Nos. 16-35380 and 16-35382

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA OIL AND GAS ASSOCIATION, et al.,
Plaintiffs-Appellees,

v.

PENNY PRITZKER, in her capacity as U.S. Secretary of Commerce, et al.,
Defendants-Appellants,

and

CENTER FOR BIOLOGICAL DIVERSITY,
Intervenor-Defendant-Appellant.

On Appeal from the U.S. District Court, District of Alaska
Case Nos. 4:14-cv-00029-RRB, 4:15-cv-00002-RRB and 4:15-cv-00005-RRB

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES ALASKA OIL AND GAS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE

Ryan P. Steen
Jeffrey W. Leppo
Jason T. Morgan
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101
Tel: (206) 386-7641
Fax: (206) 386-7500

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel state that Plaintiffs-Appellees Alaska Oil and Gas Association and American Petroleum Institute are non-profit trade associations that have no parent corporations. Neither of these non-profit trade associations issues stock and, accordingly, no publicly held corporation owns 10 percent or more of their stock.

TABLE OF CONTENTS

Page

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. Ringed Seal Biology, Distribution, And Abundance 5

B. Statutory Context—The Endangered Species Act 8

C. The Ringed Seal Listing Decision 10

D. District Court Proceedings 12

V. SUMMARY OF THE ARGUMENT 13

VI. STANDARD OF REVIEW 15

VII. ARGUMENT 17

A. Why This Case Matters 17

B. NMFS Unlawfully Speculated That The Arctic Ringed Seal Is Likely To Be On The Brink Of Extinction By The End Of The Century 22

1. NMFS did not and could not forecast the magnitude or direction of the adverse impact, if any, to the Arctic ringed seal species 24

2. The Ninth Circuit's opinion in the bearded seal listing litigation is not controlling 32

C. NMFS's Arguments Misunderstand And Misstate The Record And Applicable Precedents 38

1. This is not a "best available science" case 38

2. This is not a dispute over the use of qualitative versus quantitative information.....41

3. The BRT's risk ratings are no substitute for the required analysis.....43

VIII. CONCLUSION.....47

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Oil & Gas Ass'n v. Pritzker,
840 F.3d 671 (9th Cir. 2016) .....passim

In re Am. W. Airlines, Inc.,
217 F.3d 1161 (9th Cir. 2000) 30

Ariz. Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 15

Bennett v. Spear,
520 U.S. 154 (1997).....passim

Cal. Energy Comm'n v. Dep't of Energy,
585 F.3d 1143 (9th Cir. 2009) 16

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior,
344 F. Supp. 2d 108 (D.D.C. 2004).....40

Cappaert v. United States,
426 U.S. 128 (1976).....18

Ctr. for Biological Diversity v. Lubchenco,
758 F. Supp. 2d 945 (N.D. Cal. 2010).....19, 23, 34

Defenders of Wildlife v. Norton,
258 F.3d 1136 (9th Cir. 2001) 23, 34

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009).....16

Glacier Fish Co. v. Pritzker,
832 F.3d 1113 (9th Cir. 2016) 31

Greater Yellowstone Coal., Inc. v. Servheen,
665 F.3d 1015 (9th Cir. 2011) 40

Harrell v. 20th Century Ins. Co.,
934 F.2d 203 (9th Cir. 1991) 47

Home Builders Ass'n of N. Cal. v. FWS,
529 F. Supp. 2d 1110 (N.D. Cal. 2007) 42, 43

Idaho Sporting Cong., Inc. v. Rittenhouse,
305 F.3d 957 (9th Cir. 2002) 31

Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries,
657 F.3d 988 (9th Cir. 2011) 17

Knight v. Comm'r,
552 U.S. 181 (2008).....17

Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008) 47

Lands Council v. McNair,
629 F.3d 1070 (9th Cir. 2010) 31

McDonnell Douglas Corp. v. U.S. Dep't of the Air Force,
375 F.3d 1182 (D.C. Cir. 2004).....16

Michigan v. EPA,
135 S. Ct. 2699 (2015).....15

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....15, 40

Nat'l Ass'n of Home Builders v. Norton,
340 F.3d 835 (9th Cir. 2003) 42

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,
524 F.3d 917 (9th Cir. 2008) 15

Nw. Coal. for Alternatives to Pesticides v. U.S. EPA,
544 F.3d 1043 (9th Cir. 2008) 16

Or. Nat. Res. Council v. Daley,
6 F. Supp. 2d 1139 (D. Or. 1998) 22, 34

Otay Mesa Prop., L.P. v. U.S. Dep't of Interior,
646 F.3d 914 (D.C. Cir. 2011).....40, 42

In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. - MDL No. 1993,
709 F.3d 1 (D.C. Cir. 2013).....15, 29, 42

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978).....18

Trout Unlimited v. Lohn,
645 F. Supp. 2d 929 (D. Or. 2007).....19, 39

TRW Inc. v. Andrews,
534 U.S. 19 (2001).....33

Tucson Herpetological Soc'y v. Salazar,
566 F.3d 870 (9th Cir. 2009).....18

United States v. Scott,
705 F.3d 410 (9th Cir. 2012).....31

United States v. Tohono O'Odham Nation,
563 U.S. 307 (2011).....37

Ursack Inc. v. Sierra Interagency Black Bear Grp.,
639 F.3d 949 (9th Cir. 2011).....16

W. Watersheds Project v. Ashe,
948 F. Supp. 2d 1166 (D. Idaho 2013).....20, 27, 28

Statutes

5 U.S.C. § 704.....15

5 U.S.C. § 706(2)(A).....15

16 U.S.C. § 1362(1)(C).....10, 12

16 U.S.C. § 1362(19)(C).....10, 12

16 U.S.C. § 1531(a)(2).....8, 17

16 U.S.C. § 1531(b)-(c).....20

16 U.S.C. § 1532(3).....20

16 U.S.C. § 1532(5)(A).....20

16 U.S.C. § 1532(6).....8, 32

16 U.S.C. § 1532(20).....passim

16 U.S.C. § 1533(a).....8

16 U.S.C. § 1533(a)(1).....32

16 U.S.C. § 1533(a)(3)(A).....10

16 U.S.C. § 1533(b).....9

16 U.S.C. § 1533(b)(1)(A).....44

16 U.S.C. § 1533(f).....10

16 U.S.C. § 1536(a)(2).....10

Regulations

62 Fed. Reg. 41,016 (July 31, 1997).....35

63 Fed. Reg. 54,972 (Oct. 13, 1998).....35

77 Fed. Reg. 76,706 (Dec. 28, 2012).....2

79 Fed. Reg. 10,236 (Feb. 24, 2014).....9

79 Fed. Reg. 11,053 (Feb. 27, 2014).....9

79 Fed. Reg. 73,010 (Dec. 9, 2014).....20

79 Fed. Reg. 74,954 (Dec. 16, 2014).....35

79 Fed. Reg. 77,998 (Dec. 29, 2014).....35

79 Fed. Reg. 7136 (Feb. 6, 2014).....9

79 Fed. Reg. 8656 (Feb. 13, 2014).....9

80 Fed. Reg. 55,286 (Sept. 15, 2015).....35

80 Fed. Reg. 76,068 (Dec. 7, 2015).....35

81 Fed. Reg. 22,710 (Apr. 18, 2016) 35

Legislative History

119 Cong. Rec. S14509 (daily ed. July 24, 1973) 20, 33

H.R. Rep. No. 97-567, pt. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807.....18

H. Rep. No. 93-412 (1973), *reprinted in* 1 Cong. Research Serv., A Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980, Serial No. 97-6 (1982).....18

S. Rep. No. 93-307 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989 .....9, 24, 33

Other Authorities

Alaska Marine Mammal Stock Assessments, 2013 (July 2014), http://www.nmfs.noaa.gov/pr/sars/pdf/ak2013_final.pdf.....12

IUCN, The IUCN Red List of Threatened Species, Canis Iatrans, http://www.iucnredlist.org/details/3745/0 7

IUCN, The IUCN Red List of Threatened Species, http://iucnredlist.org/about/introduction.....7

IUCN, The IUCN Red List of Threatened Species, http://www.iucnredlist.org/search.....7

IUCN, The IUCN Red List of Threatened Species, Odocoileus Virginianus, http://www.iucnredlist.org/details/42394/0 8

M. Simpkins, NOAA Fisheries Serv., Marine Mammals (Oct. 19, 2009), Table M1, available at: ftp://ftp.oar.noaa.gov/arctic/documents/ArcticReportCard_full_report2009.pdf.....5

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).....22, 26

Reply Brief, *Black's Law Dictionary* (10th ed. 2014) 47

Speculate, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/speculate.....31

United Nations Terminology Database, http://unterm.un.org/UNTERM/Display/Record/UNHQ/NA?OriginalId=b2c9bfe4efc5e4fc852578d40063af0a (last visited Mar. 22, 2017) 45

I. INTRODUCTION

There are, literally, millions of Arctic ringed seals. This subspecies (*Phoca hispida hispida*) presently exists in healthy and huge abundance throughout all of its immense historical range, with a circumpolar distribution spanning the Arctic Basin and its adjacent seas. It is undisputed that there is no evidence of any past or present adverse impact to the Arctic ringed seal population attributable to climate change.

