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1 Brendan Cummings (CA Bar No. 193952)  
2 CENTER FOR BIOLOGICAL DIVERSITY  
3 P.O. Box 549  
4 Joshua Tree, CA 92252  
5 Phone: (760) 366-2232  
6 Facsimile: (760) 366-2669  
7 Email: bcummings@biologicaldiversity.org

8 Andrea A. Treece (CA Bar No. 237639)  
9 Miyoko Sakashita (CA Bar No. 239639)  
10 CENTER FOR BIOLOGICAL DIVERSITY  
11 351 California Street, Suite 600  
12 San Francisco, CA 94104  
13 Phone: (415) 436-9682  
14 Facsimile: (415) 436-9683  
15 Email: atreece@biologicaldiversity.org  
16 miyoko@biologicaldiversity.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 CENTER FOR BIOLOGICAL DIVERSITY,  
17 and GREENPEACE, Inc.,

18 Plaintiffs,

19 v.

20 JANE LUBCHENCO, Administrator, National  
21 Oceanic and Atmospheric Administration;  
22 NATIONAL MARINE FISHERIES  
23 SERVICE; and GARY LOCKE, United States  
24 Secretary of Commerce,

25 Defendants.

**CV 09 4087**

COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF

## I. INTRODUCTION

1  
2 1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY and GREENPEACE, INC.,  
3 bring this action against Defendants JANE LUBCHENCO, Administrator of the National Oceanic and  
4 Atmospheric Administration, the NATIONAL MARINE FISHERIES SERVICE, and GARY  
5 LOCKE, United States Secretary of Commerce (collectively “the Secretary”) to remedy the  
6 Secretary’s violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, related to  
7 the Secretary’s failure to protect the ribbon seal (*Histiophoca fasciata*) as threatened or endangered  
8 under the ESA. *See* 16 U.S.C. §§ 1533(a)(1), (b)(1) & (b)(3)(B).

9 2. Ribbon seals are completely dependent upon sea ice for their survival. They are  
10 strongly associated with sea ice during their whelping, mating, molting and nursing periods, from mid-  
11 March through June. Global warming is transforming the Bering and Okhotsk seas in which the ribbon  
12 seal lives and rapidly eliminating the habitat the ribbon seal needs to survive.

13 3. On December 30, 2008, the Secretary published its decision determining that listing of  
14 the ribbon seal was not warranted. Endangered and Threatened Wildlife; Notice of 12-Month Finding  
15 on a Petition to List the Ribbon Seal as a Threatened or Endangered Species, 73 Fed. Reg. 79822 (“12-  
16 month finding”).

17 4. The Secretary found that “[a]lthough the ribbon seal population abundance is likely to  
18 decline gradually for the foreseeable future” it is not in danger of extinction or likely to become so  
19 within the foreseeable future. 73 Fed. Reg. at 79822. In coming to this conclusion, the Secretary used  
20 an irrationally truncated time-frame of 43 years for the foreseeable future; ignored the best available  
21 science; failed to consider whether there might be a distinct population segment of ribbon seals that  
22 should be listed; and failed to consider whether ribbon seals might be threatened or endangered in a  
23 “significant portion” of their range.

24 5. Plaintiffs now seek judicial relief declaring that the Secretary failed to properly  
25 determine whether the ribbon seal is threatened or endangered in all or parts of its range under the  
26 ESA, and ask that the Court remand the 12-month finding. Such relief is necessary to afford the  
27 ribbon seal the full protections of law to which it is entitled and so desperately needs.  
28

## II. JURISDICTION, VENUE and INTRADISTRICT ASSIGNMENT

1  
2 6. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g)  
3 (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5  
4 U.S.C. § 702 (right of review under the Administrative Procedure Act (“APA”)), and 28 U.S.C. § 1361  
5 (mandamus). The relief sought is authorized by 28 U.S.C. §§ 2201 (declaratory judgment), 28 U.S.C.  
6 § 2202 (injunctive relief), 16 U.S.C. § 1540(g) and 5 U.S.C. §§ 701-706.

7 7. As required by 16 U.S.C. § 1540(g), Plaintiffs provided the Secretary with written  
8 notice of the violations alleged herein more than 60 days prior to commencement of this action. In  
9 spite of such notice, the Secretary has failed to remedy his ESA violations.

10 8. An actual, justiciable controversy exists between the parties within the meaning of 28  
11 U.S.C. § 2201.

12 9. Plaintiffs have no adequate remedy at law. The Secretary’s continuing failure to  
13 comply with the ESA and the APA will result in irreparable harm to the ribbon seal, to Plaintiffs and  
14 Plaintiffs’ members, and to the public. No monetary damages or other legal remedy can adequately  
15 compensate Plaintiffs, their members, or the public, for this harm.

