

Nos. 16-35380 and 16-35382

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

Plaintiffs-Appellees,

v.

PENNY PRITZKER, in her official capacity as Secretary of Commerce;
KATHRYN D. SULLIVAN, in her official capacity as the Under Secretary of
Commerce for Oceans and Atmosphere and National Oceanic and Atmospheric
Administration Administrator; NATIONAL MARINE FISHERIES SERVICE;
EILEEN SOBECK, Assistant Administrator for Fisheries, National Oceanic and
Atmospheric Administration; 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. 4:14-cv-00029-RRB, 4:15-cv-00002-RRB, 4:15-cv-00005-RRB

**ANSWERING BRIEF OF THE NORTH SLOPE BOROUGH; ARCTIC
SLOPE REGIONAL CORPORATION; NANA REGIONAL
CORPORATION, INC.; NORTHWEST ARCTIC BOROUGH; AND
IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE**

MATTHEW A. LOVE
Van Ness Feldman, LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
Tel: (206) 623-9372
Fax: (206) 623-4986

MICHAEL F. McBRIDE
TYSON C. KADE
Van Ness Feldman, LLP
1050 Thomas Jefferson Street NW
Washington, DC 20007
Tel: (202) 298-1800
Fax: (202) 338-2416

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for the Plaintiffs-Appellees state:

The Arctic Slope Regional Corporation and NANA Regional Corporation, Inc. are each Alaska Native regional corporations formed under the Alaska Native Claims Settlement Act (“ANCSA”). Pursuant to ANCSA, shares in Alaska Native corporations are not allowed to be sold or traded and there is no publicly traded stock. Accordingly, the foregoing parties have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

The North Slope Borough and Northwest Arctic Borough are each governmental entities located in northern Alaska. They are not corporations and do not issue stock.

The Iñupiat Community of the Arctic Slope (“ICAS”) is a Regional Alaska Native tribal government governed by the Indian Reorganization Act of 1934. ICAS is not a corporation and does not issue stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
I. INTRODUCTION	1
II. STATEMENT OF JURISDICTION	4
III. ISSUES PRESENTED FOR REVIEW	4
IV. STATEMENT OF THE CASE	5
A. ESA Statutory Background	5
B. Ringed Seal Biology and Behavior	7
C. Interests of the Northern Alaska Plaintiffs	10
D. NMFS’s Decision to List the Arctic Ringed Seal as Threatened.....	13
E. Procedural History.....	15
V. SUMMARY OF THE ARGUMENT	16
VI. STANDARD OF REVIEW.....	17
VII. ARGUMENT.....	19
A. NMFS’s Decision to List Arctic Ringed Seals as Threatened Based on a Foreseeable Future Extending to 2100 Is Arbitrary and Capricious.	19

(1)	The Majority of Peer Reviewers Concluded That NMFS’s Predictions of Snow Cover Through 2100 Were Unreliable and Speculative.....	21
(2)	NMFS’s Use of a Foreseeable Future Extending to 2100 Directly Contradicts Its Prior Conclusions, and NMFS Failed to Provide a Reasoned Explanation Justifying This Contradiction.	28
B.	NMFS Failed to Meet Its Burden to Show That the Abundant Population of Arctic Ringed Seals Will Be on the Brink of Extinction in the Foreseeable Future as Required by the ESA.....	35
(1)	The Record Is Devoid of Any Evidence Demonstrating That Any Loss of Habitat Will Actually Threaten the Ringed Seal Population with Extinction.....	36
(2)	The BRT’s Assessment Does Not Provide a Rational Basis for Listing the Arctic Ringed Seal as Threatened.	40
C.	Contrary to the Federal Defendants’ Arguments, the District Court Properly Applied the ESA and Concluded That NMFS’s Decision to List the Arctic Ringed Seal Is Arbitrary and Capricious.	45
D.	Contrary to CBD’s Argument, This Court’s Decision in <i>AOGA v. Pritzker</i> Does Not Resolve the Issues in This Case.....	49
VIII.	CONCLUSION.....	51
	STATEMENT OF RELATED CASES	53
	CERTIFICATE OF COMPLIANCE.....	54
	CERTIFICATE OF SERVICE	55
	ADDENDUM	

TABLE OF AUTHORITIES

Cases

<i>Alaska Oil & Gas Ass’n v. Pritzker</i> , 840 F.3d 671 (9th Cir. 2016)	<i>passim</i>
<i>Arizona Cattle Growers’ Ass’n v. Salazar</i> , 606 F.3d 1160 (9th Cir. 2010), <i>cert. denied</i> , 562 U.S. 1216 (2011)	19
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	20, 47
<i>Center for Biological Diversity v. Lubchenco</i> , 758 F. Supp. 2d 945 (N.D. Cal. 2010)	29, 37
<i>Defenders of Wildlife v. Norton</i> , 258 F.3d 1136 (9th Cir. 2001)	36
<i>F.C.C. v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009)	30
<i>Greater Yellowstone Coalition, Inc. v. Servheen</i> , 665 F.3d 1015 (9th Cir. 2011)	19, 48
<i>Humane Society of the U.S. v. Locke</i> , 626 F.3d 1040 (9th Cir. 2010)	30, 44, 50
<i>In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litigation</i> , 794 F. Supp. 2d 65 (D.D.C. 2011), <i>aff’d on other grounds</i> , 709 F.3d 1 (D.C. Cir. 2013)	35
<i>Lands Council v. McNair</i> , 629 F.3d 1070 (9th Cir. 2010)	22
<i>Motor Vehicle Manufacturers Ass’n of the U.S. v. State Farm Mutual Auto Insurance Co.</i> , 463 U.S. 29 (1983).....	18

<i>Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services</i> , 545 U.S. 967, 981 (2005)	30
<i>Nat’l Wildlife Federation v. NMFS</i> , 524 F.3d 917 (9th Cir. 2008)	18
<i>Natural Resources Defense Council v. Pritzker</i> , 828 F.3d 1125 (9th Cir. 2016)	24
<i>Ocean Advocates v. U.S. Army Corps of Engineers</i> , 402 F.3d 846 (9th Cir. 2004)	18
<i>Oregon Natural Desert Ass’n v. Bureau of Land Management</i> , 625 F.3d 1092 (9th Cir. 2010)	19, 44
<i>Organized Village of Kake v. U.S. Dep’t of Agriculture</i> , 795 F.3d 956 (9th Cir. 2015)	30, 31, 33, 50
<i>Otay Mesa Property, L.P. v. U.S. Dep’t of the Interior</i> , 646 F.3d 914 (D.C. Cir. 2011).....	47
<i>Pacific Coast Federation of Fishermen’s Ass’ns, Inc. v. NMFS</i> , 265 F.3d 1028 (9th Cir. 2001)	18
<i>Pacific Coast Federation of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation</i> , 426 F.3d 1082 (9th Cir. 2005)	19
<i>San Luis & Delta–Mendota Water Authority v. Jewell</i> , 747 F.3d 581 (9th Cir. 2014)	22
<i>Trout Unlimited v. Lohn</i> , 645 F. Supp. 2d 929, 957 (D. Or. 2007).....	25

Statutes

Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012)	
§ 1531(a)(2)	5, 35, 36
§ 1532(6)	1, 6, 45
§ 1532(19)	7

§ 1532(20)	1, 6, 20, 45
§ 1533(a)(1)(A)-(E)	5
§ 1533(a)(3)(A)	7
§ 1533(b)(1)(A)	6
§ 1533(d)	7
§ 1533(f)	7
§ 1536(a)(2)	7
§ 1538(a)(1)	7
§ 1539(e)(4)	11

Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629h (2012)

§ 1601(b)	10
§ 1606(r)	11

Administrative Procedure Act, 5 U.S.C. § 500 et seq. (2012)

§ 706(2)(A)	18
-------------------	----

Administrative Materials

S. Rep. No. 93-307 (1973)	6, 36
---------------------------------	-------

Threatened Status for the Southern Distinct Population Segment of the Spotted Seal, 75 Fed. Reg. 65,239 (Oct. 22, 2010)	30, 33, 50
---	------------

Endangered and Threatened Species; Designation of Critical Habitat for the Arctic Ringed Seal, 79 Fed. Reg. 73,010 (Dec. 9, 2014)	7
---	---

I. INTRODUCTION

At issue is whether the National Marine Fisheries Service (“NMFS”) properly listed a population of millions of Arctic ringed seals as “threatened” under the Endangered Species Act (“ESA”). A “threatened” listing determination “depends upon both the foreseeability of threats to the species and foreseeability of the species’ response to those threats.” ER 073 (FR).¹ Indeed, by statute, to list Arctic ringed seals as “threatened,” NMFS is required to demonstrate that the species is “likely” to become “in danger of extinction” within the foreseeable future. 16 U.S.C. § 1532(6), (20).

NMFS failed to satisfy this statutory standard. As the District Court correctly concluded, NMFS’s decision was arbitrary and capricious because the administrative record fails to support a rational conclusion that the Arctic ringed seal is threatened with extinction at any time in the foreseeable future. NMFS predicated its listing of the ringed seal on a “foreseeable future” extending through 2100. Yet NMFS had no ability to make reliable predictions of environmental conditions nearly 100 years from now.

¹ This Brief cites the Excerpts of Record as ER__, and the Plaintiffs’ Supplemental Excerpts of Record submitted by the Alaska Oil and Gas Association and American Petroleum Institute (collectively, “AOGA”) as SER__. Citations to the Final Rule and the Status Review, as produced in the ER, are denoted with the parenthetical “FR” and “SR,” respectively.