Notwithstanding these facts, the National Marine Fisheries Service ("NMFS") listed the Arctic ringed seal as a "threatened species" under the federal Endangered Species Act ("ESA") based on its speculation about theoretical, end-of-century impacts to the species that are of a magnitude that NMFS admits is scientifically impossible to determine.[1] Such speculation is no basis for listing a species under the ESA.

When, as here, the best available data are uncertain and inconclusive, NMFS must decline to list the species rather than act upon precautionary surmise. To be sure, if NMFS can list a presently healthy and abundant species based solely upon standardless conjecture about what may or may not be the species' status at the end of the century, then there are no rational limits on whether any (or all) species may

[1] The Federal Defendants-Appellants are referred to as "NMFS" in this brief.

be listed as "threatened." The ESA, the Administrative Procedure Act ("APA"), and common sense prohibit such an absurd result.

This consolidated litigation was brought by a comprehensive coalition of the Alaskan public bodies that govern and manage Alaska's Arctic region, the Alaska Native interests that have lived and subsisted in the Arctic for centuries, and the commercial interests that lease, explore, and develop nationally strategic oil and gas resources within and offshore of the Alaskan Arctic (the "Alaska Parties"). In the proceedings below, the Alaska Parties successfully challenged the final rule promulgated by NMFS to list the Arctic ringed seal as a "threatened species" under the ESA (the "Final Rule").[2]

The central premise of the claims asserted by the Alaska Parties is that there are essential and, therefore, legally fatal record and analytical gaps in NMFS's decision. Principally, there is no analysis in the record showing the extent to which the Arctic ringed seal subspecies will be affected by climate-related habitat conditions projected by NMFS to the year 2100. The Arctic ringed seal has survived and thrived for more than 13 million years through massive cycles of global heating and cooling (including ice-free climates). Yet NMFS assumed—without any analysis of the nature, direction, or magnitude of the risk posed by

[2] 77 Fed. Reg. 76,706 (Dec. 28, 2012) (ER71-104) (Final Rule ("FR")).

projected habitat changes—that the Arctic ringed seal is likely to be in danger of extinction by the year 2100. Without an analysis of the extent of the risk posed by climate change, there is no rational basis to conclude, as required by statute, that the Arctic ringed seal is likely to be in danger of extinction at the end of the century.

To be clear, the Alaska Parties are not asking the Court to resolve issues involving the science associated with climate change. The error in NMFS's decision is much more fundamental. NMFS has produced no analysis showing whether the response of this historically resilient species to habitat changes will be of a sufficient magnitude to make it likely that the species will be in danger of extinction by the year 2100. NMFS made its listing decision notwithstanding an indisputable record demonstrating that NMFS does not know where, when, or to what degree changes in Arctic habitat will actually impact the Arctic ringed seal subspecies. NMFS's failure to conduct the analysis required by the ESA listing provisions is fatal to the listing decision, stretches the ESA far beyond Congress's intent, and defies common sense.

Never before has a species that numbers in the millions, has existed for millions of years, and fully occupies its vast historical range been added to the ESA's list of threatened and endangered species. NMFS's precedential decision to list the Arctic ringed seal as a "threatened species" violates the ESA and the APA,

and undermines the very purpose of the ESA by diverting federal resources away from species that are actually in need of protection. This Court should affirm the judgment of the district court vacating and remanding the Final Rule to NMFS.

II. STATEMENT OF JURISDICTION

Plaintiffs-Appellees Alaska Oil and Gas Association and the American Petroleum Institute (the "Associations") agree with NMFS's Statement of Jurisdiction.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Final Rule is arbitrary and capricious because NMFS speculated that the projected effects of climate change are likely to cause the Arctic ringed seal subspecies to be in danger of extinction by the end of the century without a rational analysis of the magnitude of the projected impact on the species.

2. Whether NMFS's reliance upon an end-of-century foreseeable future renders the Final Rule arbitrary and capricious because NMFS and the U.S. Fish and Wildlife Service ("FWS") (collectively, the "Services") have previously concluded that the same data used for the same purpose was unreliable beyond mid-century and NMFS failed to provide a rational explanation for contradicting the Services' prior decisions.[3]

[3] With respect to the second issue, the Associations incorporate by reference the argument set forth in Section VII.A of the Answering Brief filed by the North (continued . . .)

IV. STATEMENT OF THE CASE

A. Ringed Seal Biology, Distribution, And Abundance

The ringed seal, a primitive carnivorous marine mammal that has existed as a distinct species for 13 million to 17 million years, is—by far—the most abundant of all the Arctic marine mammal species. ER121.[4] The species is resilient and adaptable, having survived through several global cycles of glaciations and ice-free periods due to its (i) wide distribution, which includes fresh, brackish, and saltwater environments; (ii) use of a variety of ice habitats, including shorefast and pack-ice; (iii) ability to make long movements; (iv) diverse diet; and (v) generally high levels of genetic diversity. ER154, 307-08. Ringed seals are the smallest and most numerous of the northern seals, and are adapted to remaining in ice-covered areas throughout the fall, winter, and spring by using the stout claws on their front flippers to maintain breathing holes in the ice. ER52.

Ringed seals are circumpolar and are found in all seasonally ice-covered seas of the Northern Hemisphere as well as certain freshwater lakes. ER52, 54

(. . . continued)
Slope Borough, Arctic Slope Regional Corporation, NANA Regional Corporation, Inc., Northwest Arctic Borough, and Iñupiat Community of the Arctic Slope (the "Northern Alaska Plaintiffs"). To reduce briefing duplication, the Associations' Answering Brief focuses solely on the first issue.

[4] *See* M. Simpkins, NOAA Fisheries Serv., Marine Mammals (Oct. 19, 2009), Table M1, available at: ftp://ftp.oar.noaa.gov/arctic/documents/ArcticReportCard_full_report2009.pdf

(Fig. 1). NMFS recognizes five ringed seal subspecies: Arctic ringed seal, Baltic ringed seal, Okhotsk ringed seal, Ladoga ringed seal, and Saimaa ringed seal. ER53-54. The Arctic ringed seal is the only ringed seal subspecies found within jurisdictional areas of the United States (*i.e.*, in state and federal waters adjacent to Alaska). ER54 (Fig. 1).[5] Although precise population data are unavailable, NMFS recognizes that the Arctic ringed seal is the most abundant ringed seal subspecies. ER55, 145. Its circumpolar distribution encompasses five large geographic regions: Greenland Sea and Baffin Bay, Hudson Bay, Beaufort Sea, Chukchi Sea, and the White, Barents, and Kara Seas. ER55, 54 (Fig. 1).