16 10. Plaintiffs and their members are adversely affected or aggrieved by federal agency  
17 action and are entitled to judicial review of such action within the meaning of the ESA and APA. The  
18 Secretary’s failure to comply with the ESA’s mandates prevents the full implementation of measures  
19 necessary to protect ribbon seals pursuant to the ESA. Without the substantial protections of the ESA,  
20 ribbon seals are more likely to decline and become extinct. Plaintiffs are therefore injured because  
21 their use and enjoyment of ribbon seals and their habitat is threatened by the decline and likely  
22 extinction of the seals. The Secretary’s failure to comply with the ESA and APA has also resulted in  
23 informational and procedural injury to Plaintiffs. These are actual, concrete injuries to Plaintiffs,  
24 caused by the Secretary’s failure to comply with these statutory provisions. The relief requested will  
25 fully redress those injuries.

26 11. The federal government has waived sovereign immunity in this action pursuant to 16  
27 U.S.C. § 1540(g) and 5 U.S.C. § 702.

28 12. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) as this civil action is

1 brought against an agency of the United States and an officer of the United States acting in his official  
2 capacity and under the color of legal authority, no real property is involved in this action, and at least  
3 one Plaintiff resides within this judicial district.

4 13. The San Francisco or Oakland Division of this judicial district is the proper assignment  
5 by virtue of Civil L.R. 3-2(d).

### 6 III. PARTIES

7 14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3)  
8 corporation with offices in San Francisco, California and elsewhere in the United States. The Center  
9 works through science, law and policy to secure a future for all species hovering on the brink of  
10 extinction. The Center's members and staff are actively involved in species and habitat protection  
11 throughout the United States and the world, including protection of the ribbon seal. The Center has  
12 over 40,000 members throughout the United States and the world. The Center brings this action on its  
13 own behalf and on behalf of its adversely affected members and staff.

14 15. Plaintiff GREENPEACE, INC. ("Greenpeace") is a California non-profit corporation  
15 with offices in San Francisco and elsewhere. Its mission is to raise public awareness of environmental  
16 problems and promote changes that are essential to a green and peaceful future. There are  
17 approximately 250,000 current Greenpeace members in the United States. Since the 1980s,  
18 Greenpeace has been a lead advocacy organization working to raise awareness of global warming and  
19 the protection of wildlife, and to advocate for serious cuts in greenhouse gas emissions through local,  
20 national and global action. For the past decade, Greenpeace has campaigned on the causes and  
21 impacts of climate change in the Arctic, including the impacts on ribbon seals and other species that  
22 are threatened by continued Arctic warming.

23 16. Plaintiffs' members and staff include individuals with varying interests in ribbon seals  
24 and their habitat ranging from scientific, professional, and educational to recreational, aesthetic, moral,  
25 and spiritual interests. Further, Plaintiffs' members and staff enjoy, on an on-going basis, the  
26 biological, scientific, research, education, conservation, recreational and aesthetic values of the Arctic  
27 region inhabited by this species. Plaintiffs' staff and members observe and study ribbon seals and  
28 their habitat, and derive professional, scientific, educational, recreational, aesthetic, inspirational, and

1 other benefits from these activities and have an interest in preserving the possibility of such activities  
2 in the future. An integral aspect of the Plaintiffs' members' use and enjoyment of ribbon seals is the  
3 expectation and knowledge that the species is in its native habitat. For this reason, the Plaintiffs' use  
4 and enjoyment of ribbon seals is entirely dependent on the continued existence of healthy, sustainable  
5 populations in the wild. Plaintiffs bring this action on their own behalf and on behalf of their  
6 adversely affected members and staff.

7 17. Concerned that the ribbon seal is at serious risk of extinction due to global warming and  
8 other impacts, the Center for Biological Diversity submitted the petition at issue herein to list the  
9 species as endangered or threatened under the ESA. Unless the ribbon seal is protected under the  
10 ESA, and threats to the species addressed, the species is likely to decline and become extinct.  
11 Therefore, Plaintiffs' members and staff are injured by the Secretary's failure to protect the species as  
12 is required by the ESA. This injury caused by the Secretary's failure to comply with the ESA is  
13 actual, concrete, and imminent. The Secretary's failure to comply with the ESA's requirements  
14 deprives the species of statutory protection vitally necessary to its survival. The relief requested will  
15 redress these injuries.

16 18. Defendant JANE LUBCHENCO, Administrator of the National Oceanic and  
17 Atmospheric Administration, is the highest ranking official within the National Oceanic and  
18 Atmospheric Administration and, in that capacity, has responsibility for the administration and  
19 implementation of the ESA with regard to the ribbon seal, and for compliance with all other federal  
20 laws applicable to the National Oceanic and Atmospheric Administration. She is sued in her official  
21 capacity.