The ESA requires listing decisions to be based on the best available science, but does not give NMFS authorization to act without data to support its conclusions or to rely on speculation or scientific uncertainty to justify its actions. Here, it is undisputed that the Arctic ringed seal population is currently healthy, abundant, and widely distributed throughout its circumpolar range; the species has previously survived periods of widespread and prolonged global warming; and there have been no observed effects on population levels from recent climate-related habitat alterations. NMFS itself postulates that the Arctic ringed seal population numbers in the millions. ER 082 (FR). Moreover, Alaska Native hunters have reported that the Arctic ringed seal population is healthy and numerous, and they have seen more ringed seals than ever before during the past few years. SER 008; SER 036.

The ESA contains explicit statutory criteria for the listing of species, and the administrative record fails to support NMFS's decision to list the Arctic ringed seal as threatened. Even though there are concerns about future projections of inadequate snow cover, NMFS recognized that the "population trend is unknown for Arctic ringed seals," and that it has "no mechanism to detect even major changes in ringed seal population size." ER 301 (SR); ER 094 (FR). Most importantly, NMFS acknowledged that "[d]ata were not available to make

statistically rigorous inferences how Arctic ringed seals will respond to habitat loss over time.” ER 094 (FR).

The Federal Defendants argue that the Arctic ringed seal depends on habitat with sufficient snow cover for lair formation, and that climate-modeling projections indicate that these areas will be largely absent by the end of the century. These arguments fail because NMFS’s snow-cover models cannot reliably predict environmental conditions through 2100. In addition, the administrative record fails to establish that any future changes in habitat would cause a decline in the currently abundant and healthy Arctic ringed seal population such that the statutory standard—“likely” to become “in danger of extinction”—would be met.

The Center for Biological Diversity (“CBD”) argues that this Court’s decision on the listing of the bearded seal in *Alaska Oil & Gas Ass’n v. Pritzker*² is “directly on point and suggests a similar result for Arctic ringed seals.” CBD.Op.Br. at 6. On the contrary, *AOGA v. Pritzker* does not apply here because it involved a different species (the bearded seal) and did not address the unique facts and circumstances attendant to the more abundant and widely-distributed Arctic ringed seal. Furthermore, the reliability of NMFS’s snow-cover projections was not at issue in *AOGA v. Pritzker*.

² 840 F.3d 671 (9th Cir. 2016) (hereinafter “*AOGA v. Pritzker*”).

Although the listing of the Arctic ringed seal provides no conservation benefit for the species, it imposes significant burdens on the Alaska Native people who have lived in the Arctic for millennia. The Alaska Native people have long co-existed with and depended on ringed seals for subsistence and cultural purposes. Their continued survival in the harsh conditions of the Arctic requires the use of the region's natural resources for economic and community development without the additional overlay of unnecessary federal restrictions. NMFS's listing of the Arctic ringed seal violates the ESA's listing requirements and imposes substantial regulatory and economic burdens on the ability of the Alaska Native people to persist in the Arctic.

II. STATEMENT OF JURISDICTION

The North Slope Borough, Arctic Slope Regional Corporation, NANA Regional Corporation, Inc., Northwest Arctic Borough, and Iñupiat Community of the Arctic Slope (collectively, the "Northern Alaska Plaintiffs") agree with the Statement of Jurisdiction provided in the Opening Brief for the Federal Defendants.

III. ISSUES PRESENTED FOR REVIEW

1. Whether NMFS's utilization of a "foreseeable future," as required by the ESA, extending to 2100, was arbitrary and capricious because NMFS (a) failed to establish that its predictions of future snow cover were reliable, and (b) failed to

provide a reasoned explanation for contradicting its previous factual findings regarding the reliability of its climate projections.

2. Whether the listing of the Arctic ringed seal as “threatened” was arbitrary and capricious because NMFS could not reliably predict, as required by the ESA, that any declines in snow cover would be “likely” to cause the species to become “in danger of extinction.”

IV. STATEMENT OF THE CASE

A. ESA Statutory Background

The ESA was enacted 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 are listed by NMFS (or the U.S. Fish and Wildlife Service) as either endangered or threatened based on any one or more of the following five statutory factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. *Id.* § 1533(a)(1)(A)-(E). NMFS must make its decision “solely on the basis of the best scientific and commercial data available” after conducting a status review of the

species and taking into account existing conservation practices. *Id.*

§ 1533(b)(1)(A).

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). In turn, a “threatened species” is “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). In explaining the distinction between the two definitions, Congress stated that the threatened classification is intended to “give[] effect to the Secretary’s ability to forecast population trends by permitting him to regulate these animals before the danger becomes imminent.” S. Rep. No. 93-307, at 3 (1973) (emphasis added). A “threatened” listing determination “depends upon both the foreseeability of threats to the species and foreseeability of the species’ response to those threats.” ER 073 (FR) (emphasis added). Thus, NMFS must determine that an identified threat will affect the species’ future population status to such a degree that it becomes “in danger of extinction.”

There are numerous regulatory consequences that follow from an ESA listing. For example, listing triggers a mandate for the Secretary to designate

critical habitat for the species,³ 16 U.S.C. § 1533(a)(3)(A), and to “develop and implement” a recovery plan for that species. *Id.* § 1533(f). Pursuant to Section 7, all federal agencies must consult with NMFS whenever any action authorized, funded, or carried out by the agency “may affect” a listed species, to ensure that the action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. *Id.* § 1536(a)(2). Section 9, among other things, prohibits an illegal or unauthorized “taking” of an endangered species.⁴ *Id.* § 1538(a)(1). Under Section 4(d), NMFS may, but is not required to, promulgate regulations extending the Section 9 “take” prohibition to a threatened species. *Id.* § 1533(d).

B. Ringed Seal Biology and Behavior

Ringed seals have persisted as a species for millions of years and have survived previous periods of widespread and prolonged global warming. ER 222 (SR). NMFS has recognized five subspecies of ringed seal, with the Arctic subspecies (*Phoca hispida hispida*) being the largest both in population and

³ NMFS previously proposed to designate approximately 350,000 square miles (an area larger than Texas) of ocean adjacent to Alaska as critical habitat for the ringed seal. *See* 79 Fed. Reg. 73,010 (Dec. 9, 2014).

⁴ “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

geographic range. ER 145 (SR). The Arctic ringed seal is widely distributed across a circumpolar range that includes all seasonally ice-covered areas of the Atlantic, Arctic, and Pacific Oceans and the Bering, Chukchi, and Beaufort Seas adjacent to Alaska.

There are no specific estimates of population size for the Arctic ringed seal, but NMFS postulates that the population numbers in the millions. ER 082 (FR). Due to uncertainties associated with existing abundance estimates, NMFS has recognized that the “population trend is unknown for Arctic ringed seals.” ER 301 (SR). Moreover, Alaska Native hunters have observed that the Arctic ringed seal population is healthy and numerous. SER 008. These seal hunters have reported seeing more ringed seals than ever before during the past few years. SER 036.

In the late winter to early spring, ringed seals typically give birth in subnivean lairs on the sea ice, which provide ringed seals with refuge from cold temperatures and protection from predators. ER 128 (SR); ER 131 (SR). NMFS assumes that useable lairs are excavated in snow depths greater than or equal to 45 cm, which can occur where snow has drifted next to a pressure ridge or ice hummock. ER 131 (SR). NMFS also assumes that a minimum average snow cover of 20 cm is needed to provide sufficient snow depth for the formation of lairs. ER 228 (SR). However, Alaska Natives have observed healthy ringed seal pups in areas of low-snow concentrations, such as in areas of the Bering Straits

region where NMFS projections suggest that snow cover is no longer adequate. SER 036-037; SER 040-41; *see also* SER 046 (Quakenbush) (ringed seals are known to successfully pup on top of snow in the Sea of Okhotsk). As the sea ice breaks up during the summer, ringed seals return to spending most of their time in the water. ER 125 (SR).⁵

NMFS stated that “[d]iminishing ice and snow cover are the greatest challenges to persistence of all of the ringed seal subspecies.”⁶ ER 077 (FR). However, based on numerous uncertainties associated with ringed seal life history and habitat requirements, “[t]he demographic, ecological, and evolutionary responses of ringed seals to threats from a warming climate are, in most cases, difficult to predict, even though future warming is highly likely to continue.” ER 161 (SR). As explained in the Status Review:

[t]he difficulty stems both from limited knowledge of the species’ current status (i.e., population density, trends, and vital rates) and its resilience to the effects of climate change. . . . [T]he data on size and trends of most of the populations are imprecise, especially in the Arctic and Okhotsk subspecies, limiting quantitative predictions of the

⁵ Ringed seals are capable of making extensive seasonal movements, with some tagged individuals exhibiting ranges of movement from 2,500-7,100 km² during winter and 800-2,100 km² in the spring. ER 130 (SR).

⁶ The Final Rule acknowledges that there will be little or no decline in ice extent in April and May in the majority of the range of the Arctic ringed seal (e.g., the East Siberian, Chukchi, Beaufort, Kara-Laptev, and Greenland Seas, the Central Arctic, Baffin Bay, and the Canadian Arctic Archipelago), and only a moderate decline in June through the end of the century. ER 074 (FR).

impact of projected environmental conditions on ringed seal survival or reproduction. The range of uncertainty in forward projections of ringed seal population size is bounded above by the species maximal growth rate, approximately 12% annually. There is, of course, no lower bound on the rate of population change, as any population could conceivably go extinct instantly from a sufficiently severe perturbation. These extreme scenarios of hypothetical population responses, however, are not very helpful in the practical matter of judging whether ringed seals are likely to reach some threshold conservation status within a particular period of time.

ER 161-62 (SR).

Despite the concern about future ringed seal habitat based on projections of inadequate snow cover for lair formation, NMFS stated that there are “no population estimates sufficiently precise for use as a reference for judging trends,” and that it has “no mechanism to detect even major changes in ringed seal population size.” ER 095 (FR); ER 094 (FR). Most important, NMFS acknowledged that “[d]ata were not available to make statistically rigorous inferences how Arctic ringed seals will respond to habitat loss over time.” ER 094 (FR).

