

# The Regs Just Keep On Comin' (*or do they?...*)

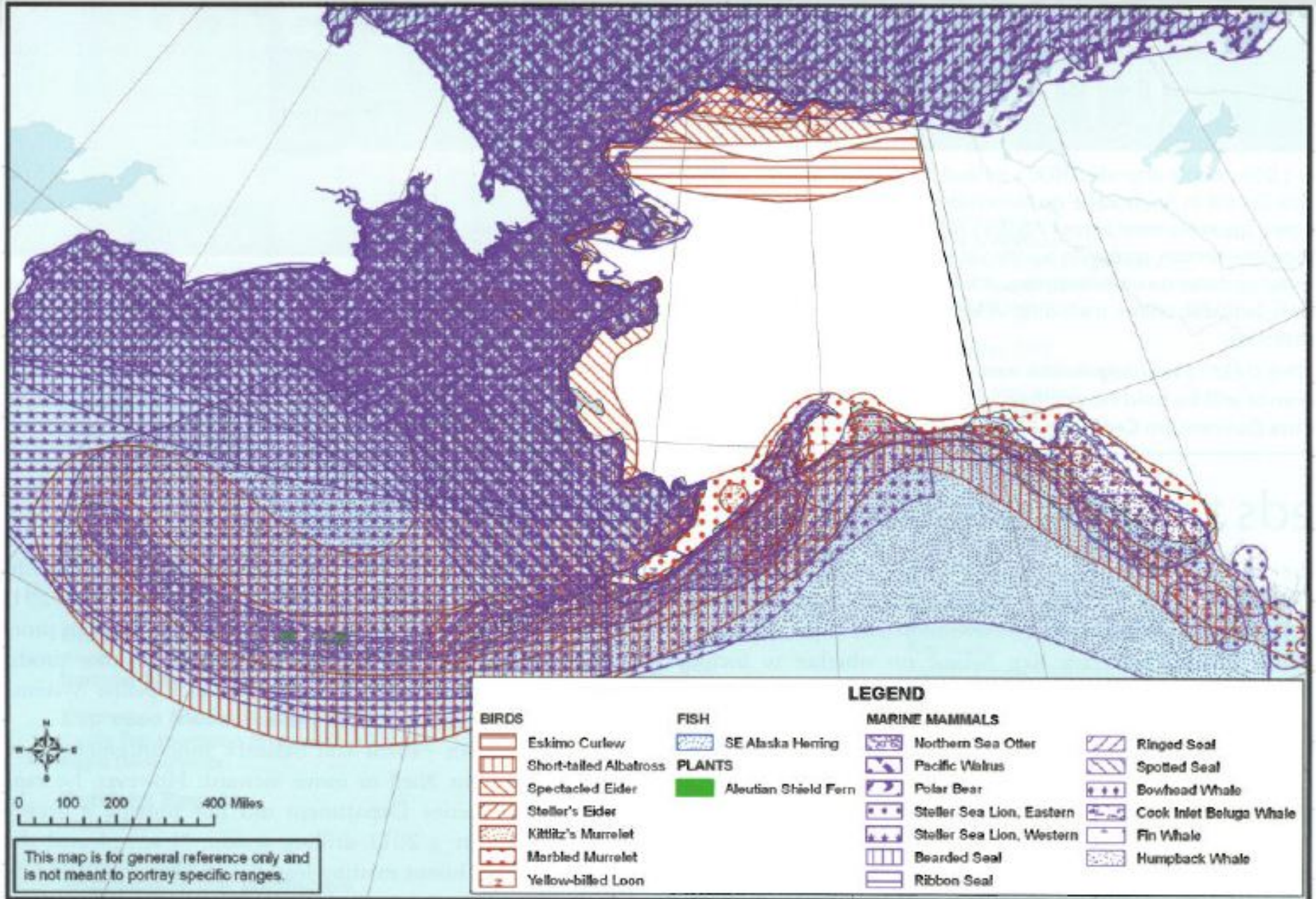
Ryan Steen  
RDC 37th Annual Conference  
November 2016

# ROADMAP

- Endangered Species Act
  - Critical Habitat
  - Listings
- Compensatory Mitigation
- Change in Political Landscape

# Endangered Species Act

# Range of listed and candidate species



# *Critical Habitat:*

“the *specific areas* within the geographical area occupied by the species . . . . *on which are found* those physical or biological features *essential* to the conservation of the species...”