NMFS has concluded that Arctic ringed seals are "distributed throughout their range and number in the millions, are widely distributed and genetically diverse, and are not presently in danger of extinction." ER94 (FR), 305 (NMFS finding that "[t]here is no evidence that at current population levels the Arctic ringed seal is at risk due to a substantial change or loss of variation in life-history traits, population demography, morphology, behavior, or genetic characteristics"). Substantial information from Alaska Natives also indicates that the Arctic ringed seal population is healthy and numerous. *See* SER8, 35-36, 40. In addition,

[5] Although the Arctic ringed seal is a "subspecies," it is considered a "species" for ESA purposes and is therefore occasionally referred to in this brief as a "species."

despite the documented effects of climate change in the Arctic, including substantial reductions in summer sea ice, there have been no known resulting adverse impacts to the Arctic ringed seal species.[6]

Finally, consistent with the health, abundance, and distribution of Arctic ringed seals, the International Union for Conservation of Nature ("IUCN") lists the Arctic ringed seal as a species of "Least Concern." *See* SER127. The IUCN ranks the conservation status of species across a seven-category spectrum beginning at "Least Concern" and progressively increasing to "Near Threatened," "Vulnerable," "Endangered," "Critically Endangered," "Extinct in the Wild," and "Extinct." *See* IUCN, The IUCN Red List of Threatened Species, http://iucnredlist.org/about/introduction (last visited Mar. 22, 2017). For context, the Arctic ringed seal joins 40,919 other healthy species rated as "Least Concern" by the IUCN, including the ubiquitous coyote and white-tailed deer species.[7]

---

[6] *See*, *e.g.*, SER45 (scientific peer review comment: "The Alaska Department of Fish and Game has collected data on ringed seals for more than 40 years and this information indicates that the Arctic subspecies of ringed seal is currently doing as well or better than it has since the 1960s (before the effects of climate change were evident). For example, reproductive rate, age at maturity, pup survival, size at age, and blubber thickness all indicate that current conditions are good for ringed seals (Quakenbush et al. 2001a)."); *see also* SER55-126 (State of Alaska report).

[7] *See* IUCN, The IUCN Red List of Threatened Species, http://www.iucnredlist.org/search (last visited Mar. 22, 2017); IUCN, The IUCN Red List of Threatened Species, Canis Iatrans,

(continued . . .)

B. Statutory Context—The Endangered Species Act

Congress enacted the ESA to ensure the conservation of "species of fish, wildlife, and plants [that] have been so depleted in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2). Section 4(a) of the ESA requires the Secretary of Commerce and the Secretary of the Interior (collectively, "Secretary") to determine by regulation whether any species, subspecies, or distinct population segments are "threatened" or "endangered" based upon any one or more of five statutory factors. *Id.* § 1533(a).[8]

An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). 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). As Congress explained, the threatened classification is intended to "give[] effect to the Secretary's ability to forecast population trends by permitting

---

(. . . continued)
http://www.iucnredlist.org/details/3745/0 (last visited Mar. 22, 2017); IUCN, The IUCN Red List of Threatened Species, Odocoileus Virginianus, http://www.iucnredlist.org/details/42394/0 (last visited Mar. 22, 2017).

[8] The ESA is implemented through both NMFS (generally as to marine species) and FWS (generally as to terrestrial and fresh water species, but also polar bears, walrus, sea otters, and dugongs).

him to regulate these animals before the danger becomes imminent." S. Rep. No. 93-307, at 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2992.

Pursuant to Section 4(b) of the ESA, determinations of whether to list a species under Section 4(a) must be made based upon "the best scientific and commercial data available" after conducting a review of the status of the species. 16 U.S.C. § 1533(b). As the Secretary has often explained, "mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of endangered or threatened under the Act." 79 Fed. Reg. 11,053, 11,070 (Feb. 27, 2014).[9] Thus, to list a species as "threatened," the Secretary must determine that "the best available information" demonstrates that an identified threat will affect the population status of a species to such a degree that the species is likely to become "in danger of extinction."

The remaining provisions of the ESA principally apply to listed species and their designated critical habitat, and to actions that may affect them. Once a species has been listed under the ESA as "threatened" or "endangered," the

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

Services must designate critical habitat "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). The Services are also required to "develop and implement" a recovery plan for a listed species. *Id*. § 1533(f). In addition, all federal agency actions that may affect listed species or that may adversely modify critical habitat are subject to a lengthy and complex consultation process to assess whether the proposed action may "jeopardize" the species, or may destroy or adversely modify designated critical habitat. *Id.* § 1536(a)(2).[10]

C. The Ringed Seal Listing Decision

In May 2008, the Center for Biological Diversity ("CBD") petitioned NMFS to list the Arctic ringed seal as a threatened or endangered species under the ESA. *See* ER72 (FR). On December 28, 2012, NMFS issued the Final Rule, determining that the Arctic ringed seal is a "threatened species" under the ESA. ER71-104 (FR).

The only threat to the Arctic ringed seal species identified by NMFS as sufficient to support its ESA listing is the projected future loss of sea ice and associated on-ice snow habitat due to a forecasted increase in Arctic temperatures by the year 2100. *See* ER82 (FR). NMFS found that "the demographic,

[10] For marine mammal species listed under the ESA, there are additional regulatory consequences under other federal wildlife protection and environmental statutes, particularly the Marine Mammal Protection Act ("MMPA"). *See, e.g.*, 16 U.S.C. §§ 1362(1)(C), (19)(C) (mandatory MMPA designation of ESA-listed marine mammal stocks as "depleted" and "strategic").

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." ER161. NMFS also found that it has "no population estimates sufficiently precise for use as a reference for judging trends" and has "no mechanism to detect even major changes in ringed seal population size." ER94-95 (FR).

As part of the rulemaking process, NMFS completed two rounds of peer review: an initial independent peer review and a subsequent "special" independent peer review of the status review report "over which there was substantial disagreement." ER72-73 (FR). In the first round, two of the three peer reviewers disagreed with NMFS's conclusion that the Arctic ringed seal should be listed as a threatened species.[11] In the second round, again, two of the three peer reviewers disagreed with the agency.[12] Despite NMFS's findings regarding the inconclusive

[11] *See* SER133 ("It is my belief that the Proposed Rule that ringed seals are threatened cannot be justified based on the available information."); SER049 ("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.").

[12] *See* SER146 ("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 U.S. Endangered Species Act (ESA)." (emphasis in original)); SER148 ("list[ing] ringed seals as threatened . . . is difficult and premature given the available information in some areas").

and uncertain record as to how the Arctic ringed seal species may (or may not) be affected by future habitat changes, and despite two-thirds of the independent peer reviews concluding that listing was unwarranted, NMFS proceeded to list the Arctic ringed seal as a "threatened species."

Contemporaneous with promulgation of the Final Rule, NMFS withdrew its proposed ESA Section 4(d) rule that would have applied the protective "take" prohibitions of the ESA to the Arctic ringed seal species. Instead, NMFS concluded that because of the current large population size, the long-term nature of the primary threat (habitat alteration resulting from climate change), and the existing protections of the MMPA, "it is unlikely that the proposed protective regulations would provide appreciable conservation benefits." ER72, 84 (FR).[13]

D. District Court Proceedings

In December 2014, the Associations filed this action in the District of Alaska. Two additional lawsuits were subsequently filed by the Northern Alaska Plaintiffs and by the State of Alaska. These cases were administratively consolidated with the Associations' case.

[13] Despite the high abundance and health of the Arctic ringed seal species, NMFS designated the species as "depleted" under the MMPA as a direct consequence of the ESA listing decision. *See* 16 U.S.C. §§ 1362(1)(C), (19)(C); U.S. Dep't of Commerce, NOAA Technical Memorandum NMFS-AFSC-277, Alaska Marine Mammal Stock Assessments, 2013 (July 2014), http://www.nmfs.noaa.gov/pr/sars/pdf/ak2013_final.pdf.

Following the exchange of cross-motions for summary judgment, the district court issued a Memorandum Decision, as corrected, on March 17, 2016. ER1-32. The district court held that the Final Rule was arbitrary and capricious in violation of the APA. ER29-30. The court found it "troubling" that no "serious threat of a reduction in the population of the Arctic ringed seal, let alone extinction, exists prior to the end of the 21st century." ER28. The court also found that NMFS acknowledged 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." ER28-29. The court concluded that "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." ER29. Consequently, the district court vacated and remanded the Final Rule to NMFS, and entered final judgment. ER31-32.

V. SUMMARY OF THE ARGUMENT

The Final Rule directly contradicts the well-established principle that ESA decisions may not be based upon "speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). For a species that may be threatened with extinction based solely upon future changes in the environment, the agency must demonstrate that the species is likely to become in danger of extinction as a result of the projected habitat loss—not simply that habitat will decline. Accordingly, as NMFS conceded in the proceedings below, NMFS was required to establish a

likely future change in the environment over a foreseeable period of time that is of sufficient magnitude to likely imperil the Arctic ringed seal with extinction. NMFS failed to do so.