C. Interests of the Northern Alaska Plaintiffs

The Northern Alaska Plaintiffs are local municipal governments, Alaska Native regional corporations,⁷ and a federally-recognized regional tribal

⁷ The Alaska Native regional corporation stands in stark contrast to the typical corporation. Rather than purely maximizing shareholder return, regional ANSCA corporations treat the preservation of their community’s culture and way of life as among its primary duties to shareholders. *See* 43 U.S.C. § 1601(b) (settlement to

government located in northern Alaska. Their residents, shareholders, and members are predominantly Iñupiat people who have had a unique relationship with the Arctic ringed seal since time immemorial.⁸ The health, cultural well-being, and survival of the Iñupiat people depend on their continued ability to take the species for subsistence purposes.⁹ The listing of the Arctic ringed seal would allow NMFS to impose ESA regulations restricting the ability of Alaska Natives to engage in subsistence hunting of the species.¹⁰

The Northern Alaska Plaintiffs reside and own land along the northern Alaska coastline and within the habitat of the Arctic ringed seal.¹¹ In addition to continued access to the species, the ability of the Iñupiat people to maintain their

be accomplished “in conformity with the real economic and social needs of Natives”); *id.* § 1606(r) (Native Corporations authorized “to provide benefits . . . to promote the health, education, or welfare of [its] shareholders”). Business operations are thus governed by the respective Alaska Native community’s longstanding values and norms. As an example, many of the regional corporations grant extensive leave so that their employees/shareholders can hunt or attend whaling festivals. Regional tribal organizations, like the Iñupiat Community of the Arctic Slope, have also been established for governance of members.

⁸ ER 099 (FR) (“[w]e recognize the importance of ringed seals to the Alaska Native community, as well as the expertise and particular knowledge the Alaska Native hunting communities possess regarding the species and its habitats.”).

⁹ SER 460 (Hepa); SER 444 (Brower); SER 456-57 (Glenn); SER 482 (Smith); SER 441 (Barr); SER 472 (Olemaun).

¹⁰ 16 U.S.C. § 1539(e)(4).

¹¹ SER 459 (Hepa); SER 452 (Glenn); SER 479 (Smith); SER 435 (Barr); SER 470 (Olemaun).

traditional ways of life depends on the use of their ancestral lands and waters.¹² Given the harsh environment in northern Alaska, it is already challenging to conduct any type of community infrastructure, economic development, or other activity. The ringed seal listing will only add additional layers of federal review, along with the imposition of new permitting conditions and increased economic costs, which may be sufficient to derail those projects necessary to sustain the existence and employment of the Iñupiat people and the other residents of northern Alaska.¹³

Alaska Natives recognize the need to protect species, and the habitats upon which they depend. However, in listing the Arctic ringed seal, NMFS places Alaska Natives in the untenable position of suffering significant economic and cultural consequences from a decision that is based on speculative and unreliable projections of habitat conditions almost 100 years into the future and provides no conservation benefit to the species.¹⁴

¹² SER 445-46 (Brower); SER 452-56 (Glenn); SER 479-80 (Smith); SER 435-37 (Barr); SER 476-77 (Olemaun).

¹³ SER 446-48 (Brower); SER 453-56 (Glenn); SER 481 (Smith); SER 437-41 (Barr); SER 476-77 (Olemaun).

¹⁴ NMFS concedes that the ESA will not “provide appreciable conservation benefits” for the ringed seal given that the principal threat is projected climate-related habitat alterations in the future. ER 084 (FR).

D. NMFS's Decision to List the Arctic Ringed Seal as Threatened

On March 28, 2008, NMFS initiated a review of the status of the ringed seal. ER 072 (FR). NMFS subsequently convened a biological review team (“BRT”) to prepare the Status Review for the ringed seal. *Id.* On December 10, 2010, NMFS issued its 12-month finding, and proposed to list the Arctic subspecies as a threatened species (“Proposed Rule”). ER 051.

NMFS then sought peer review of the scientific data and assumptions related to the listing determinations for the ringed seal. Two of the three peer reviewers disagreed with NMFS's conclusion that the Arctic ringed seal should be listed as a threatened species:¹⁵

- “It is my belief that the Proposed Rule that ringed seals are threatened cannot be justified based on the available information.” SER 133 (Hammill) (emphasis added).
- “The Arctic subspecies of ringed seal numbers in the millions (3-7), it is widely distributed across a large area and variety of habitats, and therefore it is not likely to be at high risk of major declines due to environmental perturbations including catastrophic events.” SER 049 (Quakenbush) (emphasis added).

A number of other commenters, including the Northern Alaska Plaintiffs, also disagreed that climate-related habitat alterations posed a threat to the Arctic ringed

¹⁵ The third peer reviewer, who has no expertise on ringed seals or marine mammals, generally supported the listing. SER 494 (Serreze) (“To the extent that the climate models provide defensible projections, the information presented in the Proposed Rule supports the conclusions of the demographic risks assessment.”).

seal and opposed the listing of the species. *E.g.*, SER 007-009; SER 506-07; SER 512-13.

Due to the “substantial disagreement” expressed by the peer reviewers and public commenters regarding the data supporting the Proposed Rule, on December 13, 2011, NMFS solicited additional data through a special independent peer review.¹⁶ SER 484. As with the previous peer review, two of the three reviewers stated that the available data do not provide an adequate basis for the Arctic ringed seal listing determination:¹⁷

- “I firmly believe that the results from this assessment **do not** provide an adequate basis upon which to consider the ringed seal for consideration as a threatened species under the [ESA].” SER 146 (Barber) (emphasis in original).
- “List[ing] ringed seals as threatened . . . is difficult and premature given the available information in some areas.” SER 148 (Sjare) (emphasis added).

Ignoring these peer reviewers’ conclusion that the proposed listing lacked sufficient scientific basis, on December 28, 2012, NMFS issued the final rule listing the Arctic ringed seal as a threatened species (“Final Rule”). ER 071 (FR).

¹⁶ NMFS noted that, “for Arctic ringed seals, substantial disagreement exists concerning the sufficiency or accuracy of the analysis of model projections of future sea ice habitat, in particular on-ice snow cover, and related impacts. This disagreement extends to the magnitude and immediacy of the threats posed to this population by the projected habitat changes.” SER 485 (emphasis added).

¹⁷ The third peer reviewer did not express a specific opinion about the listing determination. SER 498-99 (Perovich).

E. Procedural History

The Final Rule was challenged through the filing of three separate complaints by: (1) the Northern Alaska Plaintiffs; (2) the State of Alaska; and (3) AOGA. The three cases were consolidated before Judge Ralph R. Beistline for purposes of assembling the administrative record and for summary judgment proceedings.

The District Court held that NMFS's listing of the Arctic ringed seal was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. ER 029. The District Court relied on the "lack of any articulated discernable, quantified threat of extinction within the reasonably foreseeable future." *Id.* The District Court stated that:

[i]t does not appear from the Listing Rule that any serious threat of a reduction in the population of the Arctic ringed seal, let alone extinction, exists prior to the last decade of the 21st century. This is troubling. Indeed, the Listing Rule itself concedes that, at least through mid-21st century, there is little threat to the population level of the Arctic ringed seal. With respect to the second half of the century it appears that no significant threat to the Arctic ringed seal is contemplated until sometime after 2050, but somewhere around 2090-2100. Even as to that date, NMFS acknowledges that it lacks any reliable data as to the actual impact on the ringed seal population as a result of the loss of sea-ice.

ER 028-029. The District Court then concluded that "forecasting more than some 80 years into the future is simply too speculative and remote to support a

determination that the Arctic ringed seal is in danger of becoming extinct.”¹⁸

ER 029. The District Court vacated the listing of the Arctic ringed seal and remanded the decision to NMFS to correct the substantive deficiencies. ER 030.

V. SUMMARY OF THE ARGUMENT

NMFS’s listing of the Arctic ringed seal was predicated on a “foreseeable future” extending through 2100, yet NMFS had no ability to make reliable predictions of snow cover conditions almost 100 years from now. NMFS’s modeling projections of snow cover were soundly rejected by most of its own peer reviewers as inadequate to support the listing determination. Despite revising its analytical framework to focus on the specific threat of climate-related habitat changes, NMFS relied on the same climate projections that it previously determined were too variable and unreliable to support forecasts beyond 2050, and offered no reasoned explanation for its contradictory findings regarding the same underlying data. In light of this administrative record, the District Court properly concluded that “the evidence is insufficient to support a finding that the Arctic ringed seals are threatened with extinction in the foreseeable future.” ER 007.

Other than general predictions of future habitat changes, NMFS failed to demonstrate that any climate-related threat would affect the population status of

¹⁸ *See also* ER 029 n.77 (“[A]n unknown, unquantifiable population 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.”).

the Arctic ringed seal to such a degree that the species is likely to become in danger of extinction. NMFS explicitly acknowledged that it lacked any reliable data concerning the actual impact on the ringed seal population as result of habitat changes over time. In light of the administrative record, the District Court properly concluded that there was “the lack of any articulated discernable, quantified threat of extinction within the reasonably foreseeable future.” ER 029.

The Federal Defendants strenuously argue that the District Court’s decision should be reversed because it violates the ESA’s best available science standard by requiring quantitative data and additional research. The Federal Defendants mischaracterize the District Court’s holding and misconstrue the arguments of the Northern Alaska Plaintiffs and other Plaintiff-Appellees. As the District Court concluded, and as argued below, the ringed seal listing decision was flawed because NMFS failed to provide a rational connection between the limited scientific evidence in the administrative record and its speculative conclusion that the species is likely to become in danger of extinction within the foreseeable future. The ESA and the Administrative Procedure Act (“APA”) require more than a baseless conclusion, unsupported by real data.