# CONGRESSIONAL INTENT

Before 1978 FWS had gone “**too far**” with critical habitat designations by “**just designating territory as far as the eyes can see and the mind can conceive.**” So, in 1978, Congress amended the ESA to include an “**extremely narrow definition of critical habitat.**”

# POLAR BEAR CRITICAL HABITAT

- 187,157 sq. miles (larger than California)
- Largest in ESA history (when designated)



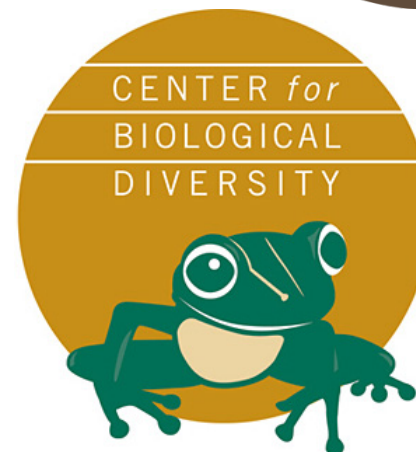
# PBCH LITIGATION



(and many other ANCs)



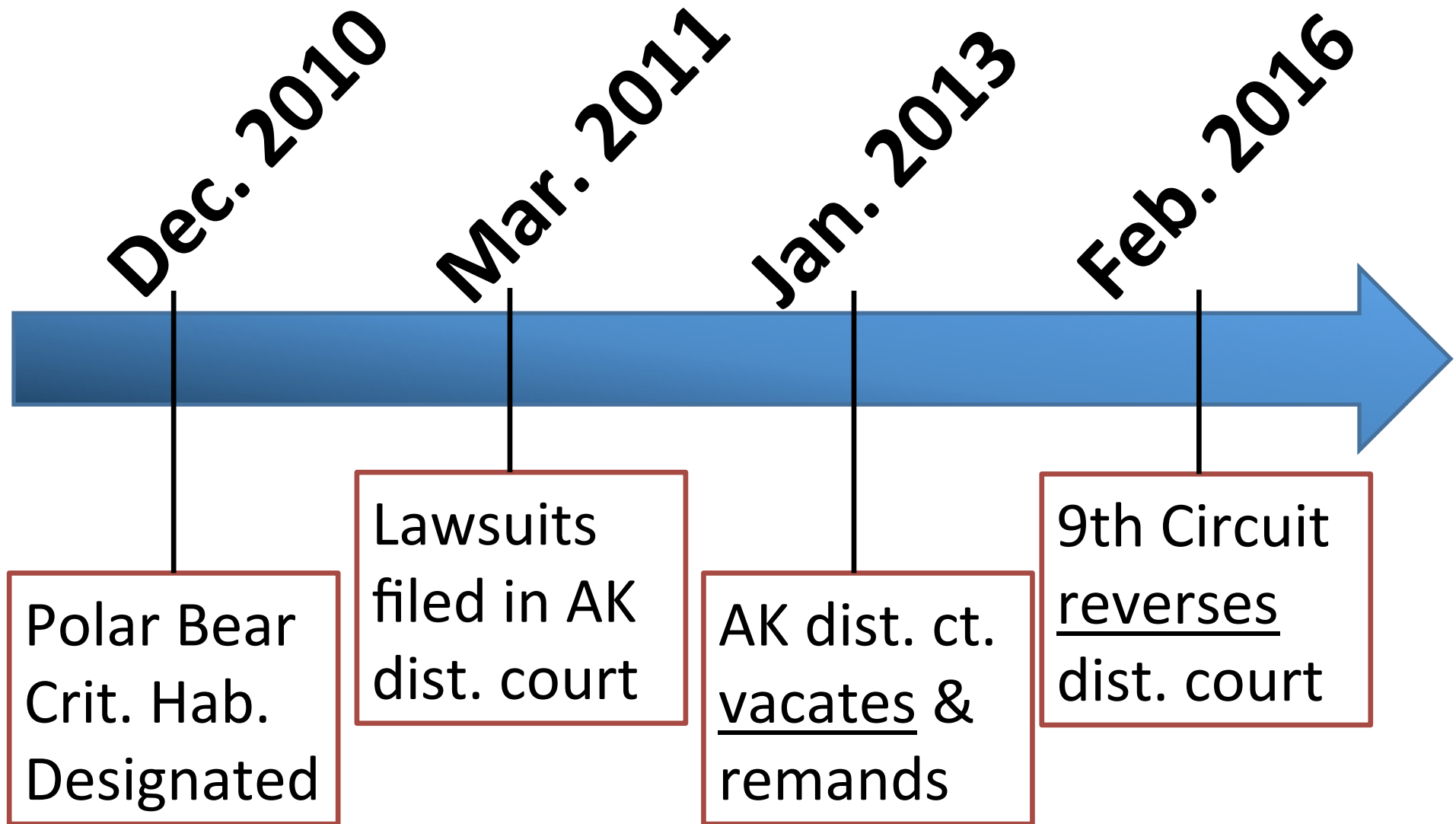
VS.