There is no rational basis in the record upon which NMFS could forecast or otherwise analyze the magnitude of the presumed future adverse impacts of climate change by the end of the century on the Arctic ringed seal species. The record in this case shows that NMFS's decision to list the Arctic ringed seal as a "threatened species" is premised entirely upon the potential for future habitat alteration resulting from global climate change by the year 2100. The record shows that NMFS presumed that these habitat changes are likely to cause adverse effects on the Arctic ringed seal species that are not currently observed. The record further demonstrates that NMFS speculated that these unobserved adverse effects will materialize by the year 2100 at such an extreme magnitude—which NMFS admits is unknown and incapable of analysis—to likely bring the highly abundant and wide-ranging Arctic ringed seal species to the brink of extinction.

This is precisely the type of "uncertain or inconclusive" record that requires the agency to avoid making a listing decision based upon speculation. Without the required rational analysis, NMFS could not lawfully conclude that the Arctic ringed seal species is "likely to" become in danger of extinction by the year 2100. These fundamental flaws render the Final Rule arbitrary and capricious agency

action in violation of the APA and the ESA. The district court's judgment should be affirmed.

VI. STANDARD OF REVIEW

The APA directs a reviewing court to set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 704, 706(2)(A); *see Bennett*, 520 U.S. at 174 (APA review applied to ESA claims); *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. - MDL No. 1993*, 709 F.3d 1, 8 (D.C. Cir. 2013) (APA review of ESA listing).

"Federal administrative agencies are required to engage in 'reasoned decisionmaking.'" *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citation omitted). A reviewing court must therefore determine whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). 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. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2008).

Moreover, courts "do not defer to [an] agency's conclusory or unsupported suppositions," and *post-hoc* explanations provide no grounds for upholding agency decisions. *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004). The "mere fact that an agency is operating in a field of its expertise does not excuse . . . agency[] reasoning . . . [that] is irrational, unclear, or not supported by the data it purports to interpret." *Nw. Coal. for Alternatives to Pesticides v. U.S. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring) ("If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.").[14]

[14] NMFS incorrectly states that "the court should uphold the agency's decision" if it is supported by "substantial evidence." NMFS Br. at 25. The "substantial evidence" standard applies to findings of fact. *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 960 n.4 (9th Cir. 2011). In contrast, the Associations argued below and argue on appeal that NMFS's legal conclusion that the ringed seal is likely to become in danger of extinction within the foreseeable future is arbitrary and capricious because NMFS failed to provide a rational connection between the facts found and the decision made. An agency action can be arbitrary and capricious for this and multiple other reasons independent of the substantial evidence test. *See Cal. Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150–51 (9th Cir. 2009).

VII. ARGUMENT[15]

A. Why This Case Matters

The Arctic ringed seal listing decision gravely undermines the intent of Congress in enacting the ESA and stretches its listing provisions to a point of absurdity. The precedent of this listing, if reinstated, will also have substantial negative consequences for both the regulated community and the species that are actually in need of special management under the ESA. The following points illustrate these serious problems.

First, Congress intended the ESA to apply to species truly in need of protection. *See* 16 U.S.C. § 1531(a)(2) (ESA is intended to ensure 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" (emphasis added)). Congress recognized that "the decline and disappearance of species and subspecies is a

[15] Although the district court found that the rationale underlying NMFS's decision not to apply the "take" prohibitions of the ESA to the Arctic ringed seal under Section 4(d) of the ESA contradicted NMFS's rationale for listing the species in the first place, the Associations did not contend below, and do not argue here, that there is an inherent conflict between listing a species as threatened and a contemporaneous decision under Section 4(d) not to apply the ESA's "take" prohibitions. Additionally, this Court may affirm the lower court's decision on any grounds argued below and supported by the record, even if not expressly addressed in the district court's order. *Knight v. Comm'r*, 552 U.S. 181, 183 (2008) (affirming a lower court's decision, but for different reasons); *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 657 F.3d 988, 994 n.3 (9th Cir. 2011) (same).

matter of national and international concern, and that it is necessary . . . to reverse this decline." H. Rep. No. 93-412 (1973), *reprinted in* 1 Cong. Research Serv., A Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980, Serial No. 97-6, at 140, 148 (1982) (emphasis added).[16]

The Associations do not contend that the ESA listing of a species is solely dependent upon documentation of a present decline in the species' abundance or range. For example, species facing an imminent catastrophic threat,[17] or species restricted to a very narrow range or endemically small in population size that face a heightened threat,[18] have qualified for ESA listing without a present decline in abundance or range. However, the listing of a species, such as the Arctic ringed

---

[16] *See also* H.R. Rep. No. 97-567, pt. 1, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2809 ("This multi-faceted measure is designed to restore species that are so depleted in numbers that they are in danger of, or threatened with, extinction." (emphasis added)); *id.* at 12 (ESA applies to species that have "declined sufficiently to justify listing"); *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009) ("without persuasive evidence of widespread decline," the evidence "may not be enough to establish that the Secretary must list the lizard as threatened" (emphasis in original)).

[17] *See, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (famously addressing application of the ESA to the snail darter, a small fish confined to one stretch of one river that faced extinction from construction of the proposed Tellico Dam).

[18] *See, e.g., Cappaert v. United States*, 426 U.S. 128 (1976) (addressing the Devil's Hole pupfish, which lives in a single sinkhole in a Nevada desert that was threatened by a drop in groundwater levels).

seal, that numbers in the millions, has existed for millions of years, occupies its entire historical range, shows no evidence of decline, and shows no evidence of an impact from the identified threat (climate-induced habitat change) is plainly beyond the contemplation of Congress.

Second, if NMFS may list a species under these circumstances based upon speculation about what could happen at the end of the century—if the limits of climate projections are ignored, if the species reacts adversely to climate change in ways not currently observed, and if any adverse impact is of a magnitude without any present scientific basis to foresee—then virtually any or all species may be listed as "threatened" under the ESA. When, as here, the best available data are "uncertain or inconclusive," an agency may not, as a precautionary measure, "give the benefit of the doubt to the species" by listing it as "threatened." *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007). Otherwise, agencies (such as NMFS in the present instance) could improperly "list[] a species as threatened if there is any possibility of it becoming endangered in the foreseeable future." *Id*. (emphasis added); *see Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) ("benefit of the doubt" does not apply to ESA listing decisions). As the Supreme Court directs, the ESA may not be implemented "haphazardly, on the basis of speculation or surmise." *Bennett*, 520 U.S. at 176-77.

Third, NMFS's listing of the Arctic ringed seal species is incompatible with the ESA's fundamental purpose to provide a framework for federal agencies to identify, regulate, and ultimately recover species that are actually on the "brink of extinction" or foreseeably threatened with extinction. *See* 16 U.S.C. §§ 1531(b)-(c), 1532(3); 119 Cong. Rec. S14509, 14521 (daily ed. July 24, 1973) (statement of Sen. Williams) (referring to "in danger of extinction" as "brink of extinction"); *W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1171 (D. Idaho 2013) ("The ultimate goal of the ESA is to recover listed species to the point where they no longer need ESA protection."). One regulatory action taken by the Services to serve this purpose is the designation of "critical habitat"—*i.e.*, the "specific areas" that are "essential" to the conservation of the species. 16 U.S.C. § 1532(5)(A). The Arctic ringed seal listing makes this requirement a farce, as shown by NMFS's proposal to indiscriminately designate nearly all U.S. jurisdictional waters inhabited by Arctic ringed seals as "critical" habitat.[19] This would be the largest designation of critical habitat area in the history of the ESA.

Another such action is the preparation of a recovery plan, the purpose of which is to identify distribution and abundance metrics that, if restored, would

[19] *See* 79 Fed. Reg. 73,010 (Dec. 9, 2014) (proposal to designate approximately 350,000 square miles of U.S. jurisdictional waters in the Beaufort, Chukchi, and Bering Seas as a single "specific area").

allow a species to be delisted. For a species that already numbers in the millions, shows no evidence of decline, fully occupies its entire historical range, and has existed for millions of years, the development and implementation of a recovery plan is a needless exercise because there is no status to be "recovered." Compounding the effects of these regulatory absurdities is the fact that the designation of critical habitat, preparation of a recovery plan, and Section 7 consultations for activities unrelated to the basis for the Arctic ringed seal's listing will consume substantial federal resources that could otherwise be spent on species that are actually in need of special management under the ESA.

Finally, the ESA listing of the Arctic ringed seal species has significant practical impacts on those who live in and subsist on, use and develop resources in, govern, and conduct commerce in and adjacent to Alaska's Arctic region. Overlay of the ESA's regulatory requirements will burden these users with increased costs, regulatory obligations, and legal uncertainty to maintain their access to the region. A foreseeable consequence will be ongoing litigation brought by advocacy organizations premised upon the unwarranted extension of ESA jurisdiction over the Arctic ringed seal and intended to frustrate responsible development of Alaska's valuable natural resources.

