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## Alaska Oil & Gas Association v. Pritzker

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*Alaska Oil & Gas Association v. Pritzker*, 840 F.3d 671 (9th Cir. Oct. 24, 2016)

**Benjamin Almy**

In *Alaska Oil & Gas Association v. Pritzker*, the Ninth Circuit reversed the United States District Court for the District of Alaska’s decision to strike down the National Marine Fisheries Service’s (“NMFS”) listing of distinct population segments of the Pacific bearded seal. The court determined that the NMFS was in full compliance with the requirements of the Endangered Species Act and squarely rejected the district court’s demand for highly specific data pertaining to the projected effects of climate change on the bearded seal.

I. INTRODUCTION

In *Alaska Oil & Gas Association v. Pritzker*, Alaska Oil and Gas Association, the State of Alaska, and North Slope Borough (collectively, “Plaintiffs”) filed individual lawsuits under the Endangered Species Act’s (“ESA”) citizen-suit provision and the Administrative Procedure Act (“APA”).<sup>1</sup> Their suits challenged the National Marine Fisheries Service’s (“NMFS”) listing of the Beringia and Okhotsk Distinct Population Segments (“DPS”) of the Pacific bearded seal as threatened under the ESA.<sup>2</sup> The NMFS determined that the species survival, while not presently endangered, was threatened due to the likely loss of habitat resulting from climate change.<sup>3</sup>

The United States District Court for the District of Alaska held that the rule was arbitrary and capricious due to an insufficient basis.<sup>4</sup> The court based its holding primarily on two factors: 1) the failure of the NMFS to articulate a “discernible, quantified threat of extinction within the reasonably foreseeable future”; and 2) the action was superfluous in light of existing adequate protections.<sup>5</sup> On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court’s ruling on both accounts.<sup>6</sup> The Ninth Circuit held that “NMFS’s decision to list the Beringia DPS as threatened was not arbitrary, capricious, or otherwise in contravention of applicable law.”<sup>7</sup>

II. FACTUAL AND PROCEDURAL BACKGROUND

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<sup>1</sup> Alaska Oil & Gas Ass’n v. Pritzker, 840 F.3d 671, \*674-75 (9th Cir. Oct. 24, 2016) [hereinafter *Alaska Oil & Gas Ass’n II*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at \*674.

<sup>4</sup> *Id.*

<sup>5</sup> Alaska Oil & Gas Ass’n v. Pritzker, 2014 WL 3726121, \*16 (D. Alaska July 25, 2014) [hereinafter *Alaska Oil & Gas Ass’n I*].

<sup>6</sup> *Alaska Oil & Gas Ass’n II*, at \*675.

<sup>7</sup> *Id.*

“In 2008, the Center for Biological Diversity (“CBD”) filed a petition requesting that the Secretary of Commerce list three ‘sea ice seal’ species as endangered or threatened under the ESA.”<sup>8</sup> Following two rounds of peer review, several rounds of public notice and comment, and public hearings, the NMFS determined that the Okhotsk and Beringia DPS of the Pacific bearded seal subspecies were “likely to become . . . endangered species within the foreseeable future throughout . . . a significant portion of [their] range.”<sup>9</sup> On December 28, 2012, the NMFS and the National Oceanic and Atmospheric Administration of the Department of Commerce issued a final decision that listed the Beringia and Okhotsk DPS of bearded seals as threatened under the ESA (“Listing Rule”).<sup>10</sup>

In May and June of 2013, the Plaintiffs filed lawsuits in the United States District Court for the District of Alaska, challenging the Listing Rule.<sup>11</sup> The Plaintiffs alleged that the listing was not based on the “best scientific and commercial data available” in violation of the “basis for determinations” provision of the ESA<sup>12</sup>; “NMFS’s use of predictive climate projections beyond 2050 were speculative”; NMFS had “changed tack” from prior decisions involving Arctic sea-ice; NMFS had failed to show there existed a “causal connection” between the loss of sea ice and the impact of that loss to the species’ viability; there was an abundant bearded seal population; and “a lack of reliable population data made it impossible to determine an extinction threshold.”<sup>13</sup>

On July 25, 2014, the district court held the Plaintiffs lacked standing to challenge the listing of the Okhotsk DPS, but granted summary judgment against the government on two issues related to the Beringia DPS.<sup>14</sup> First, the court reasoned that the NMFS’s decision to list the Beringia DPS as threatened was arbitrary and capricious, and granted summary judgment in favor of the Plaintiffs on that claim.<sup>15</sup> The district court based its conclusion on the argument that “NMFS’s long-term climate projections were volatile and the agency lacked data on the bearded seal’s adaptability and population trends, including ‘a specified time’ at which the seal would reach an extinction threshold.”<sup>16</sup> Second, the district court granted summary judgment to Alaska on their separate claim which alleged NMFS failed to comply with ESA’s state cooperation provisions by not providing the State with a separate written justification for rejecting their comments.<sup>17</sup> Citing the NMFS’s reasoning as “too

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<sup>8</sup> *Id.* at \*674.