22 19. Defendant NATIONAL MARINE FISHERIES SERVICE ("NMFS" or "NOAA  
23 Fisheries") is a federal agency within the National Oceanic and Atmospheric Administration in the  
24 Department of Commerce authorized and required by law to protect and manage the fish, marine  
25 mammals, and other marine resources of the United States, including enforcing and implementing the  
26 ESA. NMFS has been delegated authority by the Secretary of Commerce to implement the ESA for  
27 the ribbon seal, including responsibility for making decisions and promulgating regulations, including  
28 proposed and final listing decisions and the processing of petitions for such actions.





1 listing, delisting, and reclassifying species under the ESA. Policy Regarding the Recognition of  
2 Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb.  
3 7, 1996). Under this policy, once a population segment is found to be both “discrete” and  
4 “significant,” then it is deemed a separate “species” for the purposes of the ESA and may be  
5 considered for listing under the Act.

6 26. Under the Secretary’s DPS policy a population segment of a vertebrate species is  
7 discrete if it satisfies either of the following conditions:

8 1. It is markedly separated from other populations of the same taxon as a consequence of  
9 physical, physiological, ecological, or behavioral factors.

10 2. It is delimited by international governmental boundaries within which differences in  
11 control of exploitation, management of habitat, conservation status, or regulatory  
12 mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

13 61 Fed. Reg. at 4722, 4725.

14 27. The Secretary’s DPS policy requires that once a population is established as discrete,  
15 then the biological and ecological significance is next considered. Each population segment’s  
16 significance must be analyzed on a case-by-case basis. This consideration may include, but is not  
17 limited to, the following:

18 1. Persistence of the discrete population segment in an ecological setting unusual or  
19 unique to this taxon.

20 2. Evidence that loss of the discrete population would result in a significant gap in the  
21 range of a taxon.

22 3. Evidence that the discrete population segment represents the only surviving natural  
23 occurrence of a taxon that may be more abundant elsewhere as an introduced population  
24 outside its historical range.

25 4. Evidence that the discrete population segment differs markedly from other populations  
26 of the species in its genetic characteristics.

27 61 Fed. Reg. 4722.

28 28. For a species comprised of multiple DPSs, in certain instances, some DPSs of the

1 species may warrant protection as “endangered” while others warrant listing as “threatened.”

2 29. None of the protections of the ESA come into force until a species is officially listed as  
3 threatened or endangered under the statute.

4 30. In order to ensure the timely protection of species, Congress set forth the listing process  
5 described below. The process includes mandatory, non-discretionary deadlines for the three required  
6 findings that the Secretary must meet, so that species in need of protection do not languish in  
7 administrative purgatory. The three required findings, described below, are the 90-day finding, the 12-  
8 month finding, and the final listing determination.

9 31. Any interested person can begin the listing process by filing a petition to list a species  
10 with the Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).

11 32. Upon receipt of a petition to list a species, the Secretary has 90 days “to the maximum  
12 extent practicable,” to make a finding as to whether the petition “presents substantial scientific or  
13 commercial information indicating that the petitioned action may be warranted.” 16 U.S.C § 1533  
14 (b)(3)(A); 50 C.F.R. § 424.14 (b)(1). If the Secretary finds that the petition presents substantial  
15 information indicating that the listing may be warranted, the Secretary then publishes in the Federal  
16 Register a “90 day finding and commencement of status review.” 16 U.S.C. § 1533(b)(3)(A).

17 33. Upon issuing a positive 90-day finding, the Secretary must then conduct a full review  
18 of the status of the species. 50 C.F.R. § 424.14. Upon completion of this status review, and within 12  
19 months from the date that it received the petition, the Secretary must make one of three findings: (1)  
20 the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned  
21 action is warranted but presently precluded by other pending proposals for listing species, provided  
22 certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second  
23 determination is known as a “12-month finding.”

24 34. If the Secretary finds in the 12-month finding that the listing of the species is  
25 warranted, then he must publish in the Federal Register a proposed rule, for public comment, to list  
26 such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

27 35. Within one year of the publication of a proposed rule to list a species, the ESA requires  
28 the Secretary to publish a final listing determination in the Federal Register. 16 U.S.C. §



1 1533(b)(6)(A). At such time, the Secretary must either list the species or withdraw the proposal. 16  
2 U.S.C. § 1533(b)(6)(A)(i).

3 36. Once a species is listed, an array of statutory protections applies. For example, Section  
4 7 requires all federal agencies to ensure that their actions neither “jeopardize the continued existence”  
5 of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” 16  
6 U.S.C. § 1536(a)(2).

7 37. Additionally, ESA Section 9 and its regulations prohibit, among other things, any  
8 person from intentionally taking listed species or incidentally taking listed species without a permit  
9 from the Secretary. 16 U.S.C. §§ 1538(a)(1)(B) & 1539.

10 38. “Take” is defined broadly under the ESA to mean to “harass, harm, pursue, hunt, shoot,  
11 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. §  
12 1532(19).