B. NMFS Unlawfully Speculated That The Arctic Ringed Seal Is Likely To Be On The Brink Of Extinction By The End Of The Century

The ESA expressly requires NMFS to make a reasoned determination that a species is "likely to" become endangered in the foreseeable future before listing that species as threatened. 16 U.S.C. § 1532(20) (defining "threatened species" as one that is "likely to" become endangered in the foreseeable future); *Or. Nat. Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood—rather than merely the prospect—that a species will become endangered in the foreseeable future). NMFS does not dispute this. Indeed, the Services consistently require an analysis and findings regarding the "foreseeability of the impact of the threats on the species," "not only the foreseeability of threats."[20] *See also* Opening Brief for the Federal Appellants ("NMFS Brief"), Dkt. 9 at 40 (conceding a species' future status depends on the foreseeability of "the species' response" to threats). The agency's analysis must be based on a "reliable prediction" and must avoid "reliance on assumption, speculation, or preconception." SER161 (M-Opinion at 8); SER162 (M-Opinion at 9) ("One may speculate about many possible outcomes, but one cannot determine

[20] SER163 (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 upon the M-Opinion in the Final Rule. *See* ER73, 88 (FR). NMFS does not dispute that the M-Opinion correctly states the standards applicable to ESA listing decisions.

that a given outcome is more likely than not without the ability to make reliable predictions.").

Additionally, in assessing a species' status, "a downward trend in habitat by itself is not sufficient to establish that a species should be listed under the ESA." *Ctr. for Biological Diversity*, 758 F. Supp. 2d at 955 (affirming NMFS's decision not to list the ribbon seal). As this Court has confirmed, "it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing." *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001).[21] This principle is consistent with the plain language of the ESA, which requires a species, not habitat, to be threatened before it can be listed. *See* 16 U.S.C. § 1532(20) ("threatened" modifies "species"); *see, e.g.*, *Defenders of Wildlife*, 258 F.3d at 1143 ("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.").

Thus, to lawfully list the Arctic ringed seal as a "threatened species," NMFS must do more than merely demonstrate that habitat changes projected many years into the future may cause adverse impacts to the species. NMFS must show that

[21] NMFS would not even meet this insufficient basis for listing because it has not identified a projected amount of loss of habitat or range that qualifies the Arctic ringed seal for listing.

sea ice recession and associated decreases in snow cover will adversely impact the Arctic ringed seal species, and that the projected future impact is of such magnitude that the species will likely be on the "brink of extinction" by the year 2100. NMFS fails to make this showing.

1. NMFS did not and could not forecast the magnitude or direction of the adverse impact, if any, to the Arctic ringed seal species

NMFS provided no analysis or data-supported explanation showing that future habitat impacts caused by climate change will be of a magnitude that will likely cause the Arctic ringed seal species to be "in danger of extinction" by the year 2100. Although NMFS believes the Arctic ringed seal species is currently very abundant, NMFS did not support its listing determination with any forecasts—whether qualitative or quantitative—of the Arctic ringed seal population over any period of time. Indeed, there are no projections or estimates of the future status of the Arctic ringed seal population anywhere in the record. *Cf.* S. Rep. No. 93-307, at 3 (threatened classification intended to "give[] effect to the Secretary's ability to forecast population trends").

The absence of this required information is undisputed. For example, NMFS admits:

> The principal threat to ice-associated seals is habitat alteration anticipated in the latter half of this century stemming from climate change. The expected response

> of these seal populations to such habitat alteration is uncertain due to a paucity of data.[22]
>
> ———————
>
> Data were not available to make statistically rigorous inferences how Arctic ringed seals will respond to habitat loss over time.[23]
>
> ———————
>
> [T]here is little basis for quantitatively linking projected environmental conditions or other factors to ringed seal survival or reproduction.[24]
>
> ———————
>
> 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 . . . subspecies[.][25]
>
> ———————
>
> There is no evidence that at current population levels the Arctic ringed seal is at risk due to a substantial change or loss of variation in life-history traits, population

[22] SER171 (Memo by James Balsiger, Administrator of Alaska Region).

[23] ER94 (FR).

[24] ER74 (FR).

[25] ER161.

> demography, morphology, behavior, or genetic characteristics.[26]

Thus, NMFS's own record statements demonstrate that NMFS was unable to assess the future status of the Arctic ringed seal population in response to the habitat threat it identified. *See also* ER94 (FR) (NMFS admission that there is no information as to "how Arctic ringed seals will respond to habitat loss over time"); ER94-95 (FR) (NMFS has "no population estimates sufficiently precise for use as a reference for judging trends" and has "no mechanism to detect even major changes in ringed seal population size").

Accordingly, no information is available upon which NMFS can make a reasoned assessment of the status of the Arctic ringed seal species at the end of the century. There is also no basis for quantitatively or qualitatively establishing a population trend (nor has NMFS done so), let alone a decline in health, population, or distribution over any period of time of sufficient magnitude to warrant an ESA listing.[27] NMFS's recognition of its inability to assess the magnitude of the impact from projected habitat changes on the Arctic ringed seal species does not excuse

---

[26] ER305.

[27] *Cf.* SER161 (M-Opinion at 8) ("[T]he foreseeable future extends only so far as the Secretary can explain reliance on the data to formulate a reliable prediction. . . . 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.").

NMFS from its statutory duty to provide a rational, record-supported analysis supporting its conclusion that this species is likely to be in danger of extinction by the year 2100.

FWS's decision not to list the pygmy rabbit, as addressed in *Ashe*, 948 F. Supp. 2d at 1178, is an instructive example. In *Ashe*, environmental advocacy organizations challenged FWS's determination that the listing of the pygmy rabbit was not warranted. *Id.* at 1177. The United States countered that it "lacked sufficient data (such as population data or data establishing a link between population trends and potential threats) to develop reliable predictions." *Id.* at 1178.

Ultimately, the court upheld FWS's decision, recognizing that the "foreseeable future" is typically the timeframe over which the agency can "reliably assess threats and the species' response to those threats . . . supported by species-specific factors, including . . . life history characteristics and population dynamics." *Id.* at 1180. The court concluded that FWS could not define the foreseeable future and, consequently, could not list the species, because the "population trend data typically used to assess [the] foreseeable future was simply not available," and because FWS "had incomplete data for . . . distribution, abundance, and habitat, to adequately define 'foreseeable future.'" *Id.* at 1180-81

(recognizing FWS's duty to reliably assess threats and the species' response to those threats).

In the proceedings below, NMFS attempted to distinguish *Ashe* on the basis that FWS did not know the size of the population of pygmy rabbits, whereas NMFS has estimated the population size for the Arctic ringed seal. To be sure, NMFS recognized that experts estimate the Arctic ringed seal species' current population size to be "in the millions" (ER67), but this fact works against, not for, NMFS's decision to list the species, particularly considering that NMFS made no effort to assess the population status at any point during the end-of-century "foreseeable future" period. Moreover, this distinction ignores the greater problem FWS faced in *Ashe*—the absence of long-term population trend information and rational links between population trend information and potential threats. *See id.* at 1180.

In actuality, the similarities between *Ashe* and this case are striking. In both cases, population trend information (qualitative or quantitative) is not available. In both cases, the agency "lacked sufficient data (such as population data or data establishing a link between population trends and potential threats) to develop reliable predictions." *Id.* at 1178 (citing agency record). And, in neither case can the agency "'reliably assess threats and the species' response to those threats . . . supported by species-specific factors, including . . . life history characteristics and

population dynamics.'" *Id.* at 1180 (quoting agency record). Indeed, the relevant distinction between *Ashe* and this case is that, in *Ashe*, FWS properly responded to the absence of necessary information by declining to list the pygmy rabbit. Here, facing the same fatal informational gap, NMFS unlawfully listed the Arctic ringed seal.