<sup>9</sup> *Id.* (quoting 16 U.S.C. § 1532(20)(2016)).

<sup>10</sup> *Alaska Oil & Gas Ass’n I*, at \*3.

<sup>11</sup> Pl.’s Brief, 11-12, May 12, 2015, No. 14-35806.

<sup>12</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>13</sup> *Alaska Oil & Gas Ass’n II*, at \*675.

<sup>14</sup> *Id.*

<sup>15</sup> *Alaska Oil & Gas Ass’n I*, at \*4.

<sup>16</sup> *Id.* at \*6.

<sup>17</sup> *Id.* at \*6-7.

speculative and remote to support a determination that the bearded seal is in danger of becoming extinct<sup>18</sup>, the district court vacated the Listing Rule.<sup>19</sup>

### III. ANALYSIS

On de novo review, the Ninth Circuit analyzed the district court's grant of summary judgment which found that the NMFS's ESA listing decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>20</sup> The Ninth Circuit's standard of review required a "high threshold for setting aside agency action following public notice and comment," as well as a presumption that an agency's action is effective "so long as the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made."<sup>21</sup> The ESA requires an agency to base its determination "solely on the basis of the best scientific and commercial data available" when identifying and listing endangered or threatened species.<sup>22</sup>

The CBD's petition to list the bearded seals named global warming as the foremost risk to their existence.<sup>23</sup> In accordance with CBD's guidance, the NMFS "focused its status review on the impact of warmer temperatures" on the Beringia DPS, including projections of ice recession by 2050.<sup>24</sup> Using those projections as foundation, and augmented by additional scientific research, the NMFS determined that Arctic sea ice will continue to recede through 2100.<sup>25</sup>

Based on the NMFS's reliance on models and data broadly accepted by the global scientific community,<sup>26</sup> the court held that NMFS's determination was backed by the "best available science" and reasonably sustained its conclusion "that a species reliant on sea ice likely would become endangered in the foreseeable future."<sup>27</sup>

The Plaintiffs relied on three principle arguments to challenge the NMFS's listing decision.<sup>28</sup>

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<sup>18</sup> *Id.* at \*54.

<sup>19</sup> *Alaska Oil & Gas Ass'n II*, at \*675.

<sup>20</sup> *Id.* at \*675-76.

<sup>21</sup> *Id.* (quoting *Nw. Ecosys. All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, \*1140 (9th Cir. 2007)).

<sup>22</sup> *Id.* at \*678 (quoting 16 U.S.C. § 1533(b)(1)(A)).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*679-80.

<sup>26</sup> *Id.* at \*678 (Referring to the NMFS's use of the Intergovernmental Panel on Climate Change's predictive models, and the application of those models to observational data that the Department of the Interior collected annually regarding sea ice in the Bering and Chukchi Seas).

<sup>27</sup> *Id.* at \*679.

<sup>28</sup> *Id.* at \*681.

A. “Foreseeable Future” Beyond 2050

First, Plaintiffs contend that NMFS diverged from its previous practice of setting an outer boundary for its “foreseeable future” analysis by extending its climate projections beyond 2050.<sup>29</sup> The court held however, that an “agency may determine the timeframe for its ‘foreseeable future’ analysis based upon the best data available for a particular species and its habitat.”<sup>30</sup>

The court accepted NMFS’s adoption of a new definition of “foreseeable future”, which the Department of Interior laid out in a 2009 memorandum.<sup>31</sup> The framework articulated “that an interpretation of ‘foreseeable future’ must be supported by reliable data regarding ‘threats to the species, how the species is affected by those threats, and how the relevant threats operate over time.’”<sup>32</sup> The memorandum further noted that “foreseeable future” time frames would vary dependent on threat-specific evaluations of the best data available for different species and for different threats.<sup>33</sup> The memorandum recognized that this interpretation was a change in agency policy, designed to adopt a more data-driven threat analysis to future harm, and that this policy sought “to conform to federal appellate decisions requiring ESA analyses to adhere to the statute’s ‘best data available’ standard.”<sup>34</sup> An agency may issue a new policy if it provides a “reasoned explanation” for the policy’s adoption that includes recognition of the changing position and factual findings that motivated the change.<sup>35</sup>

