“Steller” Protection of the Western Distinct Population Segment: *Alaska v. Lubchenco*

**INTRODUCTION**

There is a delicate relationship between governmental agencies, required to protect the environment, and the industries those agencies oversee, challenged by the need to profit within a vulnerable environment. In *Alaska v. Lubchenco*, the Ninth Circuit upheld an agency’s oversight of the fishing industry in Alaska because of environmental concerns. The court’s deference to the agency ensured that the Endangered Species Act’s (ESA) intertwined goals of survival and recovery were both upheld. The case’s holding also has potential to promote the ESA’s recovery goal. Courts have traditionally interpreted the ESA to promote the survival of listed species, but recently have construed the ESA to require species’ recovery. *Alaska v. Lubchenco* contributes to this recent trend by focusing on the recovery, not just the survival, of the western Distinct Population Segment of Steller sea lions.

I. BACKGROUND

A. *Steller Sea Lion Population Trends*

Steller sea lions populate the North Pacific Ocean Rim’s subarctic waters from northern Japan, through the Aleutian Islands and Bering Sea, to central California. Roughly 70 percent reside in Alaska. Steller sea lions forage and feed on a variety of marine wildlife, primarily cod and mackerel.
The Steller sea lion population steadily declined from 1960 to 1990. In 1990, the National Marine Fisheries Service (NMFS) listed the entire population as “threatened” under the ESA. Protective measures were taken to reduce mortality rates, restrict potential harassment, and minimize disturbance and interference with sea lion behavior, particularly at pupping and breeding sites. In 1997, NMFS divided the population into two subpopulations based on genetic and survival rate research: the eastern Distinct Population Segment (eDPS) and the western Distinct Population Segment (wDPS). There are about 39,000 to 45,000 wDPS sea lions, but between 46,000 and 58,000 eDPS individuals. NMFS changed the wDPS’s status to “endangered” because the wDPS experienced a “precipitous, large population decline.” The wDPS dropped 75 percent between 1967 and 1990, and another 40 percent between 1991 and 2000. Nutritional stress brought on by commercial fishing is the most plausible explanation for the wDPS’s decline.

B. Relevant Statutes

The relevant statutes in this case are the Magnuson-Stevens Fisheries Conservation Act (MSA) and the ESA. The MSA dictates fishery management in U.S. waters and establishes regional councils charged with developing fishery management plans to sustainably manage fisheries. The North Pacific Fishery Management Council manages wDPS Steller sea lions.

The ESA’s purpose is to conserve ecosystems upon which endangered and threatened species depend. The ESA requires the federal government to list endangered species’ critical habitats, and section 7 prohibits federal agencies from “jeopardiz[ing] the continued existence of any endangered species or threatened species or [taking actions that] result in the destruction or adverse modification of habitat of such species.” Designating critical habitat notifies

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4. Potential causes include: “disease, incidental takes in fishing gear, direct mortality (shooting), and natural or human induced changes (through fishing) in the abundance and species composition of the sea lion prey,” Designated Critical Habitat; Steller Sea Lion, 58 Fed. Reg. at 45,269.
5. COMM. ON THE ALASKA GROUNDFISH FISHERY & STELLER SEA LIONS, supra note 2, at 1.
6. Designated Critical Habitat; Steller Sea Lion, 58 Fed. Reg. at 45,269.
7. Alaska v. Lubchenco, 723 F.3d 1043, 1048–49 (9th Cir. 2013).
8. See NAT’L MARINE FISHERIES SERV., supra note 1, at x (eDPS sea lions); Steller Sea Lion, supra note 3 (wDPS sea lions).
9. Lubchenco, 723 F.3d at 1049.
10. See Steller Sea Lion, supra note 3. In contrast, the eDPS is stable or increasing in the northern part of its range in Southeast Alaska and British Columbia. In December 2013, the National Oceanic and Atmospheric Administration removed the eDPS from the List of Endangered and Threatened Wildlife because it was “not in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range.” Delisting of the Eastern Distinct Population Segment of Steller Sea Lion under the Endangered Species Act, 78 Fed. Reg. 66,140, 66,140 (Nov. 4, 2013) (codified at 50 C.F.R. §§ 223–224).
11. Lubchenco, 723 F.3d at 1050.
12. Id. at 1047.
13. Id. at 1049.
federal agencies that a listed species depends on a geographic area for existence, and provides special protections for the habitat under ESA section 7.