13 39. There is one exception to Section 9 that is relevant to the ribbon seal. Section 10(e) of  
14 the ESA exempts Alaska Natives from the take prohibition “if such taking is primarily for subsistence  
15 purposes.” 16 U.S.C. § 1539(e).

## 16 **B. Ribbon seals in a Warming Arctic**

17  
18 40. The ribbon seal (*Histiophoca fasciata*) is one of nine ice-associated pinnipeds of the  
19 Arctic shelf region that is completely dependent on sea ice for its survival. It is readily distinguished  
20 by the distinctive banding pattern of its fur, on which four white bands encircle the head, the base of  
21 the trunk, and the two fore-flippers against a dark base coat. During late winter through early summer  
22 (March-June), the ribbon seal relies on the loose pack ice of the sea-ice front of the Bering and  
23 Okhotsk Seas for reproduction, molting, and as a platform for foraging. During summer and fall, the  
24 ribbon seal is entirely pelagic, foraging on fish, squid, and crustaceans in the Bering and Chukchi  
25 Seas. The current status and trend of ribbon seal populations is unknown, but the Secretary estimates  
26 that there are at perhaps 200,000 ribbon seals globally, with a Bering Sea population of 100,000 or  
27 more. 73 Fed. Reg. at 79824.

28 41. The ribbon seal faces likely global extinction in the wild by the end of this century due

1 to global warming, which is resulting in the rapid melt of this species' sea-ice habitat. Sea ice  
2 represents the only substrate where ribbon seals rest, give birth, nurse their pups, and molt, and where  
3 weaned pups rest as they learn aquatic proficiency and foraging skills. In addition to providing habitat  
4 for critical life cycle activities (reproduction, molting, resting), sea ice provides numerous other  
5 important functions for the ribbon seal, including isolation from polar bears and terrestrial predators,  
6 greater proximity to food resources, and passive transport to new feeding areas.

7 42. The ribbon seal's sea-ice habitat is threatened by rapid Arctic climate change that is  
8 occurring at a pace that is exceeding the predictions of the most advanced climate models. Arctic  
9 surface temperatures increased twice as much as the global average during the 20th century. Sea-ice  
10 extent in the Bering and Okhotsk Seas has experienced significant declines during the March-June  
11 ribbon seal reproductive and molting periods in recent decades; sea ice is breaking up progressively  
12 earlier in the spring; and sea-ice thickness is declining. Arctic-wide winter sea-ice extent in 2006 and  
13 2007 declined to record minima that most climate models forecast would not be reached until 2070 or  
14 beyond, and Arctic-wide summer sea-ice extent in 2007 plummeted to a record minimum that most  
15 climate models forecast would not be reached until 2050 or later. The unprecedented declines in Arctic  
16 summer sea ice are leading to increased ocean warming, which results in further reductions in the  
17 winter-spring sea ice critical to ribbon seals.

18 43. Of foremost concern for the ribbon seal, global warming will accelerate in this century.  
19 Arctic air temperatures are projected to increase by an average of 8°C during winter by the end of the  
20 century, and Arctic summer sea ice may disappear entirely before mid-century under a mid-level  
21 emissions scenario. The ribbon seal's winter sea-ice habitat in the Bering and Okhotsk Seas is  
22 predicted to decline by 40% by mid-century under a mid-level emissions scenario, which the world is  
23 currently on the path to exceeding. Any remaining sea-ice habitat will likely be of low quality because  
24 the sea ice will be thinner and the ice will melt sooner, leading to break-up of the sea-ice front during  
25 the reproductive and molting periods.

26 44. The growing loss of sea ice due to global warming will impact ribbon seals directly by  
27 degrading and eliminating critical habitat and indirectly by changing prey availability, altering  
28 interactions with predators and disease, and increasing human disturbance throughout the range.

1           45.     The loss and early break-up of seasonal sea ice in the Bering and Okhotsk Seas could  
2 lead to complete breeding failure of the ribbon seal within this century. The ice floes of the sea-ice  
3 front must remain stable throughout the period of pup-rearing and pup independence that lasts from  
4 late March through mid-June. If females are forced to abandon their pups early, pup mortality would  
5 be very high because pups would not have gained a sufficient blubber layer and adequate body  
6 condition to survive pre-mature weaning. Additionally, ribbon seals show a strong preference for thick  
7 pack ice for pup-rearing and are rarely found on thin ice. Females that are unable to find sea ice of  
8 sufficient quality for pupping could abandon their reproductive effort for the year by aborting their  
9 pups.

10           46.     Pup mortality after weaning will increase with the early melting and break-up of  
11 seasonal sea ice. Ribbon seal pups depend on sea ice as a resting platform from May-June during the  
12 postweaning period when they are learning aquatic proficiency, diving, and foraging skills. Pups that  
13 are forced to abandon the sea ice during this energetically stressful period suffer from decreased  
14 fitness and survival.