The court recognized “that while climate projections for 2050 through 2100 may be volatile, that does not deprive them of value in the rulemaking process.”<sup>36</sup> The ESA does not require listing decisions to be based on “ironclad evidence,” only that “the agency consider the best and most reliable scientific and commercial data and the limits of that data”.<sup>37</sup>

In applying this standard, the court concluded that NMFS’s newly adopted foreseeability analysis was in accord with the ESA’s “best data available” mandate, and that the NMFS’s altered methodology was not arbitrary and capricious.<sup>38</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at \*682.

<sup>32</sup> Office of the Solicitor of the U.S. Dep’t of the Interior, *Memorandum on the Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act*, No. M-37021 (Jan. 16, 2009).

<sup>33</sup> *Id.* at \*8.

<sup>34</sup> *Id.* at \*8-9.

<sup>35</sup> *Alaska Oil & Gas Ass’n II*, at \*682.

<sup>36</sup> *Id.* at \*680.

<sup>37</sup> *Id.* at \*681.

<sup>38</sup> *Id.* at \*682.

*B. Relationship Between Habitat Loss and Bearded Seal's Survival*

Next, Plaintiffs alleged that the NMFS failed to demonstrate a nexus between the loss of sea ice and the bearded seal's risk of future extinction.<sup>39</sup> Plaintiffs argued that instead of listing the bearded seal, NMFS should have used a "wait and see" approach.<sup>40</sup> The district court agreed, finding NMFS failed to provide specific predictions to sufficiently demonstrate a reasonable basis for its listing.<sup>41</sup>

The Ninth Circuit rejected this argument, asserting that the ESA merely requires that an agency articulate a rational connection between the relevant data and its listing decision.<sup>42</sup>

Grounded in that reasoning, the court held that NMFS does not need to wait until a species' habitat is devastated to conclude that habitat loss may cause extinction.<sup>43</sup> Data presented that "reasonably supports the conclusion that loss of habitat at key life stages will likely jeopardize the Beringia DPS's survival over the next 85 years" is not invalidated by uncertainty regarding the speed and scale of that impact.<sup>44</sup>

*C. Standard for "Likely to Become Endangered" Under ESA*

Lastly, Plaintiffs argued that the NMFS was required to demonstrate the magnitude of climate change's impact on the species before listing.<sup>45</sup> The court quickly dismissed this contention as discordant with the ESA's requirement that a listing agency demonstrate a likelihood of endangerment.<sup>46</sup> The court reasoned that both case law and the plain meaning of the statutory language<sup>47</sup> contradicted the Plaintiff's final argument<sup>48</sup>

#### IV. CONCLUSION

In *Alaska Oil & Gas Association v. Pritzker*, the Ninth Circuit reversed the district court's ruling that invalidated NMFS's listing of the Beringia and Okhotsk DPS of the Pacific bearded seal as threatened under

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*683.

<sup>41</sup> *Alaska Oil & Gas Ass'n I*, at \*15.

<sup>42</sup> *Alaska Oil & Gas Ass'n II*, at \*683 (The Ninth Circuit rejected the district court's imposition of additional requirements because a "narrow construction of what qualifies as critical habitat runs directly counter to the ESA's conservation purposes." The Court further noted that the ESA was "concerned with protecting the future of a species and not merely preservation of an existing" population).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at \*684.

<sup>46</sup> *Id.*

<sup>47</sup> 16 U.S.C. § 1533(a)(1) ("the present or threatened destruction, modification, or curtailment of its habitat or range").

<sup>48</sup> *Alaska Oil & Gas Ass'n II*, at \*684.

the ESA.<sup>49</sup> The Ninth Circuit squarely rejected the district court's demand for highly specific data as contrary to ESA requirements.

Following in the path of the polar bear listing, this ruling further cements as precedent the ability to rely on climate change projection as sufficient means to list species under the ESA. Historically, judicial interpretation of the ESA suggests strong support for governmental authority to redress underlying threats. However, while effective as a regulatory tool, the ESA was not designed to address climate change, and abuse of its breadth could ultimately lead to restrictive amendment of the act.

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<sup>49</sup>

*Id.* at \*674.