VI. STANDARD OF REVIEW

The ESA does not contain its own unique standard of review. Accordingly, review of NMFS actions is governed by the APA. The APA directs a reviewing

court to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The court is to inquire whether the agency considered the relevant factors and “articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); *Pac. Coast Fed’n of Fishermen’s Ass’ns, Inc. v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001).

In making this inquiry, the court “must engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it.” *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 927 (9th Cir. 2008) (citation omitted). An agency action is arbitrary and capricious if the agency:

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43. Judicial review “must not rubber-stamp . . . administrative decisions that [a court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 859 (9th Cir. 2004) (internal quotation marks and citation omitted; ellipsis in original). While a court

will defer to an agency making predictions within its area of expertise, “[i]t is not enough for the Service to simply invoke ‘scientific uncertainty’ to justify its action. . . . Otherwise, we might as well be deferring to a coin flip.” *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011); *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), *cert. denied*, 562 U.S. 1216 (2011) (a court “need not defer to the agency when the agency’s decision is without substantial basis in fact.”).

Additionally, an agency’s decision may only be upheld based on reasons articulated in the administrative record. “[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action. . . . It is well- established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1120 (9th Cir. 2010) (citations omitted); *Pac. Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090-91 (9th Cir. 2005) (agency must articulate reasons in the record, and reviewing court cannot rely on agency’s unstated assumptions).

VII. ARGUMENT

A. NMFS’s Decision to List Arctic Ringed Seals as Threatened Based on a Foreseeable Future Extending to 2100 Is Arbitrary and Capricious.

To list the Arctic ringed seal as threatened, the ESA requires that any threat to the future status of the species be “foreseeable.” ER 073 (FR); 16 U.S.C.

§ 1532(20) (a “threatened species” is likely to become endangered in the “foreseeable future”). For a threat to be foreseeable, NMFS must demonstrate that it can make “reliable predictions” about future conditions.¹⁹ As the Solicitor of the Department of Interior explained:

The net result is that the foreseeable future extends only so far as the Secretary can explain reliance on the data to formulate a reliable prediction. What must be avoided is reliance on assumption, speculation, or preconception. Thus, for a particular species, the Secretary may conclude, based on the extent or nature of data currently available, that a trend has only a degree or period of reliability, and to extrapolate the trend beyond that point would constitute speculation.²⁰

SER 161 (M-Opinion). As NMFS attempts to project threats farther into the future, it has a greater burden to explain how the extended timeframe remains foreseeable. SER 163 (M-Opinion).

For the ringed seal listing decision, NMFS relied on climate modeling projections of habitat conditions that may occur by 2100. The Federal Defendants assert that NMFS can rely on these projections simply because they constitute the best available science. *See* Fed.Op.Br. at 53; CBD.Op.Br. at 12. This argument is

¹⁹ SER 161 (Office of the Solicitor, U.S. Department of the Interior, *The Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act* (Jan. 16, 2009)) (“M-Opinion”). NMFS relied on the M-Opinion in the Final Rule. ER 073 (FR); ER 088 (FR).

²⁰ As the Supreme Court has recognized, the ESA may not be implemented “haphazardly, on the basis of speculation or surmise.” *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

unavailing because, irrespective of whether the modeling projections are the best or only science available, the projections of future habitat conditions are too unreliable and speculative to support NMFS's listing decision. As explained below, the expert peer reviewers almost unanimously concluded that NMFS's snow-cover model could not reliably predict snow depths, and NMFS failed to explain, as the APA requires it to do, its departure from its previous contradictory conclusion that the climate models were too variable and unreliable for use beyond 2050.

(1) The Majority of Peer Reviewers Concluded That NMFS's Predictions of Snow Cover Through 2100 Were Unreliable and Speculative.

NMFS listed the Arctic ringed seal based on a projected decline in snow cover by the end of the century. ER 076 (FR); Fed.Op.Br. at 3 (the "primary concern" is "the projected loss of snow-covered sea-ice"). NMFS stated that "[b]y 2100, . . . April snow cover is forecasted to become inadequate for the formation and occupation of ringed seal birth lairs over much of the subspecies' range."²¹ ER 076 (FR). NMFS relied on snow-cover projections derived from a single model

²¹ The Federal Defendants include a table depicting decreases in April snow depth by mid-century and end of century. Fed.Op.Br. at 45. In the Final Rule, NMFS only relied on the threat of snow depth declines by 2100. ER 076 (FR). Further, as explained below, the majority of the peer reviewers examined these projections and concluded that they cannot reliably predict relevant snow conditions and do not support NMFS's listing determination.

(CCSM3), which the Federal Defendants assert “projected snow-depth reasonably well.” Fed.Op.Br. at 50. On the contrary, the conclusions of NMFS’s selected panel of expert peer reviewers and recent observations demonstrate that the CCSM3 modeling projections are unreliable and inadequate to justify listing the Arctic ringed seal as a threatened species.

NMFS has discretion to choose its modeling methodology, but it must “explain[] why it is reliable.”²² *Lands Council v. McNair*, 629 F.3d 1070, 1078 (9th Cir. 2010) (citation omitted). The selected model must bear a “rational relationship to the characteristics of the data to which it is applied.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014) (citation and quotations omitted). On review, the court must examine “all agency choices with respect to models, methodologies, and weighing scientific evidence to ensure that the agency’s choices are supported by reasoned analysis.” *Id.* (citation and quotations omitted). The Federal Defendants fail to identify any information in the administrative record that demonstrates that NMFS’s modeling projections of snow cover through 2100 were reliable or had a rational relationship to the data they purportedly represent.

²² The Interior Department’s Solicitor stated that “[t]he foreseeable future extends only so far as the Secretary can explain reliance on the data to formulate a reliable prediction. What must be avoided is reliance on assumption, speculation, or preconception.” SER 161 (M-Opinion) (emphasis added).

NMFS's snow-cover projections were examined by six peer reviewers, and they almost unanimously concluded that the modeling projections were not sufficiently reliable to support the listing of the Arctic ringed seal.²³ In their expert opinions, the peer reviewers stated that:

- “Current models attempt to predict snow depth over extremely large scales and probably do this very poorly. This is in contrast to the current inability to predict snow depth at local scales, the scale that is important to the ringed seal (ie at scales of metres or kilometres).” SER 134 (Hammill) (emphasis added) (citation omitted).
- “Climate models are even less reliable at modeling snow depth since it is a function of sea ice cover duration, temperature, precipitation levels, sea ice roughness and wind. . . . Recent work has shown how difficult modeling snow depths is at small local scales and there do not appear to be adequate methods to predict/evaluate snow depths over larger scales.”²⁴ SER 140 (Hammill) (emphasis added) (citation omitted).
- “[S]now cover is what we can measure at regional scales, but it is really snow drift depth that is critical to seals . . . There has been very little modeling work to establish the relationship between snow cover and snow drift height in the different regions of the seal’s range.” SER 150 (Sjare) (emphasis added).
- “[I]t should be noted how difficult it is to measure snow cover and how poor data cover is across various parts of species range. This is an issue of data

²³ Four of the six peer reviewers concluded that the data do not support the listing determination. Of the remaining two reviewers, one did not express an opinion on the listing, and the other was supportive only “[t]o the extent that the climate models provide defensible projections.” SER 494 (Serreze).

²⁴ SER 140 (“[I]t is highly likely that seals will be able to find sufficient snow depths for lairs during the key months when reproduction is likely to occur.”) (Hammill) (emphasis added).

quality that does need to be addressed for proper evaluation of the snow cover predictions presented.” *Id.* (Sjare) (emphasis added).

- “[I]t is unlikely that reductions in snow depth will be uniform across the entire range of this subspecies on an annual basis.” SER 047 (Quakenbush) (emphasis added); *see also* SER 049 (“it is not likely that snow models can predict that snow will be inadequate for lairs across the entire range of the Arctic subspecies.”) (same) (emphasis added).²⁵
- “The main problem is that it’s just about impossible to predict how snow accumulation will occur over the next few decades since models are so terrible at getting the hydrological cycle sufficiently precise for prediction.” SER 144 (Barber) (emphasis added).
- “The general circulation models are designed to consider hemispheric to global conditions of the Earth’s climate. They do not capture regional scale processes that are very important to the question of ringed seal habitat.” SER 146 (Barber) (emphasis added).
- “This section of the work is simply not supportable in my opinion. . . . The problem is that the models we have available at this time are not suitable to satisfactorily capture the required processes.” *Id.* (Barber) (emphasis added).
- “I firmly believe that the results from this assessment **do not** provide an adequate basis upon which to consider the ringed seal for consideration as a threatened species under the [ESA].” *Id.* (Barber) (emphasis in original).

An agency conclusion that is in “direct conflict” with the conclusions of its subject matter experts is arbitrary and capricious. *E.g., Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016) (subject matter experts were “specifically

²⁵ SER 047 (Quakenbush) (“local variation in ice cover or snowfall will probably not result in the Arctic subspecies becoming endangered throughout their range.”) (emphasis added).

convened” to provide their expertise); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 957 (D. Or. 2007) (rejecting reliance on scientific assessment “in the face of peer review findings that the viability conclusion had insufficient scientific support.”).

