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COMMENT

Projecting the Future: Ninth Circuit Upholds ESA Listing for Bearded Seals

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In *Alaska Oil & Gas Ass'n v. Pritzker*,[1] the U.S. Court of Appeals for the Ninth Circuit recently upheld a rule listing two species of seals as "threatened" under the Endangered Species Act (ESA)[2] based on climate change projections and associated habitat loss from reduction of sea ice. The listing rule concluded that the loss of sea ice over shallow waters in the Arctic would leave the Pacific bearded seal subspecies endangered by 2095. Reversing the U.S. District Court for the District of Alaska, which concluded that the climate projections and modeling were uncertain and unreliable, the appellate court held, in October 2016, that the National Marine Fisheries Service (NMFS) listing decision was reasonable and supported by substantial evidence. The opinion is noteworthy because it allowed the extension of the "foreseeable future" time frame almost 50 years beyond any prior listing decision and reconfirmed that reliance on climate change models, even if uncertain, may constitute "best available science."

The case has garnered particular attention based on its use of climate modeling over an almost 100-year horizon, despite acknowledging the inherent uncertainty and increasing variability of such models over time. The court's opinion supports NMFS' and the U.S. Fish and Wildlife Service's (FWS') recent policy shift toward resolving climate change uncertainties in favor of listing species, and has caused consternation because it is possible to argue that almost any species could become in danger of extinction from climate change over a long enough period. However, it is also arguable that such a finding could be limited on its facts.

I. The Listing

On December 28, 2012, NMFS issued a final rule listing the Beringia and Okhotsk distinct population segments (DPS) of bearded seals as "threatened" under the ESA (2012 listing decision).[3] The ESA defines a "threatened species" as one that "is likely to become endangered in the foreseeable future throughout all or a significant portion of its range." In 2008, the Center for Biological Diversity had filed a petition to list the subject species as endangered, citing global warming as the primary threat to bearded seals.[4] In the 2012 listing decision, NMFS found that the bearded seal populations were presently stable, but listed the bearded seal as threatened due to predicted loss of sea ice habitat related to climate change.

Utilizing modeling data from the Intergovernmental Panel on Climate Change's (IPCC's) Fourth Assessment Report,[5] NMFS based its decision on modeled projections nearly 100 years into the future. In terms of reliability of the modeling, NMFS acknowledged its limitations, stating, "[W]e recognize that there are uncertainties associated with predictions based on hemispheric projections or indirect means. We also note that judging the timing of onset of potential impacts to bearded seals is complicated by the coarse resolution of the IPCC models." Nevertheless, NMFS determined that the models reflect reasonable assumptions regarding habitat alterations to be faced by bearded seals in the foreseeable future.[6] Finally, although ESA §9 take prohibitions were included in the draft rule, NMFS concluded that the §4(d) regulations extending such take prohibitions were not necessary for the bearded seal population at this time.

1. No. 14-35806, 46 ELR 20169 (9th Cir. Oct. 24, 2016).
2. 16 U.S.C. §§1531-1544; ELR Stat. ESA §§2-18.
3. While the slip opinion states that NMFS found the species to be "endangered," the rule actually stated that they were "threatened." 77 Fed. Reg. 76739, 76740 (Dec. 28, 2012).
4. *See* Center for Biological Diversity, Before the Secretary of Commerce—Petition to List Three Seal Species Under the Endangered Species Act: Ringed Seal (*Pusa Hispida*), Bearded Seal (*Erignathus Barbatus*), and Spotted Seal (*Phoca Largha*) (2008), *available at* http://www.biologicaldiversity.org/species/mammals/bearded_ringed_and_spotted_seals/pdfs/CBD_ringed_bearded_spotted_petition.pdf.
5. IPCC, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (2007), *available at* https://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg3_report_mitigation_of_climate_change.htm.
6. *Id.* at 76749.

