



ADVOCATES for the **West**

ENDANGERED SPECIES ACT YEAR IN REVIEW

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Notable Decisions in 2018

- Listing challenges
- Litigation hurdles
- Injunctions



Listing Decisions

- Climate change and best available science matter
- Problems with flip-flopping, APA basics, and politics



Alaska Oil and Gas Ass'n v. Ross

722 Fed. Appx. 666 (9th Cir. Feb. 12, 2018)

- Upheld listing of Arctic ringed seal as threatened
- Need not rely on data that shows the “exact year” a species will hit its tipping point
- IPCC climate models are “best available science” despite 2100 projections and uncertainty



Ctr. for Biological Diversity v. Zinke

900 F.3d 1053 (9th Cir. 2018)

- Overturned denial of listing after agency reversed course between 2010 and 2014
- Agency cannot ignore “synergistic effects of climate change” due to uncertainty



Crow Indian Tribe v. United States

No. CV 17-89-M-DLC, 2018 WL 4568418 (D. Mont. Sept. 24, 2018)

- Vacated delisting of Greater Yellowstone grizzly bear
- Agency ignored impacts on other grizzly populations
- Relied on improper political issue instead of best available science



Litigation issues



Cascadia Wildlands v. Scott Timber

No. 6:16-cv-01710-AA (D. Or)



- Section 9 challenge to timber harvesting on former Elliot State Forest lands occupied by marbled murrelets
- 2018 WL 3341173 (July 5, 2018)
 - 2-year old anticipatory notice OK
- 2018 WL 3614202 (July 27, 2018)
 - Denied defendant's motion for summary judgment on standing despite inconsistencies in witness testimony

Friends of the Wild Swan v. FWS

No.17-35572, 2018 WL 4001658 (9th Cir. Aug. 22, 2018)

- Upheld dismissal of challenge to recovery plan
- Plan not a final agency action under the APA
- No allegation of a failure to perform non-discretionary action under the ESA



Ctr. for Biological Diversity v. Otter

No. 1:14-CV-258-BLW (D. Idaho Jan. 24, 2018)

- Section 9 challenge to Idaho trapping regulations based on harm to threatened Canada Lynx
- Reconsidered and overturned SJ and injunction, after new FWS declaration and discovery of declarant



Injunctions



Nat'l Wildlife Fed'n v. NMFS

866 F.3d 803 (9th Cir. 2018)

- Upheld Judge Simon's injunction requiring spill at Columbia Dams and monitoring of salmon
- Less than species-level threat and some uncertainty OK
- “Irreparable harm may be caused by activities broader than those that plaintiffs seek to enjoin.”



Cascadia Wildlands v. Scott Timber

715 Fed. Appx. 621 (9th Cir. 2017)

- Overturned preliminary injunction that stopped logging
- Judge Aiken failed to find it was likely, not just probable, that marbled murrelets occupied area



ESA Lessons

- Responsive to scientific uncertainty and climate change
- Political will and agency missteps are a problem