15           47.     Ribbon seals will be impaired in molting due to early sea-ice melt and break-up, which  
16 will lower fitness and survival. Ribbon seals depend on the sea ice during April through July to molt.  
17 New hair can only grow when ribbon seals are out of the water where the skin can reach higher  
18 temperatures. Furthermore, ribbon seal feeding is suppressed during the molt and activity decreases,  
19 making sea ice an essential platform for resting during this energetically stressful period. With  
20 shrinking sea ice, ribbon seals may suffer physiological stress and associated mortality from being  
21 forced into the water before molt completion or onto small, low-quality ice remnants with high  
22 concentrations of other animals during the molt period. If ribbon seals were forced to haul out on land  
23 to complete molt, depredation from terrestrial predators could be devastating.

24           48.     Ribbon seals are likely to experience more physiological stress due to loss of haul-out  
25 sites on the sea ice, which they rely on for resting from winter through summer. Females may be  
26 particularly reliant on sea-ice haul-out sites after the demanding pup-rearing period.

27           49.     The sea-ice distribution will shift further northward, which is likely to increase the  
28 ribbon seal's contact with predators, particularly polar bears, which use the pack ice of the Chukchi,

1 Beaufort and Bering Seas. Ribbon seals do not exhibit anti-predator behaviors when they are hauled  
2 out on the sea ice. Ribbon seal pups, which are exposed, defenseless, and non-aquatic, would  
3 undoubtedly suffer high depredation rate, and molting adults would be particularly vulnerable to  
4 predation during this period of inactivity. If ribbon seals were forced to haul out on land to rear their  
5 young or complete their molt, they would risk exposure to terrestrial predators including grizzly bears,  
6 wolves, and arctic foxes.

7 50. The disappearance of seasonal and perennial sea ice in the Arctic will encourage  
8 increased shipping activity and oil and gas exploration and development in the ribbon seal range.  
9 Commercial fisheries are also likely to expand; these fisheries impact ribbon seals directly through  
10 bycatch mortality and indirectly through competition for prey resources.

11 51. The ribbon seal also faces the threats of overexploitation due to the high harvest levels  
12 allowed by the Russian Federation; current oil and gas development throughout its range; rising  
13 contaminant levels in the Arctic; and bycatch mortality and competition for prey resources from  
14 commercial fisheries.

15 52. Existing regulatory mechanisms have been ineffective in mitigating the principal  
16 threats to the ribbon seal, the most important of which is global warming. The primary international  
17 regulatory mechanisms addressing greenhouse gas emissions—the United Nations Framework  
18 Convention on Climate Change and the Kyoto Protocol—do not adequately address the impacts of  
19 global warming that threaten the ribbon seal with extinction, and there are currently no legal  
20 mechanisms regulating greenhouse gases on a national level in the United States. The immediate  
21 reduction of greenhouse gas pollution is essential to slow global warming and ultimately stabilize the  
22 climate system while there is still suitable ribbon seal sea-ice habitat remaining. Unless greenhouse  
23 gas emissions are cut dramatically in the immediate future, the disappearance of sea ice and extinction  
24 of the ribbon seal are essentially assured.

### 25 **C. The Ribbon Seal Petitioning Process**

26  
27 53. On December 20, 2007, the Center for Biological Diversity submitted a formal, detailed  
28 petition to list the ribbon seal under the ESA (“Petition”). On March 28, 2008 the Secretary made a

1 positive 90-day finding on the Center's petition and initiated a 60-day public comment period.  
2 Endangered and Threatened Species; Notice of 90-day Finding on a Petition to List the Ribbon Seal as  
3 a Threatened or Endangered Species, 73 Fed. Reg. 16617. The Secretary also appointed a biological  
4 review team ("BRT") to undertake a status review of the ribbon seal ("Status Review"). Based on the  
5 Status Review, the Secretary determined that listing was not warranted and published its decision on  
6 December 30, 2008. 73 Fed. Reg. 79822. By written notices to the Secretary, sent via electronic and  
7 certified mail on March 31, 2009, Plaintiffs informed the Secretary of the violations set forth in their  
8 Complaint as required by the ESA. 16 U.S.C. § 1540(g).

9  
10 **D. The Listing Determination**

11 54. In its 12-month finding, published December 30, 2008, the Secretary found that  
12 "[a]lthough the ribbon seal population abundance is likely to decline gradually for the foreseeable  
13 future" it is not in danger of extinction or likely to become so within the foreseeable future. 73 Fed.  
14 Reg. at 79822. The Secretary determined that for the ribbon seal status review the foreseeable future  
15 would be the year 2050. *Id.* at 79823. According to the Secretary, 2050 was the appropriate timeframe  
16 because beyond that time "projections of climate scenarios are too heavily dependent on socio  
17 economic assumptions and are therefore too divergent for reliable use in assessing threats to ribbon  
18 seals." *Id.* The Secretary found that there was no evidence of discrete populations of ribbon seals on  
19 which to base a separation into distinct population segments (DPS). *Id.* at 79824.