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Section 9 of the ESA imposes a blanket prohibition against the take of any endangered species.[7] However, for species listed as threatened, §4(d) instructs that the agencies "shall issue such regulations as . . . deem[ed] necessary and advisable to provide for the conservation of such species."[8] While the FWS has adopted a regulation that applies §9 take prohibitions automatically to threatened species, NMFS applies the prohibitions on a case-by-case basis by issuing specific §4(d) rules. Here, NMFS took the teeth out of the listing by agreeing that take prohibition measures were not required. Nevertheless, the state of Alaska and various oil and gas interests sued to challenge the listing.

II. The Lower Court Decision

In challenging the 2012 listing decision as arbitrary and capricious under the Administrative Procedure Act (APA),[9] the plaintiffs raised several alleged errors on the part of NMFS, including: (1) the listing decision was not based on the "best scientific and commercial data available," in violation of 16 U.S.C. §1533(b)(1)(A); (2) the population of bearded seals was presently plentiful; (3) a lack of reliable population data made it impossible to determine an extinction threshold; (4) use of predictive climate projections beyond 2050 was speculative; and (5) there was no causal connection between the loss of sea ice and the impact of that loss on the bearded seals' viability.

The Alaska District Court agreed with the plaintiffs that the 2012 listing decision was arbitrary and capricious, and that NMFS did not act reasonably due to uncertainty in modeling and unreliability in predictions that extend so far into the future. In setting aside the 2012 listing decision, the lower court focused on two factors: (1) the lack of any articulated discernible, quantified threat of extinction within the reasonably foreseeable future, and (2) the express finding that, because existing protections were adequate, no further protective action need be taken at this time. Of significance to the lower court decision was the fact that NMFS acknowledged that it did not have sufficient data to determine the resilience of bearded seals to cope with climatic changes or to define an extinction threshold for bearded seals, much less assess the probability of reaching that threshold within a specified time.

III. The Ninth Circuit Decision

Using the same "arbitrary and capricious" standard as the lower court, the Ninth Circuit was considerably more deferential to NMFS, finding that the 2012 listing decision was reasonable. Foremost, the court addressed the agency's reliance on predictive data from the IPCC Fourth Assessment Report, which NMFS used to determine the magnitude and timing of climate change's impact on the availability of sea ice in areas inhabited by bearded seals. The IPCC projections indicated that by 2095, sea ice in several regions where the bearded seals give birth will have disappeared entirely during the mating, nursing, and birthing seasons.

The Ninth Circuit panel supported the species-specific "foreseeable future" of 2095 used by NMFS, and acknowledged that the modeling had certain issues of volatility and reliability but deferred to the agency given the complexity of the modeling and NMFS' disclosure of the limits of its approach.[10] In particular, the court found that "NMFS's projections for the second-half of the century are also reasonable, scientifically sound, and supported by evidence,"[11] despite a lack of data going beyond 2050. "The fact that climate projections for 2050 through 2100 may be volatile does not deprive those projections of value in the rulemaking process."[12] Citing the ESA's standard of "best scientific and commercial data available," the court held that there is "scientific consensus regarding the 'direction and effect' of climate change."[13]

In fact, the Ninth Circuit acknowledged that this case may be about more than this listing:

> Although Plaintiffs frame their arguments as challenging long-term climate projections, they seek to undermine NMFS's use of climate change projections as the basis for ESA listings. Plaintiffs' contention is unavailing; in *Alaska Oil and Gas Association v. Jewell*, we adopted the D.C. Circuit's holding that the IPCC climate models constituted the "best available science" and reasonably supported the determination that a species reliant on sea ice likely would become endangered in the foreseeable future.[14]

In response to the overall theme that climate change impacts on species cannot be reliably predicted, the Ninth Circuit reached the following conclusion:

> The ESA does not require NMFS to base its decision on ironclad evidence when it determines that a species is likely to become endangered in the foreseeable future; it simply requires the agency to consider the best and most reliable scientific and commercial data and to identify the limits of that data when making a listing determination.[15]

IV. Projections for Future ESA Listing Decisions

With the bearded seal subpopulations listing, NMFS took another step down the predictive modeling path. Although the agencies—NMFS and FWS—have stated that they will not use the ESA to regulate greenhouse gases, climate change continues to play an outsized role in the agencies' listing and critical habitat decisions. When viewed together

7. 16 U.S.C. §1538(a)(1).
8. *Id.* §1533(d).
9. 5 U.S.C. §§500-559.
10. *Alaska Oil & Gas Ass'n v. Pritzker*, No. 14-35806, slip op. at 16-17, 46 ELR 20169 (9th Cir. Oct. 24, 2016).
11. *Id.*, slip op. at 17.
12. *Id.*, slip op. at 18.
13. *Id.*, slip op. at 19.
14. *Id.*, slip op. at 16.
15. *Id.*, slip op. at 20.