GREENPEACE



# PBCH LITIGATION



# PBCH LITIGATION

## Alaska District Court:

“In short, the Service cannot designate a large swath of land in northern Alaska as ‘critical habitat’ based entirely on one essential feature that is located in approximately one percent of the entire set aside area.”

# PBCH LITIGATION

## Ninth Circuit:

“[T]he ESA does not require the level of specificity that the district court insisted upon....”

“The Act is concerned with protecting the future of the species, not merely the preservation of existing bears. And it requires use of the best available technology, not perfection.”

# PBCH LITIGATION

**Nov. 4, 2016: Writs of Certiorari to U.S. Supreme Court Filed (pending)**



# CRITICAL HABITAT REGS

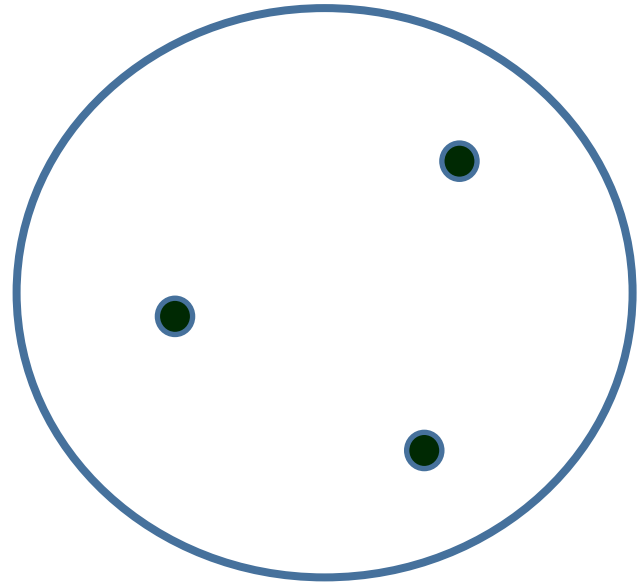
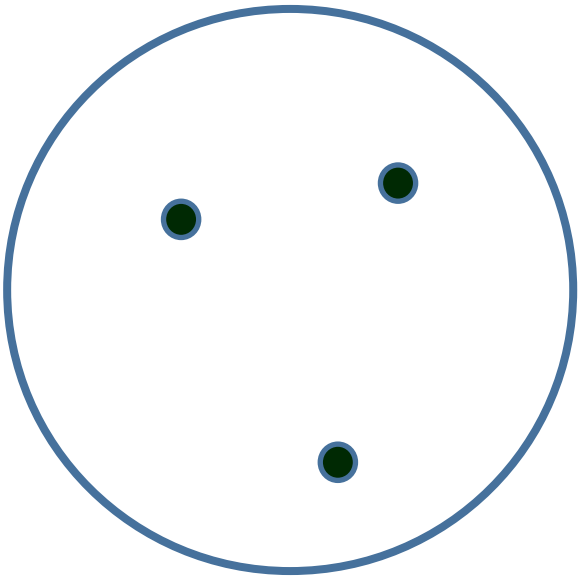
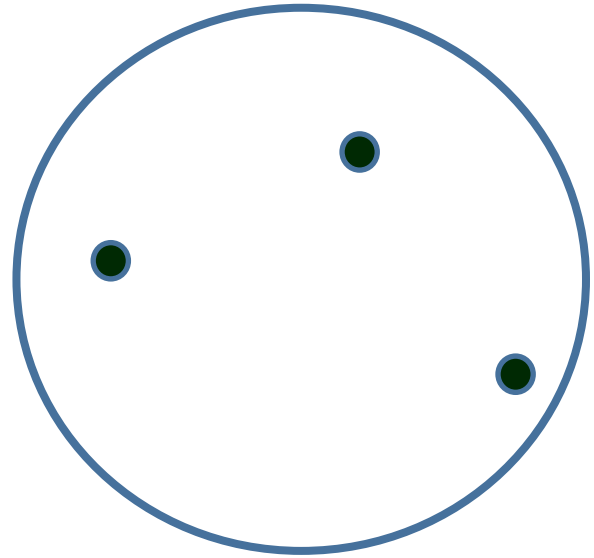
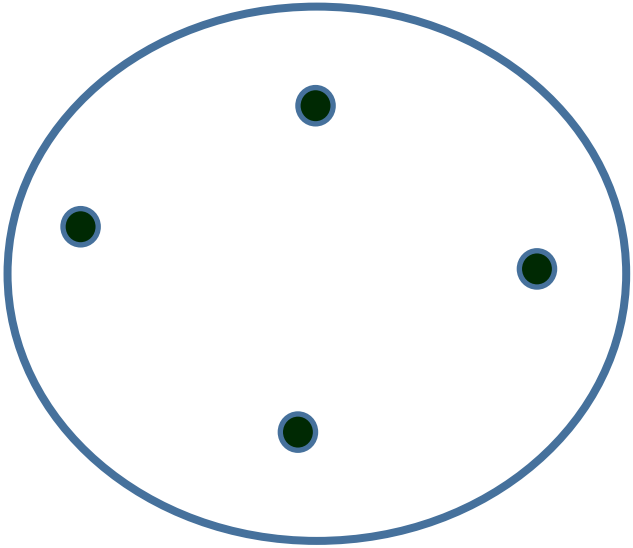
## Feb. 2016: Services Amend ESA Critical Habitat Regulations