20 55. The Secretary's "not warranted" determination for the ribbon seal is arbitrary and  
21 capricious because: (1) it relies on an irrational time frame for "the foreseeable future"; (2) its analysis  
22 of the threat of present or threatened destruction, modification, or curtailment of ribbon seals' habitat  
23 from global warming is flawed and inadequate and fails to rely on the best available scientific data; (3)  
24 its analysis of the impacts of global warming on ribbon seal viability is flawed and inadequate and  
25 fails to rely on the best available scientific data; and (4) it fails to carry out a rational analysis of  
26 whether any distinct population segment of the ribbon seal may warrant listing or whether the species  
27 is threatened or endangered in a significant portion of its range.

28 56. Despite finding that ribbon seals are "likely to decline gradually for the foreseeable



1 future” due to melting of sea-ice habitat, the Secretary determined that listing was not warranted at this  
2 time because ribbon seals are not likely to become endangered within the 43-year timespan studied  
3 (2008-2050). 73 Fed. Reg. at 79822-23. In establishing the timeframe over which future events  
4 impacting ribbon seal status can be said to be “foreseeable,” the status review stated that “the BRT  
5 considered the time frame over which the effects of global climate change can be anticipated, as the  
6 primary factor in determining the horizon for reliable assessment of the risk of the ribbon seal  
7 becoming endangered.” Status Review at 26. The BRT concluded that it would use a time frame of 43  
8 years (2008-2050) for the foreseeable future because of a stated difficulty in projecting climate  
9 conditions beyond 2050: “[W]e selected a time horizon from the present to the year 2050 because it is  
10 very difficult to project further ahead due to great uncertainty about and sensitivity to social and  
11 economic decisions that will determine future emission scenarios.” Status Review at 27.

12 57. This reasoning is unsupportable and legally and scientifically unjustified because global  
13 climate change has been projected through the end of the 21st century routinely in the climate  
14 literature, demonstrating that impacts within a 100-year time frame are inherently “foreseeable.” As a  
15 primary example of the feasibility of a 100-year time frame, the Intergovernmental Panel on Climate  
16 Change (“IPCC”), a foremost world authority on climate change, has provided climate change  
17 projections through 2100 under a range of plausible emissions scenarios, the most recent of which are  
18 provided in the 2007 Fourth Assessment. For the Fourth Assessment, the IPCC performed an  
19 unprecedented internationally coordinated climate change experiment using 23 models by 14 modeling  
20 groups from 10 countries to project future climate conditions. This large number of models ranging  
21 from simple to complex, running the same experiments, provided both quantification of future climate  
22 conditions through the end of this century and the uncertainty in the results. As stated by the IPCC  
23 itself, climate projections run through the end of the 21<sup>st</sup> century under different emissions scenarios,  
24 and accompanied by the range of uncertainty, were provided in their 2007 Fourth Assessment Report  
25 specifically because of their policy-relevance.

26 58. In fact, forecasting climate change impacts on species over a 100-year time frame is a  
27 routine analysis in the scientific literature. Furthermore, the federal government conducted an analysis  
28 of climate change impacts on the polar bear over a 100-year time frame specifically to inform the U.S.

1 Fish and Wildlife Service's ("FWS") listing decision for the polar bear. Using a suite of IPCC climate  
2 models, federal scientists forecast the status of polar bears 45, 75, and 100 years into the future.  
3 Highlighting the importance of using time frames longer than 45 years, these studies found that some  
4 polar bear populations faced extirpation over 45 year time frames, while populations in other parts of  
5 the range faced extirpation over 75 or 100 year time frames.

6 59. Beyond the use of a 100-year timeframe for the polar bear, FWS and the Secretary have  
7 repeatedly used timeframes up to and beyond 100 years when assessing the status of species. For  
8 example, the Alaska Region of the USFWS used a 100-year timeframe in considering the threatened  
9 status of Stellar's eiders; FWS planned for 100-300 years to restore Mount Graham red squirrel  
10 habitat; the Secretary considered a timeframe of 150 years for North Atlantic right whale recovery; the  
11 Secretary assessed risks to Cook Inlet beluga whales, as well as Southern Resident killer whales, over  
12 a 300-year timeframe; and the Secretary's recovery plan for Stellar sea lions analyzed extinction risk  
13 over 100 years. Thus, use of a 100 year or longer time frame for species risk assessment by the  
14 Secretary has ample precedent. It was arbitrary and capricious for the Secretary to use a much shorter  
15 time frame for the ribbon seal.

