), by itself, is not determinative; instead, the requisite determination is whether any habitat loss will have such an effect (i.e., magnitude of impact) that it renders the species likely to become in danger of extinction. *See Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) ("[A] downward trend in habitat by itself is not sufficient to establish that a species should be listed under the ESA."); *Or. Nat. Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D.Or. 1998) (ESA requires a determination as to the likelihood—rather than merely the prospect—that a species will become endangered in the foreseeable future).

Here, by contrast, NMFS's decision to list the bearded seal was predicated solely upon future projections of sea ice declines, and NMFS disclaimed any ability to assess the magnitude of the impact on the species. 77 Fed. Reg. at 76,743 (the habitat proxy cannot predict "the magnitude of the impact"). While a loss of habitat may have a "negative effect on the bearded seal's survival," *see* Opinion at 19, neither the Panel nor NMFS referenced any scientific data demonstrating that a decline in habitat placed the species in likely danger of extinction within the foreseeable future.[8] Absent an ability to assess the magnitude

[8] The Panel misstates NMFS's projections of sea ice concentrations. NMFS did not conclude that "most Beringia DPS habitats will have lost most, if not all, of

of any impact to the future population status of the species, the listing of the bearded seal as threatened cannot be sustained.

B. The Panel's Holding Undermines the ESA by Diverting Resources to Species that Do Not Need Protection and by Causing Unnecessary Adverse Regulatory and Economic Consequences.

The Panel's decision raises a question of exceptional importance because the listing of a species under the ESA triggers subsequent obligations and prohibitions that have significant repercussions for both the Services and the regulated community. Listing immediately elevates a species to "the first priority" for all federal agencies, giving protection of listed species "priority over the 'primary missions' of federal agencies." *Tennessee Valley Authority*, 437 U.S. at 185; *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1084–85 (9th Cir. 2005) ("The ESA obligates federal agencies to afford first priority to the declared national policy of saving endangered species.") (internal quotation omitted).

There are numerous regulatory consequences that follow from an ESA listing. Listing triggers a mandatory duty for the Secretary to designate critical habitat for the species, 16 U.S.C. § 1533(a)(3)(A), and to "develop and implement" a recovery plan for that species. *Id*. § 1533(f). Listing also requires all federal

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their sea ice" from 2007 to 2050, nor did NMFS conclude that there would be "devastating sea ice losses" or "a total loss of sea ice" in the second-half of the century. Opinion at 17, 19, 19 n.7. On the contrary, for April-June, NMFS explained that bearded seals would typically have sufficient ice concentrations in current habitat areas through mid-century, and over the entire shelf zones in the Beaufort, Chukchi, and East Siberian Seas through the end of the century. 77 Fed. Reg. at 76,744.

agencies to engage in consultation to "insure that any action authorized, funded, or carried out," will not jeopardize listed species or adversely modify designated critical habitat. *Id*. § 1536(a)(2). As a final example, upon listing, it is illegal (with some exceptions) to harm a member of the listed species, subject to civil and criminal penalties. *Id*. §§ 1538(a), 1540.

Given the immediate regulatory impacts, it is essential to ensure that the ESA's statutory criteria for listing a species are properly interpreted and applied consistent with Congressional intent. Congress put numerous measures in the ESA to "avoid needless economic dislocation" and ensure that the ESA is not to be "implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). By concluding that there is no requirement to consider the magnitude of a threat to support a threatened listing, the Panel has established a rule of law authorizing the Secretary to list any species based solely on future projections of some habitat loss (or some other threat). Congress plainly did not intend for every conceivable climate-related impact to species' habitat to satisfy the requirement that a species must be "likely" to become endangered in the foreseeable future in order to qualify for special listing status.

The Panel's expansive holding paves the way for the listing of species that, like the bearded seal, do not warrant the protections afforded by the ESA. The result will almost certainly be the kind of "needless economic dislocation" Congress sought to avoid. *Id*. For example, the designation of critical habitat for a listed species can consume significant agency resources and affect massive geographic areas. The recently proposed ringed seal critical habitat covers

approximately 350,000 square miles (an area larger than Texas) of ocean adjacent to Alaska.[9] *See* 79 Fed. Reg. 73,010 (Dec. 9, 2014). If the listing of the bearded seal is reinstated, NMFS would be required to designate critical habitat, which would presumably be of similarly expansive scope, for a species that requires no additional conservation measures.[10]

Each unwarranted listing, and subsequent critical habitat designation, can impose substantial and unnecessary economic burdens upon the regulated community. All activities within the range of a listed species (and certainly within a species' critical habitat) that require federal approvals will be subject to a lengthy, complex, and costly consultation process to assess whether the proposed action may jeopardize the species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). This can cause project delay (and even project abandonment) or imposition of costly conditions, all for species that are not in need of protection under the ESA in the first place.

The substantial effects of listing and critical habitat designation demonstrate that the ESA does not contemplate the kind of remote and speculative effects

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[9] Like the bearded seal, NMFS listed the Arctic subspecies of ringed seal as a threatened species under the ESA. 77 Fed. Reg. 76,706 (Dec. 28, 2012). The same coalition of plaintiffs challenged that determination, and the court below vacated and remanded the listing on similar grounds. *Alaska Oil & Gas Ass'n v. NMFS*, No. 14-cv-00029, 2016 WL 1125744 (D. Alaska Mar. 17, 2016). The defendants-appellants have also appealed that decision to this Court. Case No. 16-35380 and 16-35382.

[10] NMFS concedes that the ESA will not "provide appreciable conservation benefits" for the bearded seal given that the principal threat is projected climate-related habitat alterations in the future. 77 Fed. Reg. at 76,749.

associated with climate-related threats. Rather, the intent and purpose of the ESA is to conserve those species that are "so depleted in numbers that they are in danger of or threatened with extinction." *Id*. § 1531(a)(2). Changing local Alaskan land-use policies and injecting federal regulation into all manner of permitting and management decisions will have no impact on bearded seals, no impact on climate change, and no impact on Arctic species preservation generally, but will cause huge impacts on the local human population. It also diverts limited and valuable agency resources away from species that truly need protection. Congress did not intend for the statute to work in this way, and the important harms the Panel's decision causes to Alaskans (including Alaska Native groups) living in the Arctic thus cannot be justified. En banc review by this Court is needed to address the Panel's departure from the statutory criteria and intent of the ESA, and to restore meaning to the phrase "likely" to become "in danger of extinction."

IV. CONCLUSION

For the foregoing reasons, the Appellees respectfully request this Court to order this matter reheard en banc.

Dated: January 9, 2017

Respectfully submitted,

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Date: Jan 9, 2017

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9th Circuit Case Number(s) 14-35806 and 14-35811

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