FWS's listing of the polar bear as a "threatened species" is also illustrative. In its polar bear listing decision, FWS completed the most comprehensive and detailed analysis of climate change modeling uncertainties and the reliability of future forecasts for ESA listing purposes of any federal agency to date. *See* SER176-89. In so doing, FWS identified actual data and peer reviewed studies showing currently occurring adverse impacts to polar bears attributable to losses of summer sea ice habitat in the southern reaches of polar bear distribution. SER188-89. FWS made an express determination based upon the record—including modeling of population forecasts for numerous different future scenarios—that the magnitude of the adverse impacts would be sufficiently high to merit to an ESA listing. *See* SER175, 185-89.[28] In contrast, the Arctic ringed seal listing decision

[28] AOGA, API, and the Northern Alaska Plaintiffs did not challenge the polar bear listing rule. AOGA and the Arctic Slope Regional Corporation intervened in that litigation to defend the "threatened" listing rule against claims that the polar bear should have been listed as endangered. *See In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 78 (D.D.C. 2011), *aff'd*, 709 F.3d at 15-16.

lacks any quantitative or qualitative forecast (or basis for making such a forecast) of the magnitude of the impact on Arctic ringed seal survival—if any—that will result from future declines in sea ice and snow habitat by the end of the century. Additionally, it is undisputed that there has been no observed adverse impacts from climate change to Arctic ringed seals.

In sum, the Final Rule violates the APA because NMFS failed to make a rational connection between the facts found (*i.e.*, future climate-induced habitat reductions) and its conclusion that the Arctic ringed seal species is "likely to" be on the brink of extinction by the year 2100. As set forth above, NMFS does not know whether this highly abundant and wide-ranging species is increasing, stable, or decreasing. It has no data demonstrating any present adverse effect to individual animals or the species as a whole from climate change. NMFS also cannot reliably forecast the population and its trend over any period of time regardless of environmental conditions. And NMFS does not know at what population size, distribution, or any other metric (quantitative or qualitative) the Arctic ringed seal would be endangered.[29]

[29] NMFS contends that the Alaska Parties waived an argument that NMFS failed to identify an "extinction threshold." NMFS Brief at 28. However, to the extent the Alaska Parties make an "extinction threshold" argument, NMFS forfeited this defense by failing to raise it in the proceedings below. *See In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000) ("Absent exceptional circumstances," the Ninth Circuit "will not consider arguments raised for the first

(continued . . .)

On this record, the only explanation for NMFS's conclusion that possible end-of-century adverse habitat impacts are "likely to" cause the Arctic ringed seal species to be on the brink of extinction is exactly what the ESA prohibits: speculation and surmise. *Bennett*, 520 U.S. at 176-77.[30] This critical failure exists regardless of whether a mid-century or end-of-century foreseeable future is assumed because NMFS has provided no record-based assessment of the magnitude of future species impacts over any period of time.

(. . . continued)
time on appeal."); *United States v. Scott*, 705 F.3d 410, 415 (9th Cir. 2012) ("A party who fails to assert a waiver argument forfeits—and therefore implicitly waives—that argument."). Regardless, waiver does not apply when the agency itself considered the issue, as NMFS did here. *See Glacier Fish Co. v. Pritzker*, 832 F.3d 1113, 1120 n.6 (9th Cir. 2016); *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010); SER201 ("A species is 'threatened' if it exhibits a trajectory indicating that in the foreseeable future it is likely to be at or near a qualitative extinction threshold below which stochastic/depensatory processes dominate and extinction is expected." (emphasis added)) (NMFS's Interim Protocol for Conducting Endangered Species Act Reviews). Additionally, the Associations' public comments sufficiently alerted NMFS. *See* SER534-38, 542, 546. The Associations' comments were not required to "incant the magic words ['extinction threshold']." *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002).

[30] *See Speculate, Merriam-Webster.com*, http://www.merriam-webster.com/dictionary/speculate (last visited Mar. 22, 2017) ("to think about something and make guesses about it : to form ideas or theories about something usually when there are many things not known about it," "to take to be true on the basis of insufficient evidence").

2. The Ninth Circuit's opinion in the bearded seal listing litigation is not controlling

In *Alaska Oil & Gas Ass'n v. Pritzker*, this Court addressed the ESA listing of another Arctic seal species (the bearded seal) that NMFS determined was threatened by the future effects of climate change. 840 F.3d 671 (9th Cir. 2016) ("*AOGA v. Pritzker*"). CBD argues that *AOGA v. Pritzker* is dispositive (and presumably NMFS will argue the same in reply). Opening Brief for Intervenor-Defendant ("CBD Brief"), Dkt. 14 at 7, 26-27. However, for the following reasons, *AOGA v. Pritzker* should not be followed here.

First, *AOGA v. Pritzker* incorrectly states that "neither the ESA nor our case law requires the agency to calculate or otherwise demonstrate the 'magnitude' of a threat to a species' future survival before it may list a species as threatened." 840 F.3d at 684. This statement, if not narrowed or clarified, would mean that the ESA requires no assessment of the nature or degree of risk posed to a species before determining that the species is "likely to" become endangered in the foreseeable future. This interpretation, which is advocated for by CBD (CBD Brief at 7, 26-27), conflicts with the plain language and history of the ESA by rendering clear statutory limitations on listing meaningless. A "threatened species" is one that is "likely to" become "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(6), (20), 1533(a)(1). As *AOGA v. Pritzker* correctly states, "most dictionaries define 'likely' to mean that an event, fact, or

outcome is probable." 840 F.3d at 684. However, the only way to determine that it is "probable" that a species will face extinction in the foreseeable future is to assess the significance or magnitude of a threat to that species' survival.

The legislative history of the ESA confirms this common sense result. In 1973, Congress amended the ESA to add the "threatened species" designation to afford imperiled species additional protection depending upon the temporal proximity of the risk of extinction. As noted during debate on the ESA amendment:

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

119 Cong. Rec. S14509, 14521 (daily ed. July 24, 1973) (statement of Sen. Williams). In addition, Congress intended that the Secretary would include "forecast[s] [of] population trends" before listing a species as threatened. *See* S. Rep. No. 93-307, at 3.

To determine that a species is likely to become "in peril" or on "the brink of extinction," therefore, the Secretary is required to do more than merely identify a

projected threat to the species. *See supra* § VII.B.1. The Secretary must also evaluate the magnitude of the threat to the species' future survival. Without this evaluation, the Secretary lacks the information necessary for determining whether a species will likely be on the brink of extinction at some future point in time. In other words, absent this information, a decision listing a species as threatened would be arbitrary because that decision would rely upon an interpretation of 16 U.S.C. § 1532(20) that reads the terms "likely" and "in danger of extinction" out of the statute. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (It is a "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks and citation omitted)).

The authorities addressed above confirm that the ESA and APA require an agency to make a rationally based demonstration of the magnitude of a threat to a species' future survival before listing that species as threatened. *See Defenders of Wildlife*, 258 F.3d at 1143; *Ctr. for Biological Diversity*, 758 F. Supp. 2d at 955; *Daley*, 6 F. Supp. 2d at 1152. The Services' own implementation of the ESA also confirms this requirement. For example, in deciding not to list the Arctic ribbon seal, NMFS found that although the "net impacts will be . . . likely to cause a gradual decline in the ribbon seal population . . . such decline is of *insufficient*

magnitude to place it in danger of extinction . . . now or within the foreseeable future." SER237 (emphases added). Numerous other listing decisions demonstrate that, contrary to this Court's statement in *AOGA v. Pritzker*, the Services regularly evaluate the magnitude of threats posed to a species as a required element of the listing analysis.[31] In short, the ESA plainly requires the Services to evaluate the "'magnitude' of a threat to a species' future survival" to

[31] *See, e.g.*, 79 Fed. Reg. at 11,070 ("[W]e require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of endangered or threatened under the Act."); 81 Fed. Reg. 22,710, 22,710 (Apr. 18, 2016) (declining to list West Coast DPS fisher because threats are "not of sufficient imminence, intensity, or magnitude" (emphasis added)); 80 Fed. Reg. 76,068, 76,101, 76,104-05 (Dec. 7, 2015) (recognizing the need to "determin[e] the magnitude of threats" acting on a species before listing (emphasis added)); 80 Fed. Reg. 55,286, 55,303 (Sept. 15, 2015) ("we find that the current and future threats are not of sufficient imminence, intensity, or magnitude" to list species (emphasis added)); 79 Fed. Reg. 77,998, 78,012 (Dec. 29, 2014) ("Ocean acidification and climate change impacts could affect pinto abalone in the future; however, the magnitude, scope, and nature of these effects are highly uncertain at this time." (emphasis added)); 79 Fed. Reg. 74,954, 74,978 (Dec. 16, 2014) ("[T]he likelihood and magnitude of threats from climate change . . . must be examined . . . to fully assess extinction risk." (emphasis added)); 63 Fed. Reg. 54,972, 54,974 (Oct. 13, 1998) (Threats "including fire management practices, over collection, and random natural events, are now of insufficient magnitude to warrant listing of the species in the absence of any significant threat from other factors." (emphasis added)); 62 Fed. Reg. 41,016, 41,019 (July 31, 1997) ("Other factors cited in the proposed rule, including overcollection, inadequate regulatory mechanisms, and extinction from random events, are of insufficient magnitude to warrant listing in the absence of any significant threat from other factors." (emphasis added)).

determine the likelihood of future endangerment and, indeed, the Services regularly do so.