16 60. The Secretary's use of the 43-year time period was also arbitrary and capricious  
17 because the time period used must be long enough so that actions can be taken to ameliorate the threat  
18 of global warming to the ribbon seal to prevent its extinction. The Secretary's approach is particularly  
19 problematic with regard to greenhouse gas emissions. Because of the long-lived residence time of  
20 carbon dioxide and other greenhouse gases in the atmosphere and the lag time between emissions and  
21 climatic changes, warming will continue for centuries to come even after greenhouse gas emissions are  
22 stabilized. Climate scientists have estimated that anthropogenic greenhouse gas emissions already in  
23 the atmosphere have committed to the world to 1.6°C to 2°C of warming that has not yet been realized  
24 and most of which will be experienced during this century. This is in addition to the warming that will  
25 be generated from continuing future greenhouse gas emissions. Thus, slowing and reversing impacts  
26 from anthropogenic greenhouse gas emissions, the primary threat to the ribbon seal, will be a long-  
27 term process that must begin as soon as possible within this century. Deferring protection until some  
28 unstated point in the future will condemn the species to extinction.

1           61. As stated in the Petition and acknowledged by the Secretary in the status review, global  
2 warming poses the primary threat to the ribbon seal through the destruction and degradation of the  
3 seals' sea-ice habitat. Thus, the status review's analysis of the Present or Threatened Destruction,  
4 Modification, or Curtailment of the Species' Habitat or Range from global warming is central to the  
5 listing decision. The analysis of this threat factor in the Status Review is flawed and inadequate  
6 because it (1) fails to conduct several feasible analyses of current and future trends in sea-ice extent,  
7 duration, and quality necessary for properly assessing the threat that global warming poses to the  
8 ribbon seal's habitat in the foreseeable future; (2) ignores the best available science on climate change  
9 relevant to the ribbon seal; (3) fails to analyze current and future sea-ice loss and degradation in the  
10 Okhotsk Sea, which represents a significant portion of the ribbon seal's range; and (4) uses an  
11 inadequate 43-year time frame for the foreseeable future, as discussed above. As a result of these  
12 inadequacies, the status review draws conclusions about the threat that global warming poses to the  
13 ribbon seal that are not supported by the data presented in the status review nor supported by the best  
14 available science. The status review and 12-month finding thus fail to use the best available scientific  
15 data and therefore violate the ESA. 16 U.S.C. § 1533(b)(1)(A).

16           62. In addition to its sections on global warming's impacts on sea ice and ocean conditions,  
17 the status review also contains a section on how these changes may affect ribbon seal viability. The  
18 Secretary reached more optimistic conclusions on the impacts of climate change to ribbon seals than  
19 are warranted by the data on climate change presented in the status review and by the best available  
20 science. The Secretary arrived at these conclusions by (1) basing its conclusions on a flawed and  
21 inadequate analysis of current and future climate conditions in the Bering Sea; (2) failing to conduct a  
22 climate change analysis or consider the best available science for the Okhotsk Sea; and (3) failing to  
23 use the best available science on ribbon seal natural history to inform the assessment. In failing to use  
24 the best scientific data available, the Secretary violated the ESA. 16 U.S.C. § 1533(b)(1)(A).

25           63. While the primary threat to the ribbon seal, the loss of its sea-ice habitat do to global  
26 warming, falls within the ESA listing factor "the present or threatened destruction, modification, or  
27 curtailment of its habitat or range," 16 U.S.C. § 1533(a)(1)(A), several other ESA listing factors are  
28 also implicated in the plight of the species. The Secretary's treatment of these factors was also

1 arbitrary. First, the Secretary acknowledges that overutilization of ribbon seals in Russia is a serious  
2 threat: “the proposed level of harvest is comparable to the commercial harvest levels of the 1950s and  
3 1960s, which was shown to be unsustainable (Shustov 1965b) and ‘disastrous’ to this species  
4 (Fedoseev 1973).” Status Review at 55. The Secretary also acknowledges that existing regulatory  
5 mechanisms to control such harvest are likely ineffective: “It is unclear what mechanisms are currently  
6 in place in Russia to ensure that potential commercial harvests remain within sustainable levels.”  
7 Status Review at 65. Nevertheless, the Secretary makes no effort to actually analyze such impacts in  
8 its risk assessment for the species. Similarly, the discussions of disease and predation and other  
9 natural and anthropogenic factors describe threats to the species, such as increased orca predation, oil  
10 and gas development, and increased shipping, are summarily dismissed as of little consequence with  
11 no analysis of how they might cumulatively affect the species.

12 64. The Secretary’s finding dealing with the inadequacy of existing regulatory mechanisms  
13 is also arbitrary: “There is little evidence that the inadequacy of existing regulatory mechanisms  
14 currently poses a threat to ribbon seals throughout all or a significant portion of their range. However,  
15 there are no known regulatory mechanisms that effectively address global reductions in sea ice habitat  
16 at this time.” 73 Fed. Reg. at 79827. The Secretary admits that no regulatory mechanisms address the  
17 greatest threat to the species—the loss of sea ice as a result of global warming. Yet, somehow, the  
18 Secretary simultaneously concludes that this is not a problem for the species. Such a conclusion is the  
19 height of arbitrary government decision-making.

