



# Ninth Circuit Upholds Listing Decision Based on End of Century Climate Change Predictions

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On October 24, 2016, the United States Court of Appeals for the Ninth Circuit upheld the National Marine Fisheries Service (Service) determination listing the Beringia Distinct Population Segment (DPS) of the Bearded Seal (*Erignathus barbatus nauticus*) as a threatened species under the Endangered Species Act (ESA). *Alaska Oil & Gas Ass'n v. Pritzker*, No. 14-35806 (9th Cir. Oct. 24, 2016). In doing so, the Ninth Circuit reversed the United States District Court for the District of Alaska. The decision reinforces the fact that the Ninth Circuit applies a highly deferential standard of review to federal agency actions to protect species under the ESA, and suggests that future decisions based on long-term climate change projections will be upheld.

The action was initiated by a number of parties, including the Alaska Oil and Gas Association, the State of Alaska, and the North Slope Borough, who alleged that the decision to list violated the Administrative Procedure Act and the ESA. The principle issue in the case was whether the Service can ascribe threatened status to a currently healthy species that is predicted to lose its habitat due to climate change by the end of the century. Slip Op. at 1. The Ninth Circuit found that the Service's modeling efforts and climate change predictions through year 2100 supported the listing decision and that the Service's determination was made in accordance with the ESA. This holding is consistent with the Ninth Circuit's decision to uphold the designation of critical habitat for the polar bear based substantially on climate change predictions. *Alaska Oil and Gas Ass'n v. Jewell*, No. 13-35919 (9th Cir. Feb. 29, 2016). The decision suggests that the Ninth Circuit will affirm listing of species that are healthy and would not otherwise meet the ESA listing criteria based on climate change modeling many decades into the future, particularly where snow or ice habitat is implicated.

The Center for Biological Diversity (CBD) filed a petition in 2008 requesting that the Service list three seal species. In 2012, the Service determined that two distinct population segments of the Pacific bearded seal subspecies warranted listing as threatened species (only the Beringia seal claim remained at issue in this

appeal). The ESA defines an endangered species as one that is in danger of extinction throughout all or a significant portion of its range, however, a threatened species is one that is likely to become an endangered species within the foreseeable future . . . 16 U.S.C. § 1532(6),(20). The Service's 2012 listing determination relied heavily on the Intergovernmental Panel on Climate Change (IPCC) climate change models. Slip Op. at 10, 14. The Service used these models to determine how climate change would impact the Beringia seal's habitat. While the IPCC based its predictions through year 2050 on already-collected data, the IPCC based its predictions for years 2050-2100 on 24 models with varying assumptions. *Id.* at 14-15. The Service used these models to develop scenarios to predict the persistence of sea ice habitat. The Service focused on sea ice that had the necessary composition and presence during the species' critical life activities (shallow ice present when the seals will use the ice for breeding, etc.), and concluded that there would be no sea ice habitat available to the Beringia seal by 2095. Based on this analysis, the Service concluded that the Beringia seal should be listed as threatened under the ESA.

The Plaintiffs advanced three main arguments: (1) that the Service inappropriately included longer-term climate projections diverging from its previous practice of predicting out to the year 2050; (2) the Service failed to provide an evidence-based explanation for the relationship between habitat loss and the species' survival; and (3) the Service failed to demonstrate that the impact of climate change on the species will be of a magnitude that places the species 'in danger of extinction.' Slip Op. at 23, 26, 29-30. The district court had found the Service's decision to be arbitrary and capricious based on the Service's reliance on volatile climate change predictions, a lack of data on the species adaptability and population numbers, and the Service's failure to identify the exact time the species would reach an extinction threshold. Slip Op. at 6-7.

The Ninth Circuit disagreed with the lower court, opining that the Service adequately explained its conclusions and assumptions, and that the ESA does not require the Service to base its decision on ironclad evidence. Slip Op. at 6. Rather, the Ninth Circuit held that the Service adequately described its analysis and the limitations of the modeling effort. The Ninth Circuit concluded that the Service's decision to look as far ahead as the year 2100 was consistent with a recent Service internal memorandum and was entitled to *Skidmore* deference. Slip Op. at 23-25. Citing to its February 2016 polar bear critical habitat decision, the panel also found that the Service's determination of the relationship between habitat loss and species survival was rationally based and that waiting for evidence to demonstrate population decline would require that the Service wait for the tipping point. *Id.* at 28. The panel also concluded that the district court's holding that the Service should have quantified a population reduction or extinction threshold was beyond the requirements of the ESA. *Id.* at 31-32.

This holding marks the latest in a series of opinions in the Ninth Circuit upholding listing decisions under the ESA based on climate change projections well into the future. We expect to see the Service and the U.S. Fish and Wildlife Service increasingly rely on climate change projections to justify listing. This means we may continue to see species with robust populations protected now based on modeled predictions of impacts to species populations as much as 100 years from now.