If a governmental entity, including an MSA regional council, has plans that might impact an endangered species, that entity must consult with the agency that has authority over the species. If the agency determines in its Biological Opinion (BiOp) that the planned action jeopardizes the species’ continued existence or adversely modifies its critical habitat, then the agency may suggest a reasonable and prudent alternative.\footnote{16}

The ESA requires NMFS to plan for sea lion recovery.\footnote{17} NMFS’s 2008 Recovery Plan divided the wDPS into seven subregions and outlined criteria to be met before the wDPS could be downlisted to “threatened” or delisted altogether.\footnote{18} These criteria required the entire wDPS population to grow, and to stabilize or increase in five of seven subregions.\footnote{19} The species could not be delisted if the population declined “significantly” in two adjacent subregions or if the population decreased by more than 50 percent in one subregion.\footnote{20}

NMFS “stands at the intersection” between the MSA and the ESA.\footnote{21} It protects threatened or endangered species and their habitats from regional council action, like fishery management plans. NFMS’s Alaska regional office oversees fisheries that produce roughly half of the fish caught in U.S. waters.\footnote{22} In accordance with the ESA, the North Pacific Fishery Management Council consulted with NMFS about its fishery plans, and NMFS prepared a BiOp.\footnote{23}

The BiOp reported that the wDPS population increased in four subregions, but declined in three others.\footnote{24} These two subregions prevented the whole population from meeting the Recovery Plan’s goal of a statistically significant population increase. The BiOp inquired whether fisheries “reduce[d] the value of the critical habitat for the conservation of the species.”\footnote{25} The BiOp identified stress from fisheries as contributing to the wDPS population’s decline and consequently proposed restricting fishery activity.\footnote{26}

\footnote{16. See 16 U.S.C. § 1536.}
\footnote{17. Lubchenco, 723 F.3d at 1047–48.}
\footnote{18. Id. at 1049.}
\footnote{19. Id.}
\footnote{20. Id.}
\footnote{21. Id. at 1048.}
\footnote{22. About Us, ALASKA REGIONAL OFF., NAT’L MARINE FISHERIES SERV., http://alaskafisheries.noaa.gov (last visited Apr. 16, 2014).}
\footnote{24. 2010 BIOLOGICAL OPINION, supra note 23, at xxiii–iv. Between 2001 and 2009, the rate of wDPS rookery pup production declined by 7 percent in the central Aleutian Islands subregion and 43 percent in the western subregion. Id. at 288.}
\footnote{25. Lubchenco, 723 F.3d at 1050.}
\footnote{26. Id.}
II. DISCUSSION

Litigation concerning the Steller sea lion since the late 1980s suggests the court’s use of the species as a means of defining relationships between regulating authorities and establishing a precedent to evaluate future challenges to biodiversity in the North Pacific ecosystem. Steller sea lions experienced a population decrease that prompted the NMFS to limit commercial fishing in 2010. This limitation provoked *Alaska v. Lubchenco*.

In *Lubchenco*, fishing industry representatives and the State of Alaska challenged limitations placed on commercial fishing in areas that served as profitable fishing opportunities and wDPS critical habitat. The Ninth Circuit examined whether the lower court properly granted summary judgment to NMFS on ESA claims and a National Environmental Policy Act injunction. The lower court held that using subregions did not violate the ESA, and that NMFS used appropriate standards to determine that permitting the then-current fishing levels would negatively affect the Steller sea lion’s critical habitat and entire population. The Ninth Circuit affirmed the lower court’s decision.

The *Lubchenco* decision upheld deference to agencies with specialized knowledge and confirmed that recovery is a vital element to considering whether a species will “survive” under the ESA when determining the effect of federal actions. Most important among the plaintiffs’ five arguments was that NMFS should not have considered the proposed action’s impact on the species’ recovery prospects and instead should have only considered whether continued fishing would averesely harm the species’ survival. The plaintiffs also argued that NMFS should have applied the regulatory definition of adverse habitat modification, which the Ninth Circuit had previously partially rejected.

The Ninth Circuit rejected these and three other arguments. First, the plaintiffs claimed that the BiOp should have focused on the possible harm to the existing wDPS population rather than considering the adverse effect of fishing on the wDPS’s recovery. But the court upheld NMFS’s considerations because the ESA’s goals extend beyond species survival to include the delisting of a species. Survival and recovery are important goals; thus, NMFS “had to consider whether the proposed action, continued fishing, could prevent the species from achieving the Recovery Plan’s goals for delisting.” NMFS found that the wDPS’s elimination in the western Aleutians would be “significant to the wDPS, and is expected to appreciably reduce the likelihood of both their survival and recovery in the wild.”