In addition to the peer reviewers’ refutation of the snow cover modeling, recent observations demonstrate that NMFS’s projections are not rationally related to actual habitat conditions. For example, NMFS stated that average snow cover only exceeded 10 cm in northern portions of the Bering Sea during April of the first decade of this century. ER 203 (SR). However, contrary to NMFS’s projections, community members, observers, hunters, and biologists throughout the region, “all report seeing ringed seal pups on the ice frequently in spring time.” SER 040 (emphasis added); *see also* SER 041 (model “clearly does not match reality” because ringed seals are successfully pupping in areas of the Bering Sea that the model suggests have 5 cm average snow depth) (emphasis added). Based on observations in coastal Labrador, “[a]s long as the appropriate rough ice is present, 10 cm of snow cover could still provide adequate snow drift development for successful lair construction depending on ice deformation in the area.”²⁶

²⁶ For 2000-2009, the model predicts average April snow depths in Western Hudson Bay of 0-10 cm. ER 202 (SR). Based on actual measurements, the maximum snow depth in February to May for that same area in the years 2000-2007 averaged 31 cm (with a range of 19-59 cm). SER 520.

SER 150 (Sjare). Thus, actual observations from Alaska Natives and other scientists demonstrate that NMFS's snow-cover projections are incapable of modeling real-world habitat conditions because ringed seals are successfully pupping in areas that are supposedly devoid of suitable habitat.

The Federal Defendants argue that “NMFS ensured that the models on which it relied bear a ‘rational relationship’ to the data to which they were applied” based on measurements of snow depth in the scientific literature and recent modeling results analyzed in the Hezel (2012) study.²⁷ Fed.Op.Br. at 50. While the Federal Defendants simply assert that the results of the Hezel study are “similar to the CCSM3” data that provided the scientific basis for the Final Rule, *id.* at 49-50, the Hezel study does not validate the poor performance and unreliability of the underlying snow cover projections.²⁸ In discussing the CCSM3 projections, NMFS acknowledged that “[a] single model is prone to large errors on the scale of

²⁷ NMFS's reliance on Radionov (1997) and Ferguson (2005) is unavailing because these studies only considered snow depth data from 1954-1991 and 1962-2000, respectively. ER 226 (SR); ER 203 (SR). These historic studies do not establish the reliability of the snow-cover projections almost 100 years into the future.

²⁸ The Hezel study was published after release of the Status Review, comment on the Proposed Rule, and the two rounds of independent peer review. Neither the public nor NMFS's selected panel of experts were provided with an opportunity to review or comment on the Hezel study or its application to the listing of the ringed seal. Furthermore, NMFS relied upon the CCSM3 model, and not the Hezel study, as the basis for its snow cover projections.

a few hundred kilometers.” ER 087-088 (FR) (emphasis added). NMFS also recognized that “there are uncertainties associated with predictions based on hemispheric projections or indirect means,” and that “judging the timing of the onset of potential impacts to ringed seals is complicated by the coarse resolution of the IPCC models.” ER 074 (FR) (emphasis added). Thus, while the model may indicate “trends” when averaged over large areas, NMFS stated that “[t]here may well be local or regional variation sufficient to produce locally different trends.”²⁹ ER 087 (FR) (emphasis added). Finally, NMFS conceded that “there will no doubt be many cases in which successful lairs have been created and maintained in snow shallower than the [20 cm] threshold.” ER 090 (FR) (emphasis added).

NMFS has failed to demonstrate that its snow-cover projections are reliable or rationally related to the characteristics of the data to which they are purportedly applied. NMFS’s panel of expert peer reviewers almost unanimously rejected the ability of the CCSM3 model to reliably predict snow cover at the appropriate scale to assess effects on the Arctic ringed seal population. Recent observational data demonstrate that the snow-cover projections are not rationally related to real-world conditions because ringed seals are successfully pupping in areas that should have

²⁹ SER 150 (Sjare) (“It should also be noted that snow cover is what we can measure at regional scales, but it is really snow drift depth that is critical to seals (which is determined by rough ice height and wind conditions).”); SER 047 (Quakenbush) (“it is unlikely that reductions in snow depth will be uniform across the entire range of this subspecies on an annual basis.”) (emphasis added).

insufficient snow for lair formation according to NMFS's projections. Even NMFS concedes that the CCSM3 model may contain "large errors on the scale of a few hundred kilometers." Because NMFS failed to demonstrate that its model was reliable and rationally related to the data it represents, the utilization of the referenced snow-cover projections was arbitrary, capricious, and lacked a rational basis.

(2) NMFS's Use of a Foreseeable Future Extending to 2100 Directly Contradicts Its Prior Conclusions, and NMFS Failed to Provide a Reasoned Explanation Justifying This Contradiction.

To list the Arctic ringed seal, NMFS relied on a "foreseeable future" extending through 2100 based on climate modeling projections from the Intergovernmental Panel on Climate Change's ("IPCC") Fourth Assessment Report ("AR4"). In its previous listing decisions for the ribbon and spotted seals, NMFS concluded that these same IPCC AR4 projections were too variable and unreliable for use beyond 2050.³⁰ NMFS was required, but failed, to provide a

³⁰ In *AOGA v. Pritzker*, the Court upheld the change in "foreseeable future" based solely on NMFS's adoption of the revised analytical approach set forth in the Solicitor's M-Opinion. *See* 840 F.3d at 681-82. The Panel's decision does not resolve the issue here, and, in any event, the Northern Alaska Plaintiffs respectfully submit that this issue was not correctly decided in *AOGA v. Pritzker*. For the Arctic ringed seal, NMFS used the same analytical "threat-specific" approach as in its spotted seal decision, yet reached contradictory conclusions about the same future climate projections. The administrative record in this case lacks the required reasoned explanation for these contradictory conclusions regarding the extension of the foreseeable future to 2100.

“reasoned explanation” justifying its contradictory conclusions regarding the duration of the foreseeable future predicated on the same threat and the same underlying data.³¹

In declining to list the ribbon seal, NMFS concluded that the “foreseeable future” only extended to mid-century. Based on its review of the IPCC AR4 projections, NMFS stated that “[b]eyond the year 2050, projections of climate scenarios are too heavily dependent on socio economic assumptions and are therefore too divergent for reliable use in assessing threats to ribbon seals.”³² SER 234 (emphasis added). When listing the spotted seal in 2010, NMFS again concluded that the foreseeable future based on the IPCC AR4 projections only extended to mid-century, stating that:

The status review report considered the climate projections through the end of the 21st century in assessing the threats stemming from

³¹ In commenting on the “foreseeable future,” one peer reviewer stated that “extending beyond 2050 is not justified,” and that “[t]his key weakness calls into question the findings in the Status Review.” SER 138 (Hammill); SER 139 (“beyond 2050, the models are increasingly and highly speculative.”). If NMFS had stopped at 2050, it could not have listed the Arctic ringed seal, because NMFS found that the long-term threat of climate-related habitat alteration is only “expected to materialize over the next 50 to 100 years.” SER 489; ER 094 (FR) (justifying listing based on projected effects “[b]y the end of this century.”).

³² In a subsequent challenge, the court upheld NMFS’s decision not to use a 100-year foreseeable future. *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 965 (N.D. Cal. 2010) (“the IPCC addressed warming after 2050, but since there was little reliability, NMFS did not err in determining that models after 2050 were too variable to be part of the foreseeable future.”) (emphasis added).

climate change, noting that there was less variation in the time period leading up to 2050 compared to the period between 2050 and 2100. . . . We have not determined here that 2100 constitutes “the foreseeable future.” There is too much variability beyond 2050 to make that determination.

75 Fed. Reg. 65,239, 65,240 (Oct. 22, 2010) (emphasis added). Almost immediately thereafter, when considering the listing of the ringed seal, NMFS contradicted itself and determined that the same IPCC AR4 modeling projections supported a foreseeable future extending to 2100. ER 052 (the Proposed Rule was issued less than two months after NMFS’s spotted seal decision).

As this Court has repeatedly acknowledged, “an agency may not simply discard prior factual findings without a reasoned explanation.” *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015); *Humane Soc’y of the U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) (“[d]ivergent factual findings with respect to seemingly comparable causes of salmonid mortality raise questions as to whether the agency is fulfilling its statutory mandates impartially and competently.”).³³ In *Village of Kake*, this Court held that the U.S. Department of Agriculture (“USDA”) violated the APA when it “rel[ied] upon the identical

³³ See also *F.C.C. v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 516 (2009) (“a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA].”).

factual record” and failed to provide a reasoned explanation for reversing a decision it had made two years prior regarding the application of the Roadless Rule to the Tongass National Forest. *Id.* at 959. As the Court explained:

the 2003 ROD rests on the express finding that the Tongass Forest Plan poses only “minor” risks to roadless values; this is a direct, and entirely unexplained, contradiction of the [USDA’s] finding in the 2001 ROD that continued forest management under precisely the same plan was unacceptable because it posed a high risk to the “extraordinary ecological values of the Tongass.”³⁴

Id. at 968 (citation omitted). Specifically, the Court noted that USDA “does not explain why an action that it found posed a prohibitive risk . . . only two years before now poses merely a ‘minor’ one.” *Id.* at 969. This disregard of previous factual findings without reasoned explanation violated the APA. *Id.*

As its primary justification for revising the duration of the foreseeable future, NMFS stated that “[its] scientists have revised their analytical approach . . . , adopting a more threat-specific approach based on the best scientific and commercial data available for each respective threat.” ER 073 (FR). The decision to utilize a “threat-specific approach” is completely irrelevant here because NMFS concedes that it used the same approach to establish the “foreseeable future” based on the same threat in both the spotted and ringed seal

³⁴ The reversal in the 2003 ROD was based on concerns about “economic and social hardships,” but the Court noted that “[t]hose concerns were not new” because they were acknowledged in both the 2001 and 2003 RODs. *Village of Kake*, 795 F.3d at 967.

listing decisions. ER 088 (FR) (“[i]n our more recent analyses for spotted, ringed, and bearded seals, . . . we addressed the foreseeable future based on the available data for each respective threat.”) (emphasis added). Because NMFS utilized the same analytical framework in both decisions, the purported “threat-specific approach” does not explain the contradictory conclusions regarding the reliability and variability of climate projections after 2050.