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with the final rules pertaining to critical habitat adopted in early 2016,[16] it is clear that the scope of the ESA has expanded considerably in the past year.

The first February 2016 critical habitat rule defines the term, "geographical area occupied by the species," to include areas used throughout all or a part of the species' life cycle, "even if not used on a regular basis," and to exclude the statutory modifier "at the time it is listed."[17] The other February rule clarifies the definition of the term "destruction or adverse modification" of critical habitat.[18] The regulation has the following definition:

> [A] direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.[19]

Overall, these developments give the Services broad ability to designate habitat (critical habitat or simply occupied habitat) and to protect it through its §7 consultation process.

As acknowledged by NMFS and the Ninth Circuit, per U.S. Department of the Interior 2009 guidance,[20] listing decisions must be made on the basis of a species-specific time frame for each listing analysis, based on the information available regarding the species and the threats to its survival. While the use of climate modeling has become more common and may become a regular feature of ESA listing decisions, not all species will have as direct a relationship with climate change impacts as many Arctic species. Arctic species such as the bearded seal are uniquely dependent on sea ice, and the IPCC climate modeling provided direct predictions related to the loss of this resource. Other species in the continental states have a more complicated relationship with climate change, and such listing analyses are unlikely to be supported so directly by a long-horizon model.

With the change in administration and professed distrust of climate change science by President Donald Trump, it is possible that the use of such climate change models may be rolled back entirely through policy revisions likely to be undertaken by the new Administration. Already, on January 17, 2017, 13 state attorneys general have issued a letter to the President Trump transition team requesting repeal of the critical habitat rules.[21]

Further, the case creates new fodder for Republican efforts to amend the APA to provide for de novo review of agency decisions. In March 2016, Republicans introduced the Separation of Powers Restoration Act of 2016[22] to eliminate the well-established *Chevron* deference test established by the unanimous U.S. Supreme Court 1984 decision *Chevron USA, Inc. v. Natural Resources Defense Council*,[23] which required courts to accept an agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers. It is rumored that the new Administration would take action to pass this legislation.

Finally, the case may fuel ongoing pressure at the legislative level to amend the ESA. Thus, although this case has been touted as a win for climate change science, it could also serve as a rallying point for the new Administration to undertake more sweeping APA and ESA reforms.

16. *See* 81 Fed. Reg. 7413, 7414 (Feb. 11, 2016), 81 Fed. Reg. 7214 (Feb. 11, 2016).
17. 50 C.F.R. §424.02 (2016); 81 Fed. Reg. 7413, 7429 (Feb. 11, 2016).
18. 50 C.F.R. §402.02 (2016); 81 Fed. Reg. 7214, 7216 (Feb. 11, 2016).
19. *See* 50 C.F.R. §402.02 (2016).
20. Memorandum from Solicitor, U.S. Department of the Interior, to Acting Director, U.S. Fish and Wildlife Service (Jan. 16, 2009), https://www.fws.gov/endangered/esa-library/pdf/M-37021%20Foreseeable%20future.pdf.
21. The letter to the President Trump transition team was signed by the attorneys general from Alabama, Alaska, Arizona, Arkansas, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, South Carolina, Texas, West Virginia, and Wyoming. *See* Letter from Luther Strange, Alabama State Attorney General, to Ado Machida, Policy Implementation Team Lead (Jan. 17, 2017), *available at* https://www.texasattorneygeneral.gov/files/epress/Letter_to_Ado_Machida.pdf?cachebuster%3A77=&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.
22. H.R. 4768, 114th Cong. (2016).
23. 467 U.S. 837, 14 ELR 20507 (1984).