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28. *Lubchenco*, 723 F.3d at 1054.
29. See id. at 1053 (citing Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1069–72 (9th Cir. 2004)).
30. Id. at 1051.
31. Id. at 1054.
32. Id.
33. Id.
Second, NMFS correctly applied the ESA definition of adverse habitat modification. The regulatory definition of adverse habitat modification is a “direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” However, the Ninth Circuit has previously struck down a portion of the regulatory definition as “contrary to the [ESA’s] statutory language.” As such, the Lubchenco court found NMFS’s use of ESA statutory language appropriate.

The plaintiffs also criticized NMFS’s analytical methodology and argued for requiring a finding of direct causation between fishing and wDPS stress, scoffing at the BiOp’s statement that “the agency did not have the data to demonstrate the extent of nutritional stress or that such stress was caused by the fisheries.” However, agency regulations require NMFS to ensure action will not directly or indirectly affect the wDPS, and the agency found that fisheries deplete the wDPS’s prey species, leading to nutritional distress. In response to this finding and the plaintiffs’ final argument, that the BiOp should have focused on possible harm to the existing wDPS population rather than considering the adverse effects of fishing on the wDPS’s recovery, the court deferred to the agency, holding that NMFS’s findings were sufficient.

III. ANALYSIS & IMPLICATIONS

By holding that NMFS properly regulated the fisheries, Lubchenco reinforces the protection of endangered species in two ways: (1) by continuing to defer to an agency’s technical and scientific expertise and (2) by holding that the ESA’s statutory language is superior to the regulatory definition of adverse modification. The Ninth Circuit used the Steller sea lion to ensure that equal weight is afforded to the ESA’s two goals—survival and recovery—and thus enables greater protection of endangered species.

A. Defe rence

The Ninth Circuit deferred to NMFS’s judgment, conforming to the custom of trusting agency oversight of endangered species. Agencies, like NMFS, have intimate knowledge of the species, its ecosystem, and its needs for survival and delisting.

In this case, the court accepted NMFS’s analytical methodology to determine fishery closures. The Ninth Circuit responded to the plaintiffs’

34. 50 C.F.R. § 402.02 (2013).
35. See Lubchenco, 723 F.3d at 1053.
36. Id. at 1053–54.
37. Id. at 1054–55.
38. Id. at 1054.
39. Id. at 1051.
40. Id. at 1055.
criticisms that NMFS used forage ratios and a single-species model:41 “[f]aced with competing interests of theoretical accuracy and analytical uncertainty, the agency made a rational choice. This court will not second guess the agency’s determination, which is supported by the record.”42 Yet, the Ninth Circuit does not always defer to the agency.43 In Earth Island Institute v. Hogarth, the court determined that studies researching purse seine net effects on dolphins did not use sufficient sample sizes to draw conclusions about the greater dolphin population.44 NMFS was required to consider all relevant factors, and the facts found must have had a rational connection to the determination made.45 In Lubchenco, NMFS’s interpretation that increased fishing would likely threaten the wDPS population, despite significant uncertainty, persuaded the court.46 The plaintiffs argued that the agency found causation between fishing records and decreased wDPS populations where there was none, but the court interpreted the BiOp as illustrating “the correlation between fishing and population decline” because it states “[s]ince 1999, fisheries have removed a consistently high proportion of their total catch within critical habitat [and meanwhile] Steller sea lions numbers continued to decline.”47

Further, the court identified an evaluation of the killer whale predation’s impact on the wDPS population in the BiOp where the plaintiffs did not: “[t]he agency, however, considered the effect of killer whales, but did not find it strong enough to outweigh the effect of fishing.”48 The court’s interpretation may increase the species’ potential to survive. The wDPS population trends challenge “the hypothesis that killer whale predation alone was responsible for

41. A forage ratio is the ratio of prey required by sea lions to available fish. Using forage ratios would have been problematic because ratios were already higher in areas to be affected by NMFS’s alternative plan. The criticism is misplaced, however, because NMFS instead relied on actual population decline. NMFS also used a single-species model, rather than a multispecies model that accounted for interspecies predation, because multispecies models involve more uncertain variables. Id. at 1054–55.

42. Id. The court found: (1) the NMFS determined which fisheries to close based on actual population decline in the subregions, (2) the agency made a rational choice given theoretical accuracy and analytical uncertainty in choosing a single-species model, (3) the NMFS correlated the fishing areas and decreased population growth characteristics of the subregions “to illustrate its larger theory that the fisheries and the wDPS were in competition for the same prey,” and (4) that the agency considered the predation but did not find it strong enough to outweigh the effect of fishing. Id.

43. See Earth Island Inst. v. Hogarth, 494 F.3d 757, 763–64 (9th Cir. 2007). The court held “no deference to agency discretion as to methodology is appropriate when the agency ignores its own statistical methodology” and makes a decision not rationally connected to the best available scientific evidence, especially when that decision is partly influenced by political concerns. Id.