The Federal Defendants also assert a variety of generic explanations in an attempt to justify NMFS’s contradictory conclusions regarding the post-2050 IPCC AR4 projections. These purported explanations fail because, as noted in the comparisons below, they are merely recitations of the exact same observations and conclusions that NMFS made previously in its spotted seal decision: (1) “regardless of which model is used, all of the most reliable models show continuing downward trends in sea ice and snow-cover,”³⁵ Fed.Op.Br. at 41; (2) “the IPCC’s AR4 represents the ‘scientific consensus view on the causes and future of climate change,’”³⁶ *id.*; (3) “the IPCC’s AR4, as well as the scientific

³⁵ Compare SER 526 (“Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.”) (Spotted Seal Status Review), and SER 530 (relying on models that were found to have suitable capabilities) (same).

³⁶ Compare SER 522 (“IPCC 2007a[] represents the scientific consensus view on the causes and future of climate change”) (Spotted Seal Status Review).

papers used in that report, or resulting from that report, represent the best scientific and commercial data available,”³⁷ *id.*; and (4) “projections of air temperatures consistently indicate that warming will continue throughout the century, and ‘the trend is clear and unidirectional.’”³⁸ *Id.* at 42. Because NMFS declined to extend the foreseeable future to 2100 in its spotted seal decision, simply reiterating the same previously-made statements does not provide the required reasoned explanation for NMFS’s conclusion that the same post-2050 climate projections are now reliable in its ringed seal decision. *See Village of Kake*, 795 F.3d at 967.

In addition, the Federal Defendants assert that “NMFS reasonably accounted for the variation in model predictions past mid-century.” Fed.Op.Br. at 46 (relying on Wang and Overland (2009)). This purported explanation also fails because, in both the spotted and ringed seal decisions, NMFS relied on the Wang and Overland (2009) study to identify the subset of climate models with suitable capabilities, and used the A1B (medium) and A2 (high) emissions scenarios to

³⁷ Compare SER 526 (“The IPCC has produced four assessment reports that represent syntheses of the best available and most comprehensive scientific information on climate change to date.”) (Spotted Seal Status Review).

³⁸ Compare 75 Fed. Reg. at 65,243 (“The best available information indicates that . . . a continued warming trend would be expected through mid-century and beyond (IPCC, 2007).”) (Spotted Seal Final Rule); *see also* ER 089 (FR) (NMFS states that, in both the spotted and ringed seal listing analyses, it “noted that . . . projections of air temperatures consistently indicate that warming will continue throughout the century,” and “the trend is clear and unidirectional.”).

represent the range of variability. *Compare* ER 089 (FR), *and* Fed.Op.Br. at 47-48, *with* SER 530-32 (Spotted Seal Status Review). Because NMFS utilized the same underlying scientific studies and modeling methodology to address variations in the post-2050 climate projections, this justification does not explain the contradictory conclusions underlying the change in foreseeable future.

Finally, the Federal Defendants assert that NMFS's "reliance on the IPCC AR4 projections were bolstered by a recent study by Douglas (2010)." Fed.Op.Br. at 43. NMFS states that this study noted that the observed rate of sea ice loss has been greater than most IPCC-recognized models, suggesting that the projections of sea ice decline within this century may be conservative.³⁹ ER 089 (FR). In the spotted seal listing, NMFS also recognized that sea ice loss is occurring faster than projected in the IPCC models. SER 527 ("Arctic sea ice is on faster track for loss compared to these projections.") (Spotted Seal Status Review). Thus, reliance on the Douglas study is unavailing because NMFS previously made this same observation when concluding that the foreseeable future did not extend past 2050.

The Federal Defendants' purported justifications do not explain NMFS's contradictory conclusions regarding the reliability of the IPCC climate projections, and fail to explain its decision to extend the foreseeable future beyond 2050. Just

³⁹ The Status Review and the Proposed Rule do not refer to or rely on the Douglas (2010) study, and NMFS refers to it in the Final Rule only as additional support for this already-established observation.

as in *Village of Kake*, NMFS relied on the same data and the same purported justifications in both its spotted and ringed seal listing decisions, yet reached contradictory conclusions regarding the reliability of the climate projections. Because NMFS failed to provide the requisite reasoned explanation for reversing its decision, NMFS's selection of a foreseeable future extending to 2100 was arbitrary, capricious, and without a rational basis.

B. NMFS Failed to Meet Its Burden to Show That the Abundant Population of Arctic Ringed Seals Will Be on the Brink of Extinction in the Foreseeable Future as Required by the ESA.

NMFS acknowledges that it is required to “consider the status of the species both in the present and through the foreseeable future” to determine whether the Arctic ringed seal qualifies as threatened.⁴⁰ ER 094 (FR) (emphasis added). The standard for listing a threatened species requires that any habitat-related threat makes it “likely” that the Arctic ringed seal will be on “the brink of extinction” in the foreseeable future. *In re Polar Bear Endangered Species Act Listing & § 4(d)*

⁴⁰ In *AOGA v. Pritzker*, the Court stated that the ESA does not require NMFS to “demonstrate the ‘magnitude’ of a threat to a species’ future survival” to support a threatened listing. 840 F.3d at 684. The Panel’s decision does not resolve the issue here, and, in any event, the Northern Alaska Plaintiffs respectfully submit that this issue was not correctly decided in *AOGA v. Pritzker*. *See also* AOGA.Resp.Br. § VII.B.2. For the Arctic ringed seal, NMFS failed to demonstrate that future habitat conditions will likely cause the population to reach the statutory threshold (“so depleted in numbers that they are in danger of or threatened with extinction”) for a threatened listing in the foreseeable future. *See* 16 U.S.C. § 1531(a)(2).

Rule Litig., 794 F. Supp. 2d 65, 89 & n.27 (D.D.C. 2011), *aff'd on other grounds*, 709 F.3d 1 (D.C. Cir. 2013). The Federal Defendants assert that NMFS's decision to list the Arctic ringed seal "rests on the projected losses of sea-ice and snow cover . . . and NMFS's knowledge of the significance of sea ice and on-ice snow cover to essential life-history functions of the Arctic ringed seal." Fed.Op.Br. at 52-53. There is nothing in the Status Review or elsewhere in the administrative record that demonstrates the population of millions of Arctic ringed seals will become so depleted in the future that a threatened listing was warranted.⁴¹

(1) The Record Is Devoid of Any Evidence Demonstrating That Any Loss of Habitat Will Actually Threaten the Ringed Seal Population with Extinction.

The Federal Defendants argue that "projected changes in snow cover and sea ice will lead to increased mortality, making it likely that the species will be in danger of extinction by the end of the century." Fed.Op.Br. at 53. However, as recognized by this Court and others, simply identifying the loss of suitable habitat is not sufficient to uphold a listing determination. 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

⁴¹ 16 U.S.C. § 1531(a)(2) (ESA applies to those species "so depleted in numbers that they are in danger of or threatened with extinction."); S. Rep. No. 93-307, at 3 (threatened classification "gives effect to the Secretary's ability to forecast population trends") (emphasis added).

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 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) (emphasis added) (rejecting argument that projected loss of 82% of a species' range warranted listing); *see also Lubchenco*, 758 F. Supp. 2d at 955 (“[A] downward trend in habitat by itself is not sufficient to establish that a species should be listed under the ESA.”).

Pursuant to this authority, projections of sea ice and snow-cover decline and assumptions of corresponding mortality, without an analysis of the consequences of those threats and trends, do not provide a sufficient basis to justify NMFS's decision to list a species.⁴² Yet this is exactly what NMFS did—list the Arctic ringed seal as threatened based exclusively on a projected loss of habitat. NMFS stated that it “primarily evaluated important habitat features” as the basis for listing the Arctic ringed seal. ER 074 (FR). Specifically, NMFS relied on the projected decline of April snow cover by 2100, which would purportedly reduce suitable habitat to a portion of the central Arctic, most of the Canadian Archipelago, and a

⁴² ER 159 (SR) (“Determining whether a species is threatened, therefore, requires consideration of the time frame over which the population status can be said to be ‘foreseeable’, in the sense of a credible prediction of the likely outcome.”) (emphasis added).

few other areas. ER 076 (FR). In its opening brief, the Federal Defendants fail to identify any analysis of the species' response to this threat or the degree to which the population status of the Arctic ringed seal will be affected within the "foreseeable future." Instead, the Federal Defendants merely reiterate how speculative predictions of habitat loss will purportedly pose a threat to the ringed seal.⁴³ Fed.Op.Br. at 53-59. NMFS was required (but failed) to demonstrate a corresponding impact on the health and status of the Arctic ringed seal population to support its threatened determination.

The Final Rule is fatally flawed because NMFS repeatedly acknowledges that it lacked the requisite scientific data to assess how the Arctic ringed seal population will respond to the purported threat posed by habitat changes.⁴⁴ For example, NMFS stated that: (1) data on ringed seal abundance and trends were "unavailable or imprecise," ER 074 (FR) (emphasis added); (2) there was "little basis for quantitatively linking projected environmental conditions or other factors to ringed seal survival or reproduction," *id.* (emphasis added); (3) "[d]ata were not available to make statistically rigorous inferences how Arctic ringed seals will

⁴³ The Federal Defendants reference studies regarding the localized impacts of hypothermia and predation due to inadequate snow cover for lair formation. However, the administrative record contains no study correlating these threats to an effect on the overall population status of the Arctic ringed seal throughout its range such that it would reach the threshold for a threatened listing.