Second, *AOGA v. Pritzker's* "magnitude" statement should be narrowly construed to avoid statutory conflict. As explained above, applying a broad reading here, as urged by CBD, would undermine the statutory limitations on threatened listings. One way to avoid this problem is to narrowly construe *AOGA v. Pritzker*'s statement to mean only that NMFS is not required to "calculate" or otherwise put a numeric value on the exact "magnitude" of the risk. *See* 840 F.3d at 684.[32]

Furthermore, the Court should confirm that the ESA and APA require NMFS to make a conclusion, based upon a rational analysis of the information in the record, that the effects of the identified threat are of sufficient magnitude that the species is likely to be at the brink of extinction within the foreseeable future. Whether that analysis is calculated numerically, or rationally evaluated qualitatively, would be left to NMFS's discretion. But excusing NMFS from this analytical requirement altogether would, as explained above, render the statutory definition for "threatened species" a nullity. *United States v. Tohono O'Odham*

[32] Although *AOGA v. Pritzker* can be distinguished on this bases, the Alaska Parties never actually argued that NMFS had to calculate a numeric value in *AOGA v. Pritzker*.

Nation, 563 U.S. 307, 315 (2011) ("Courts should not render statutes nugatory through construction.").

Third, if the Court declines to revisit *AOGA v. Pritzker* or to narrow its statement regarding the magnitude requirement, it should confine the potentially limitless holding of that decision to its facts. Not doing so here would result in the unprecedented ESA listing of a healthy and abundant species that has existed for millions of years and is composed of millions of animals that are fully distributed across the species' vast historical range. Such a result would undermine the unique status that Congress intended to be afforded an ESA listing. Additionally, *AOGA v. Pritzker* is premised on the court's finding that "NMFS did not rely on habitat loss, alone, to justify its listing decision." 840 F.3d at 683. Although the Associations disagree with this finding, it is inapplicable here. The record for the Arctic ringed seal decision makes clear that NMFS relied only upon projected habitat loss and had no ability to determine whether and to what degree such habitat loss would affect the species.[33] For these additional reasons, *AOGA v. Pritzker* should not be followed here.

---

[33] *See* ER74 (FR) ("[T]here is little basis for quantitatively linking projected environmental conditions or other factors to ringed seal survival or reproduction"); ER94 (FR) ("Data were not available to make statistically rigorous inferences how Arctic ringed seals will respond to habitat loss over time."); ER94-95 (FR) (NMFS has "no population estimates sufficiently precise for use as a reference for judging trends" and has "no mechanism to detect even major changes in ringed seal

(continued . . .)

C. NMFS's Arguments Misunderstand And Misstate The Record And Applicable Precedents

1. This is not a "best available science" case

NMFS attempts to hide the absence of analysis in the record by claiming that this case involves a dispute about whether the agency applied the "best available science" and whether NMFS was required to gather more data. NMFS Brief at 33-34. However, the Alaska Parties have not asserted, did not prevail based upon, and are not defending this appeal in whole or in part in reliance on a best available science claim. NMFS's misleading argument conflates the claim that the Alaska Parties actually brought and prevailed upon below (*i.e.*, that the Arctic ringed seal listing decision violates NMFS's obligation to make reasoned, record supported, and rational decisions pursuant to the APA and the ESA) with a different claim the agency wishes to defend against but which the Alaska Parties did not assert (*i.e.*, that the agency should have gathered more information beyond the "best available science").

NMFS similarly asserts that the ESA does not require an agency to "find better data," and that the "district court erred in doing so here." *See* NMFS Brief at 34. Again, the Alaska Parties did not assert, and the district court below did not

---

(. . . continued)
population size"); ER161 ("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.").

decide, that NMFS violated the ESA or the APA by failing to find better data or conduct additional studies. *See* ER29 n.77 ("The Court's holding today is limited to the facts presented in the record before it, i.e., that 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.").

Aside from mischaracterizing the record, NMFS's arguments ignore the fundamental principle that an agency shall not "'give the benefit of the doubt to the species'" under Section 4 if the data is uncertain or inconclusive. *Trout Unlimited*, 645 F. Supp. 2d at 947 (citation omitted). In such circumstances, the agency must decline to list the species—otherwise "all or nearly all species [could be] listed as threatened." *Id*. However, according to NMFS, it cannot be faulted for listing a species out of precaution based on an uncertain and inconclusive record because to fault the agency would be to improperly require the agency to gather more information. NMFS's argument turns the fundamental ESA principle described in *Trout Unlimited* on its head and, as NMFS intends, would insulate the agency from any challenge to an ESA listing decision based upon a claim that the record is too uncertain and inconclusive to support the decision.

NMFS also ignores the well-established rule that, notwithstanding the best available science standard, a federal action is arbitrary and capricious in violation of the APA if the agency does not "examine the relevant data and articulate a

satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (internal quotation marks and citation omitted). "[T]he 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." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (emphasis added).

Accordingly, use of the best available science alone is not enough to sustain an ESA listing decision where, as argued by the Alaska Parties and held by the district court, there is no record evidence and no rational explanation to support one or more essential elements of an agency's decision. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("[I]t is not enough for the Service to simply invoke 'scientific uncertainty' to justify its action . . . . Otherwise, [the court] might as well be deferring to a coin flip."). The Final Rule is unlawful because it lacks the required rational analysis, not because NMFS was required to generate more than the "best available science." This Court should ignore NMFS's straw-man arguments, and focus on the issues germane to this appeal. *See Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 133 (D.D.C. 2004) ("Whether the [S]ervice used the best science available . . . is a red herring issue.").

2. This is not a dispute over the use of qualitative versus quantitative information

Contrary to NMFS's arguments (NMFS Brief at 26-33), the Alaska Parties never argued below that the Arctic ringed seal listing decision is unlawful because the agency relied upon qualitative, instead of quantitative, information. Instead, the Alaska Parties argued, and the district court agreed, that NMFS's listing decision is arbitrary and capricious because it is impermissibly speculative. As addressed above, the foundation of this argument is that there is no scientific basis—quantitative or qualitative—for predicting the magnitude of the impact of climate-induced habitat changes on the Arctic ringed seal population. *See supra* § VII.B.1. No record information identifies (quantitatively or qualitatively) the expected magnitude of the adverse impacts to the Arctic ringed seal that NMFS believes may occur this century or that explains why that magnitude renders the Arctic ringed seal species "likely to" reach a status (also unidentified) at which it will be "in danger of extinction." *Id*.

Additionally, NMFS's complaints about the standard to which it should be held (whether qualitative or quantitative) are belied by a comparison of FWS's rigorous polar bear listing decision with NMFS's feebly supported ringed seal listing decision. When listing the polar bear as a threatened species based on projections of future sea ice recession, the record in that case showed that FWS qualitatively determined that climate-induced habitat change had already caused

negative impacts to certain polar bear subpopulations, which were likely to increase in the foreseeable future. *See, e.g., In re Polar Bear*, 709 F.3d at 9-10 (affirming threatened determination, specifically noting that FWS linked areas of climate-induced habitat loss with subpopulation declines). Then, FWS (i) grouped the 19 polar bear subpopulations into four "ecoregions" and applied two different population models (the "carrying capacity model" and the "bayesian network model") to develop projections for polar bear populations in each ecoregion 45 years, 75 years, and 100 years into the future; and (ii) explained why these specific findings rendered the polar bear "likely to" become endangered within the foreseeable future. SER185-89.