44. Id. at 764. NOAA data required a sample size of 300 dolphins per species, but the administration only studied fifty-six dolphins. Id.

45. Id. at 766.

46. See also Greenpeace Action v. Franklin, 14 F.3d 1324, 1337 (9th Cir. 1992). The court held that NMFS’s “decision to go ahead with the 1991 fishery under the proposed restrictions, despite some uncertainty about the effects of commercial pollock fishing on the Steller sea lion, was not a clear error of judgment.” Id.

47. Alaska v. Lubchenco, 723 F.3d 1043, 1055 (9th Cir. 2013); 2010 BIOLOGICAL OPINION, supra note 23, at xxvii.

48. Lubchenco, 723 F.3d at 1055.
the decline,” but this does not mean the agency found the killer whale’s effect outweighed those of fishing. Predation contributes to natural mortality and so cannot be blamed for the wDPS’s decline; however, the recovery plan identified competition with fisheries and killer whale predation as “potentially high.” The agency qualified identifying killer whale predation as a contributor, emphasizing uncertainty, controversy, and disagreement within the scientific and stakeholder communities. There is also uncertainty about fishery effects, which the court chose not to investigate: “[t]he effect of fisheries on the distribution, abundance, and age structure of the sea lion prey field . . . is largely unknown [and] uncertainty in the available information . . . permits disparate interpretations and inferences.”

B. Finding Room for Recovery in the ESA

ESA section 7 mandates that agencies consult with an overseeing agency to ensure that federal actions (1) will not likely jeopardize the continued existence of an endangered or threatened species, and (2) will not result in the destruction or adverse modification of the listed species’ designated critical habitat. This case examines the ESA’s two components: jeopardy and adverse modification. The concepts are distinct, but “[a]ctivities that result in the destruction or adverse modification of critical habitat are also very likely to jeopardize the continued existence of the species . . . regardless of any official critical habitat designation or the absence of such a designation.”

In Gifford Pinchot, the Ninth Circuit held the regulatory definition of “adverse modification” contradicted 50 C.F.R. section 402.02 because it overlooked the recovery goal. This decision aligned with the court’s holding in National Wildlife Federation v. National Marine Fisheries Service, which marked the first time an appellate court integrated recovery into the jeopardy analysis of section 7. Although the court found NMFS needed to have analyzed the effects of proposed actions on recovery, it did not address whether the ESA itself requires consideration of both survival and recovery. The Fifth and Tenth Circuits have since interpreted section 7 to include recovery.

49. NAT’L MARINE FISHERIES SERV., supra note 1, at III-11 (emphasis added).
50. Id. at xii.
51. Id. at xii–xiii.
52. Id. at IV-4.
57. Id. at 456.
58. N.M. Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1283 & n.2 (10th Cir. 2001); Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 441–42 (5th Cir. 2001).
Lubchenco affirms the concept embraced by these holdings.59 One of the fisheries’ explicit arguments in this case was that NMFS should have adhered to the regulatory definition of adverse modification, which focuses only on survival.60 The court bluntly rejected that argument: “[t]here is no reason to hold the agency should have gone back to the questionable regulation here.”61

This case has been recognized for emphasizing the ESA’s recovery goal. As recently as October 2013, the U.S. District Court for the District of Puerto Rico noted that survival and recovery “are intertwined” as “the complementary goals of the consultation process,” citing Lubchenco.62 The court defined recovery as “improvement in the status of listed species to the point at which listing is no longer appropriate” according to ESA section 4(a)(1), and then cited to the regulation, indicating that following the regulation requires adopting ESA language.63 Lubchenco might reflect the court’s willingness to move away from emphasizing survival at the expense of recovery.

**CONCLUSION**

The Ninth Circuit used Alaska v. Lubchenco as an opportunity to emphasize the ESA’s distinct, but mutually reinforcing, goals: survival and recovery. The Lubchenco court deferred to NMFS’s determination that continued cod and mackerel fishing would inhibit the wDPS’s survival and recovery. In so holding, the court adopted the ESA’s statutory language, rather than the regulation’s interpretation. Adopting this interpretation affected other courts, and refocused the importance of delisting species from the ESA, rather than ensuring the mere continued existence of those species.

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59. See Alaska v. Lubchenco, 723 F.3d 1043, 1053–54 (9th Cir. 2013).
60. _Id._ at 1054.
61. _Id._
63. _Id._

We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, _Ecology Law Currents_, please contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at our website, http://www.boalt.org/elq.