⁴⁴ *See also* AOGA.Resp.Br. at § VII.B.1.

respond to habitat loss over time,” ER 094 (FR) (emphasis added); and (4) the “precise extent and timing of these changes is uncertain.”⁴⁵ ER 077 (FR) (emphasis added). Furthermore, echoing NMFS’s own statements, several peer reviewers also concluded that the available scientific data do not support the Arctic ringed seal listing:

- “The BRT has invested considerable effort in examining external factors and potential impacts on ringed seals, but it has not invested any similar effort in evaluating how ringed seals might respond. One could argue that this is highly speculative, but then one could also state the evaluation of external factors, particularly beyond 2050 is similarly speculative.” SER 138 (Hammill) (emphasis added).
- “[T]here is relatively little data on how these habitat effects are actually influencing longer-term reproductive potential and population dynamics. This is an important data gap that needs to be acknowledged.” SER 150-51 (Sjare) (emphasis added).
- “Trying to predict the response of seals to environmental change so far into the future increases the uncertainty beyond what is reasonable.” SER 049 (Quakenbush) (emphasis added).

⁴⁵ ER 161 (SR) (“The demographic, ecological, and evolutionary responses of ringed seals to threats from a warming climate are, in most cases, difficult to predict, even though future warming is highly likely to continue. The difficulty stems both from limited knowledge of the species’ current status (i.e., population density, trends, and vital rates) and its resilience to the effects of climate change. . . . [T]he data on size and trends of most of the populations are imprecise, especially in the Arctic and Okhotsk subspecies, limiting quantitative predictions of the impact of projected environmental conditions on ringed seal survival or reproduction.”).

Given this lack of data and inherent uncertainty, NMFS could not make the requisite “reliable predictions” about the future population status of the species. *See* SER 163 (M-Opinion).

Accordingly, even if the threat associated with habitat changes is foreseeable (which it is not), NMFS lacked the ability to provide a rational connection between this threat and a corresponding effect on the future population status of the Arctic ringed seal. Without this data, NMFS had no basis to determine whether the species will likely be on the brink of extinction in the future for purposes of a threatened listing under the ESA. Because the administrative record lacks the requisite analysis regarding the future population status of the Arctic ringed seal, the Final Rule is arbitrary, capricious, and lacks a rational basis.

(2) The BRT’s Assessment Does Not Provide a Rational Basis for Listing the Arctic Ringed Seal as Threatened.

The Federal Defendants argue that NMFS reasonably relied on the BRT’s demographic risk analysis (the “assessment”) conducted as part of the Status Review as support for the listing determination.⁴⁶ Fed.Op.Br. at 60-64. However, NMFS concedes that it lacks the data to make “statistically rigorous inferences” about how the Arctic ringed seals will respond to habitat changes over time. ER

⁴⁶ The Federal Defendants assert that the purpose of the BRT’s assessment is to “determine the magnitude of the impact of sea ice and snow cover loss, and other threats, on the Arctic subspecies of ringed seal, at present and in the foreseeable future.” Fed.Op.Br. at 60 (emphasis added).

094 (FR). Instead, the BRT's assessment merely evaluated the risk to persistence through four demographic categories (abundance, productivity, spatial structure, and diversity). ER 081 (FR); ER 310 (SR) (scores of 2.8 to 4.0 out of 5.0).⁴⁷ The assessment does not provide a rational basis for the listing decision.⁴⁸

As a threshold matter, the BRT's analysis of future risks is replete with references to uncertainties, unknowns, and unavailable information. ER 298-307 (SR). One peer reviewer explained that “[c]urrent information is also very poor and current demographic information for the different populations throughout their range is also for the most part poor to non-existent. Consequently, there is considerable uncertainty associated with all of these parameters (past and current population size, reproductive rates, mortality rates, productivity).” SER 135 (Hammill) (emphasis added). Other than reiterating vague risks associated with projected habitat alterations in the future, the BRT's assessment fails to support NMFS's conclusion that this future threat is likely to cause the Arctic ringed seal to become an endangered species in the foreseeable future.⁴⁹

⁴⁷ SER 141 (Hammill) (“I feel that the timeframe for ‘foreseeable’ future is incorrect, as outlined above. Within that context none of the demographic characteristics can be assigned any elevated risk level, with the exception of the Saima seal.”) (emphasis added).

⁴⁸ See also AOGA.Resp.Br. § VII.C.3.

⁴⁹ In the assessment, the BRT relied on a set of questions to guide their considerations of the broader demographic risk categories of abundance,

Regarding the risk to the productivity of the Arctic ringed seal, NMFS conclusorily found that the risk was “high,” ER 081 (FR), yet the BRT’s assessment failed to provide any explanation supporting this determination. To the contrary, the assessment explicitly and repeatedly acknowledges the lack of information for this risk category, stating: (1) “[t]he population trend is unknown for Arctic ringed seal”; (2) “[a]verage productivity is unknown for the Arctic subspecies”; (3) “[c]hanges in demographic or reproductive traits of Arctic ringed seals are not known to pose risks”; and (4) “[t]here are no good estimates of growth rate or productivity-related parameters for Arctic ringed seal.” ER 301-03 (SR) (emphasis added). As these are the only explanations provided for demographic risks associated with productivity, the administrative record provides no support (neither qualitative nor quantitative) for the conclusion that the Arctic ringed seal is at “high” risk for extinction based on this factor.

The BRT’s analysis of the risk to spatial structure likewise falls short. NMFS summarily concluded that the risk was “high,” but again failed to provide any meaningful explanation supporting this determination. ER 081 (FR). Reviewers of the draft Status Review criticized these justifications as overstating the impacts based on the available data. SER 503 (“overstated based on available productivity, spatial structure and diversity. ER 298 (SR). The majority of these questions focus only on “imminent risk,” and do not consider risks through the foreseeable future.

data”); SER 504 (“[O]verstated. Global snowfall models are not operating at the same scale as a seal’s would respond to. . . .”); SER 580-81 (“[g]iven the uncertainties, I have questions about statements such as these without some clear qualifications”). Indeed, the assessment notes that dispersal rates are “unknown,” and that “[i]mportant aspects of the Arctic subspecies’ spatial processes need to be resolved.” ER 304-05 (SR) (emphasis added).

With respect to abundance and diversity risks to the Arctic ringed seal, NMFS concluded that both of these demographic risks were “moderate.” ER 081 (FR). However, the BRT’s assessment fails to provide a sufficient rationale to support this conclusion and relies on uncertainty and speculation. For example, in discussing abundance of Arctic ringed seals, the assessment states that “a population of this size is not likely to experience extreme fluctuations that could lead to depensation[,] . . . [t]he threshold for depensation in seals, however, is unknown.” ER 299 (SR) (emphasis added). Similarly, for diversity, the assessment states that “[i]t is unlikely that current levels of genetic diversity among Arctic ringed seals pose a significant risk. We cannot say whether that level of genetic diversity will be adequate in the face large environmental changes facing the subspecies. Important aspects of population structure among the Arctic need to be resolved.” ER 307 (SR) (emphasis added).

Finally, in a belated attempt to justify its listing decision, the Federal Defendants also argue that the impacts of diminished sea ice on molting and on ringed seal prey and prey composition provide additional support for the listing. Fed.Op.Br. at 61-63. These arguments are merely impermissible *post hoc* rationalizations that NMFS did not rely on as justifications in the Final Rule.⁵⁰ Contrary to these assertions, NMFS focused on the adequacy of snow cover for subnivean lairs, and did not identify loss of sea ice for molting as a significant effect or impact on the species. ER 075-077 (FR) (summarizing effects of changes in sea ice and snow cover and potential impacts to species); ER 080-081 (FR) (summary of demographic risks). Regarding the potential effects of changes in prey, the Federal Defendants concede that NMFS could not assess these impacts on the Arctic ringed seal. Fed.Op.Br. at 63 (“outcome . . . cannot be specified”; “extent and timing of these changes is uncertain”; “there is not a broad scientific consensus on the general direction of the expected trends”). Thus, the Federal Defendants’ *post hoc* rationalizations are unavailing and must be rejected.

Based on the limited explanation provided, and the high degree of associated uncertainty, the BRT’s assessment does not support NMFS’s conclusion to list the

⁵⁰ *Or. Natural Desert Ass’n*, 625 F.3d at 1120 (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action.” (citation omitted)); *Humane Soc’y*, 626 F.3d at 1050 (“post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself.”).

Arctic ringed seal as threatened. *See also* SER 142 (Hammill) (the analyses “fail to consider demographic risks in an impartial way”; and “the information presented in the review does not support the Demographic [R]isk Assessments for the various subspecies.”). Neither NMFS nor the Status Review provide any explanation or analysis demonstrating that a risk to persistence, even if reliably predicted, would have a corresponding effect on the population status of the Arctic ringed seal such that the species is likely to be “on the brink of extinction” within the foreseeable future. Lacking the requisite support in the administrative record, NMFS’s decision to list the Arctic ringed seal as a threatened species was impermissibly based on speculation and, therefore, arbitrary and capricious and without a rational basis.

C. Contrary to the Federal Defendants’ Arguments, the District Court Properly Applied the ESA and Concluded That NMFS’s Decision to List the Arctic Ringed Seal Is Arbitrary and Capricious.

In vacating the Final Rule, the District Court correctly concluded that the evidence in the administrative record failed to support NMFS’s decision to list the Arctic ringed seal. To be listed as “threatened,” the ESA requires that NMFS demonstrate that the species is likely to become “in danger of extinction” within the “foreseeable future.”⁵¹ 16 U.S.C. § 1532(6), (20). Applying this standard, and

⁵¹ As NMFS explained, “[t]he foreseeability of a species’ future status is case-specific and depends upon both the foreseeability of threats to the species and foreseeability of the species’ response to those threats.” ER 073 (FR).

based on its review of the administrative record, the District Court found that “forecasting more than some 80 years into the future is simply too speculative and remote,” and that no “serious threat of a reduction in the population of the Arctic ringed seal, let alone extinction, exists prior to the last decade of the 21st century.” ER 028-029. Thus, the District Court concluded that “in the absence of evidence of the current population level, the lack of projected decline in that population, and the failure to define an extinction threshold, the evidence is insufficient to support a finding that the Arctic ringed seals are threatened with extinction in the foreseeable future.” ER 007.