NMFS has made no similar findings, modeling, or demonstrations to support its decision to list the Arctic ringed seal species. *See Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003) ("While the FWS can draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no evidence.") (citing *Bennett*, 520 U.S. at 176). NMFS's record here is "simply too thin to justify the action [NMFS] took." *Otay Mesa Prop., L.P.*, 646 F.3d at 918.[34]

[34] NMFS cites *Home Builders* as support for its erroneous argument that the Alaska Parties have demanded the use of quantitative information. *See* NMFS Brief at 31 (citing *Home Builders Ass'n of N. Cal. v. FWS*, 529 F. Supp. 2d 1110, 1118 (N.D. Cal. 2007)). Aside from NMFS's mischaracterization of the Alaska

(continued . . .)

3. The BRT's risk ratings are no substitute for the required analysis

NMFS's decision is not supported by any analysis of whether the effects of climate-induced habitat changes will be of such a magnitude as to render the Arctic ringed seal species likely to become endangered in the foreseeable future. In lieu of this missing analysis, NMFS mistakenly contends that the Biological Review Team's ("BRT") "risk assessment" supplies the evaluation that NMFS did not perform. NMFS Brief at 47-49.

The BRT's assessment does not evaluate or make any findings regarding the likelihood that the perceived threat will result in the future endangerment of the Arctic ringed seal species. As the Status Review emphasizes:

> This document is a compilation of the best available scientific and commercial data describing the past, present, and likely future threats to the ringed seal. It does not represent a decision by NMFS on whether this taxon should be proposed for listing as threatened or endangered under the ESA. That decision will be made by NMFS after reviewing this document, other relevant biological and threat information not included herein,

---

(. . . continued)
Parties' argument, *Home Builders* highlights the deficiency in NMFS's decision because, in that case, FWS established a clear link between existing habitat declines and decreased tiger salamander populations, and then relied on that link combined with a projected 88% habitat loss by the year 2043 to determine the salamander was likely to become endangered in the foreseeable future. 529 F. Supp. 2d at 1118, 1123. NMFS made no similar findings here. Also, in *Home Builders*, all 11 peer reviewers supported the "threatened" listing whereas, here, four out of six peer reviewers disagreed with NMFS's proposed listing. *Compare id.* at 1118, *with* Section IV.C *supra*.

> efforts being made to protect the species, and all relevant laws, regulations, and policies.

ER120 (emphasis added). Similarly, the ESA mandates that "[t]he Secretary"—not the BRT—shall make listing determinations based upon "a review of the status of the species." 16 U.S.C. § 1533(b)(1)(A).

In addition, the fact that NMFS required BRT members to assign rudimentary rankings for each "risk assessment" category does not change the BRT's underlying findings. None of those findings, or the rankings, address the magnitude or likelihood of future potential impacts to the Arctic ringed seal species because, as stated above, the BRT expected NMFS to perform that analysis. The BRT's rankings merely labeled whether factors such as a "decrease in sea-ice" or a "decrease in prey density" are "significant." ER292-97. The rankings do not address whether those factors—significant or not—will adversely impact the Arctic ringed seal population and, if so, to what degree.

In fact, the "risk assessment" itself demonstrates the record's lack of any information showing the degree to which the Arctic ringed seal species would be affected by the identified risk:

- "The current population of Arctic ringed seals presumably is large enough to avoid depensation.[35] Combined with long life spans and slow

[35] "Depensation" means "[i]n population dynamics, the effect on a population (or stock, e.g. of fish) whereby, due to certain causes, a decrease in the breeding population (mature individuals; 'spawning stock') leads to reduced

(continued . . .)

reproduction, a population of this size is not likely to experience extreme fluctuations that could lead to depensation. The threshold for depensation in seals, however, is unknown." ER299 (emphasis added).

- "The population trend is unknown for Arctic ringed seals." ER301 (emphasis added).
- "Average productivity is unknown for the Arctic subspecies." ER302 (emphasis added).
- "Changes in demographic or reproductive traits of Arctic ringed seals are not known to pose risks." *Id.*
- "There are no good estimates of growth rate or productivity-related parameters for Arctic ringed seals." ER303.
- "Rates of dispersal are unknown for the Arctic subspecies." ER304 (emphasis added).
- "Natural processes of dispersal and gene flow among Arctic ringed seals are inadequately known . . . ." ER306 (emphasis added).
- "It 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 [of] large environmental changes facing the subspecies. Important aspects of population structure among the Arctic need to be resolved." ER307.

Thus, even the BRT admitted that the magnitude of potential adverse impacts to the Arctic ringed seal is entirely unknown.

(. . . continued)
survival and production of eggs or offspring." United Nations Terminology Database, http://unterm.un.org/UNTERM/Display/Record/UNHQ/NA?OriginalId=b2c9bfe4efc5e4fc852578d40063af0a (last visited Mar. 22, 2017).

Moreover, subjectively categorizing the significance of threats is not the same as analyzing the projected magnitude of the impact to the species and determining whether that impact will likely cause the Arctic ringed seal species to become in danger of extinction. For example, the BRT concluded that ringed seals "very likely will be negatively impacted by shorter periods of seasonal snow cover as the climate warms," that reduction of ice and snow cover "will substantially impact ringed seal habitat," and that ringed seals' "persistence will be greatly challenged." ER203, 303, 306. However, neither the BRT nor NMFS performed any analysis of the magnitude of the likely "negative" impact to the Arctic ringed seal species, the extent to which "substantial" impacts to habitat would impact the species, or, most importantly, whether the challenges to persistence will be of such magnitude to bring the species to the brink of extinction.

Instead of performing the required analysis, NMFS just referred to the BRT's assessment without further explanation or any original analysis and concluded that the Arctic ringed seal is a "threatened species" because the BRT ranked certain theoretical impacts as "moderate risk" or "high risk." As one of the peer reviewers explained:

> 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.

SER138 (peer review comment). Again, NMFS, not the BRT, was obligated to perform the required analysis and make a rational determination. The fact that NMFS directed the BRT to speculate, and the fact that the BRT did so, does not convert the BRT's answer to NMFS from speculation into a scientific finding or a legal conclusion. *See Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) ("The Forest Service must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.").[36]

VIII. CONCLUSION

Congress expressly deemed it essential that a "threatened species" is one that is "likely to" be in danger of extinction within the foreseeable future. According to

[36] In the proceedings below, NMFS puzzlingly argued that the Associations "waived" the "issue" regarding the existence of the BRT assessment. *See* Fed. Defs.' Mem. in Supp. of Cross-Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 50, *Alaska Oil & Gas Ass'n v. NMFS*, No. 4:14-cv00029-RRB (D. Alaska Oct. 9, 2015). To the extent NMFS again contends that the Associations are somehow foreclosed from responding to NMFS's argument that the BRT risk assessment justifies its unlawful action, it is mistaken. *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 n.1 (9th Cir. 1991) (no waiver where issues are raised and briefed by one party); *Reply Brief*, *Black's Law Dictionary* (10th ed. 2014) (a "reply brief" "responds to issues and arguments raised in the brief previously filed by one's opponent").

NMFS, as applied here, this essential element can be satisfied by speculation, not rational, record-supported explanation and analysis. For the foregoing reasons, NMFS's decision to list the Arctic ringed seal as a "threatened species" is unlawful, and this Court should affirm the district court's judgment vacating and remanding the Final Rule.

Dated: March 23, 2017.

Respectfully submitted,

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

STATEMENT OF RELATED CASES

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

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,602 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospace typeface using Microsoft Word with 14-point font in plain roman type style.

DATED this 23rd day of March, 2017.

STOEL RIVES LLP

/s/ Ryan P. Steen
Ryan P. Steen

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

ADDENDUM

ADDENDUM

Except for the following, all applicable authorities are contained in the Addendum to the Defendants-Appellants' Opening Brief and the Addendum to the Northern Alaska Plaintiffs' Answering Brief:

STATUTES

5 U.S.C. § 704 ..... A

16 U.S.C. § 1362(1)(C), (19)(C) ..... B

16 U.S.C. § 1531(b)-(c) C

5 U.S.C. § 704. Actions Reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

16 U.S.C. § 1362. Definitions.

For the purposes of this chapter--
(1) The term “depletion” or “depleted” means any case in which—

. . .

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 [16 U.S.C.A. § 1531 et seq.].

. . .

(19) The term “strategic stock” means a marine mammal stock--

. . .

(C) which is listed as a threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), or is designated as depleted under this chapter.

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

. . .

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.
(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, I electronically filed the foregoing ANSWERING BRIEF AND ADDENDUM OF PLAINTIFFS-APPELLEES ALASKA OIL AND GAS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ryan P. Steen
Ryan P. Steen