20 65. The Secretary based its not-warranted finding for the ribbon seal on an analysis of the  
21 extinction risk facing the species as a whole. In so doing, it failed to properly analyze whether any  
22 distinct population segment (“DPS”) of the species might warrant listing or whether the species might  
23 be threatened or endangered in a significant portion of the range. To the limited degree the status  
24 review and 12-month finding purport to make these analyses, they found that “there is currently no  
25 evidence of discrete populations on which to base a separation into DPSs.” 73 Fed. Reg. at 79824.

26 66. Under the DPS policy a population segment of a vertebrate species is discrete if it: (1)  
27 is markedly separated from other populations of the same taxon as a consequence of physical,  
28 physiological, ecological, or behavioral factors; OR (2) is delimited by international governmental

1 boundaries within which differences in control of exploitation, management of habitat, conservation  
2 status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.  
3 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered  
4 Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996). While the geographical barriers between the Bering  
5 Sea and the Sea of Okhotsk likely qualify under the first prong of the policy, there can be no dispute  
6 that Russian and Alaskan ribbon seals are separated by an international boundary and that the two  
7 countries management regimes for the species clearly differ, thereby satisfying the second prong of the  
8 policy. The very fact that Russia allows a significant commercial hunt for the species is ample  
9 evidence of differing management of the species. The Secretary's disregard of its own policy and  
10 complete failure to consider whether any DPSs of ribbon seal might warrant listing renders the 12-  
11 month finding arbitrary and unlawful.

12 67. The Secretary's significant portion of the range analysis is also unlawful. The status  
13 review's standard for what constitutes a significant portion of the species' range improperly renders  
14 the term meaningless. That status review states that "a species must be declared to be endangered or  
15 threatened even if it is at risk in only a portion of its range, when that portion is important to the  
16 species' continued viability." Status Review at 26. By defining a "significant portion of its range" as a  
17 portion that "is important to the species' continued viability" the Secretary is, in effect, rendering the  
18 phrase "significant portion of its range" meaningless. If threats in a "significant portion" of a species  
19 range threaten the "species' continued viability," then that is no different than the species being in  
20 danger of extinction in all of its range. For if a species' continued viability is at risk, then the entire  
21 species is in danger of extinction. .

## 22 **V. CLAIMS FOR RELIEF**

### 23 **Claim for Relief**

#### 24 **(Unlawful 12-Month Finding)**

25 68. Plaintiffs reallege and incorporate by reference all the allegations set forth in this  
26 Complaint, as though fully set forth below.

27 69. On December 30, 2008, the Secretary published a 12-month finding that listing the  
28 ribbon seal as threatened or endangered was not warranted. 73 Fed. Reg. 79822.





1 1. Declare that the Secretary's finding that listing the ribbon seal as threatened or  
2 endangered in all or parts of its range was not warranted, is arbitrary, capricious, violated the ESA, and  
3 is unlawful;

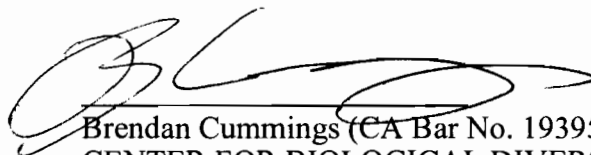
4 2. Remand the 12-month finding to the Secretary for an adequate finding that complies  
5 with all requirements of the ESA by a date certain;

6 3. Award Plaintiffs their costs of litigation, including reasonable attorneys fees under the  
7 citizen suit provision of the ESA and/or the Equal Access to Justice Act; and

8 4. Grant Plaintiffs such other relief as the Court deems just and proper.

9  
10 Dated: September 3, 2009

Respectfully submitted,

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13 Brendan Cummings (CA Bar No. 193952)  
14 CENTER FOR BIOLOGICAL DIVERSITY  
15 P.O. Box 549  
16 Joshua Tree, CA 92252  
17 Phone: (760) 366-2232  
18 Facsimile: (760) 366-2669  
19 Email: bcummings@biologicaldiversity.org

20 Andrea A. Treece (CA Bar No. 237639)  
21 Miyoko Sakashita (CA Bar No. 239639)  
22 CENTER FOR BIOLOGICAL DIVERSITY  
23 351 California Street, Suite 600  
24 San Francisco, CA 94104  
25 Phone: (415) 436-9682  
26 Facsimile: (415) 436-9683  
27 Email: atreece@biologicaldiversity.org  
28 miyoko@biologicaldiversity.org

Attorneys for Plaintiffs