The Federal Defendants argue that the District Court misapplied the ESA Section 4 requirement that listing decisions be based “solely on the basis of the best scientific and commercial data available.” Fed.Op.Br. at 26-34; CBD.Op.Br. at 22-27. Specifically, the Federal Defendants contend that the District Court erred by requiring NMFS to: (1) “quantif[y] the predicted population reduction and define[] an extinction threshold,” Fed.Op.Br. at 26-33; CBD.Op.Br. at 24-27; and (2) “undertake additional research,” Fed.Op.Br. at 33-34; CBD.Op.Br. at 23-24. The Federal Defendants’ assertions are erroneous, mischaracterize the District Court’s conclusions, and fail to acknowledge the lack of supporting evidence in the administrative record.

Contrary to the Federal Defendants' argument, there is nothing in the District Court's decision imposing any requirement that NMFS quantify the potential population reduction, establish an extinction threshold, or conduct additional scientific studies. As explained by the District Court:

NMFS essentially acknowledged that it lacks sufficient data on the resilience of Arctic ringed seal to cope with climatic changes, or to define an extinction threshold for ringed seals and assessing the probability of reaching that threshold within a specified time prior to the end of the century. NMFS also acknowledged that, because the existing body of information regarding ringed seal population and trends was limited, additional studies were needed to understand the population dynamics and habitat of the ringed seal.

ER 028 (footnotes omitted); *see also* ER 028-029 (“NMFS acknowledges that it lacks any reliable data as to the actual impact on the ringed seal population as a result of the loss of sea-ice.”). Instead of imposing additional research or quantification requirements, the District Court merely recognized and reiterated the existing scientific deficiencies that NMFS itself acknowledged in the Final Rule. *Otay Mesa Prop., L.P. v. U.S. Dep’t of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (“the absence of a requirement for the Service to collect more data on its own is not the same as an authorization to act without data to support its conclusions, even acknowledging the deference due to agency expertise”).

Although the Federal Defendants are correct that they are entitled to use the best available science, the Final Rule remains deficient because the existing scientific data are speculative and do not support NMFS's conclusion to list the

Arctic ringed seal as a threatened species.⁵² As the District Court held, “an unknown, unquantifiable population 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.” ER 029 n.77; *see also* ER 007 (“the evidence is insufficient to support a finding that the Arctic ringed seals are threatened with extinction in the foreseeable future.”). The adequacy of the science is not at issue; instead, the fatal flaw is that NMFS did not comply with the APA and the ESA because it failed to demonstrate a rational connection between the limited scientific data in the administrative record and its decision to list the Arctic ringed seal. *Greater Yellowstone Coalition*, 665 F.3d at 1028 (“[i]t is not enough for the Service to simply invoke ‘scientific uncertainty’ to justify its action.”). Because NMFS lacked the requisite information to support its determination, the District Court properly concluded that the Final Rule is arbitrary, capricious, and without a rational basis.

⁵² In *AOGA v. Pritzker*, this Court stated that the “ESA does not require NMFS to make listing decisions only if underlying research is ironclad and absolute.” *AOGA v. Pritzker*, 840 F.3d at 680. However, the U.S. Supreme Court has stated that “[t]he obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.” *Bennett*, 520 U.S. at 176 (emphasis added). We contend that the listing decision at issue here was “implemented haphazardly, on the basis of speculation.”

D. Contrary to CBD’s Argument, This Court’s Decision in *AOGA v. Pritzker* Does Not Resolve the Issues in This Case.

CBD argues that this Court’s decision in *AOGA v. Pritzker* is “directly on point and suggests a similar result for Arctic ringed seals.” CBD.Op.Br. at 6. On the contrary, this Court’s prior decision does not govern here because that case involved the listing of a different species (the bearded seal) based on a different administrative record. And significantly, the Court did not address several of the issues underlying NMFS’s flawed decision to list the Arctic ringed seal.

In *AOGA v. Pritzker*, the Court found that the IPCC climate models reasonably supported NMFS’s decision to list the bearded seal as a threatened species based on projections of sea ice decline through the end of the century. 840 F.3d at 679-81. Despite acknowledging the volatility and uncertainty of the long-term climate projections, the Court deferred to NMFS’s reliance on them, in part, because the “majority of independent peer reviewers agreed that . . . [they] were based on the ‘best scientific and commercial data available.’” *Id.* at 680. For the Arctic ringed seal, NMFS relied on future projections of snow cover (which were not at issue for the bearded seal) that were almost unanimously criticized by the peer reviews as inadequate and not suitable to support the listing determination. *See supra* § VII.A(1).

Additionally, the Court upheld the bearded seal listing based on NMFS’s decision to revise its interpretation of the “foreseeable future” to rely on a threat-

specific approach. *AOGA v. Pritzker*, 840 F.3d at 682. The Court concluded that the justification provided in the Department of Interior Solicitor’s M-Opinion validated NMFS’s adoption of an end-of-century foreseeable future.⁵³ *Id.* The Court’s decision with respect to bearded seals is readily distinguishable. Here, NMFS concedes that it used the same threat-specific approach in both its spotted seal and ringed seal listing decisions. ER 088 (FR). For the spotted seal, NMFS concluded that the same underlying climate projections were too variable to support a foreseeable future beyond 2050.⁵⁴ In extending the foreseeable future to 2100 in its ringed seal decision, NMFS failed to provide the requisite reasoned explanation for its contradictory factual conclusions regarding the reliability and variability of climate projections after 2050. *E.g.*, *Village of Kake*, 795 F.3d at 968; *Humane Soc’y*, 626 F.3d at 1049; *see supra* § VII.A(2). The Panel of this Court that decided *AOGA v. Pritzker* did not conduct this analysis.

⁵³ The Court stated that “[t]he Solicitor’s advisory letter acknowledges that its interpretation represents a change in agency policy, and it provides a thorough and reasoned explanation for its recommendation that the Service adopt a data-driven threat analysis for future harm. The letter also states explicitly that the policy change seeks to conform to federal appellate decisions requiring ESA analyses to adhere to the statute’s ‘best data available’ standard.” *AOGA v. Pritzker*, 840 F.3d at 682.

⁵⁴ 75 Fed. Reg. at 65,240 (“[w]e have not determined here that 2100 constitutes ‘the foreseeable future.’ There is too much variability beyond 2050 to make that determination.”).

Finally, in its bearded seal decision, the Court stated that NMFS is not required “to calculate or otherwise demonstrate the ‘magnitude’ of a threat to a species’ future survival.” *AOGA v. Pritzker*, 840 F.3d at 684. The Northern Alaska Plaintiffs respectfully submit that this issue was not correctly decided.⁵⁵ Notwithstanding, NMFS has conceded that it is required to “consider the status of the species both in the present and through the foreseeable future” to determine whether the Arctic ringed seal qualifies as threatened.⁵⁶ ER 094 (FR) (emphasis added); ER 073 (FR) (listing depends, in part, on the “foreseeability of the species’ response” to identified threats). Based on the administrative record in this case, NMFS failed to demonstrate that a population of millions of ringed seals will become in danger of extinction within the foreseeable future. *See supra* § VII.B.

VIII. CONCLUSION

The ESA contains explicit statutory criteria for listing species, and the administrative record fails to support NMFS’s decision to list the Arctic ringed seal. Instead, the consequences of NMFS’s listing decision fall squarely on the Alaska Native people, and the resulting regulatory and economic burdens threaten

⁵⁵ *See* AOGA.Resp.Br. § VII.B.2.

⁵⁶ SER 166 (“[b]ecause the predictions relate to the status of the species, the data relevant to an analysis of foreseeable future are those that concern the future population trends and threats to the species, and the likely consequences of those threats and trends.”) (M-Opinion) (emphasis added).

their ability to persist in the Arctic. Accordingly, for the foregoing reasons, the District Court's judgment, including vacatur and remand of the Final Rule, should be affirmed.

DATED this 23rd day of March, 2017.

VAN NESS FELDMAN, LLP

s/ Matthew A. Love

Matthew A. Love

Michael F. McBride

Tyson C. Kade

*Attorneys for Plaintiffs-Appellees North Slope Borough;
Arctic Slope Regional Corporation; NANA Regional
Corporation, Inc.; Northwest Arctic Borough; Iñupiat
Community of the Arctic Slope*

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Northern Alaska Plaintiffs state that they are not aware of any related cases pending before this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-35380, 16-35382

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) separately represented parties; (2) a party or parties filing a single brief in response to multiple briefs; or (3) a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant

s/ Matthew A. Love

Date

Mar 23, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 23, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tyson C. Kade
Tyson C. Kade

*Attorney for Plaintiffs-Appellees North
Slope Borough; Arctic Slope Regional
Corporation; NANA Regional Corporation,
Inc.; Northwest Arctic Borough; Inupiat
Community of the Arctic Slope*

ADDENDUM

Except for the following, all applicable statutes are contained in the
Addendum to the Defendants-Appellants' Opening Brief:

STATUTES

5 U.S.C. § 706	A
16 U.S.C. § 1531(a)(2)	B
43 U.S.C. § 1601(b)	C
43 U.S.C. § 1606(r)	D

5 U.S.C. § 706. Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1531. Congressional Findings and Declaration of Purposes and Policy.

(a) Findings

The Congress finds and declares that—

...

- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

.....

43 U.S.C. § 1601. Congressional Findings and Declaration of Policy.

Congress finds and declares that—

...

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

.....

43 U.S.C. § 1606. Regional Corporations.

...

(r) Benefits for shareholders or immediate families

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.