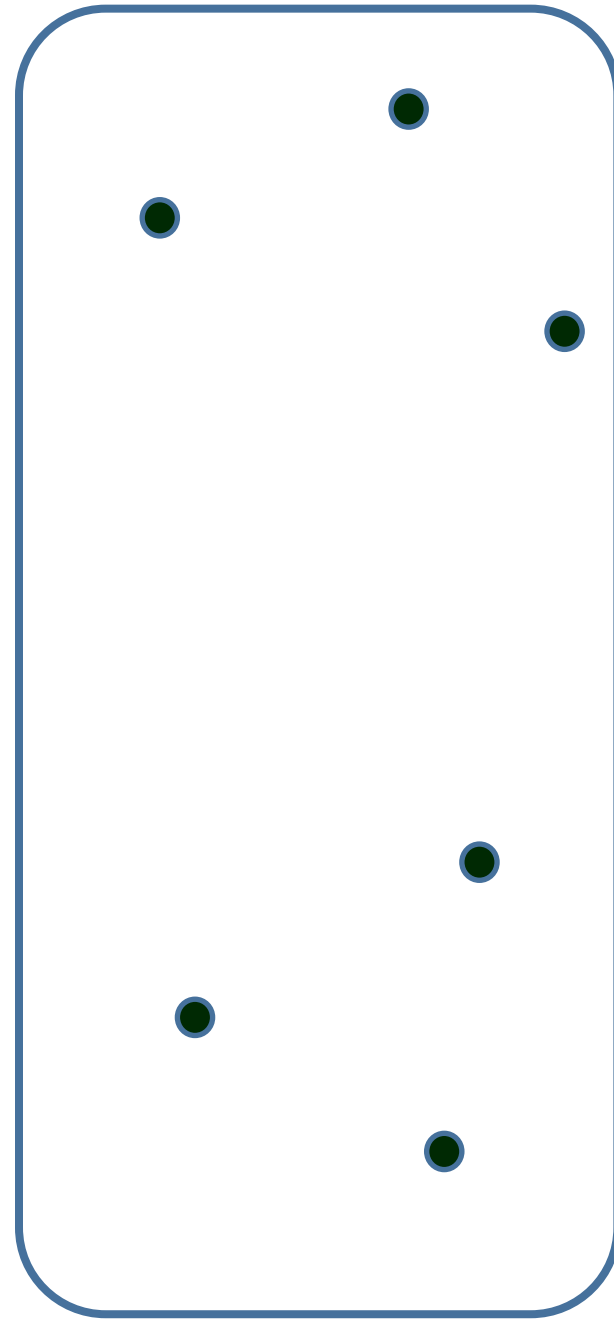
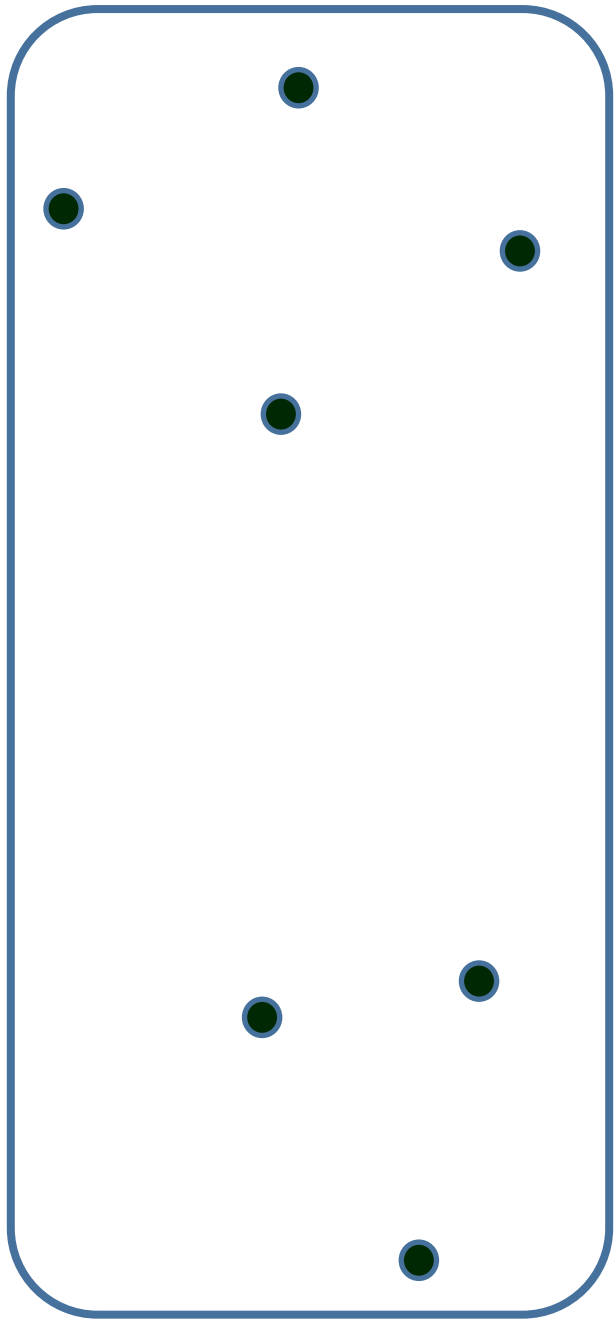
- **Changes to process for designating CH**
  - **Unoccupied Habitat**
  - **Areas that may develop essential features in the future**
- **New definition for “destruction or adverse modification of CH”**
- **Policy on 4(b)(2) exclusions from CH**

# CRITICAL HABITAT

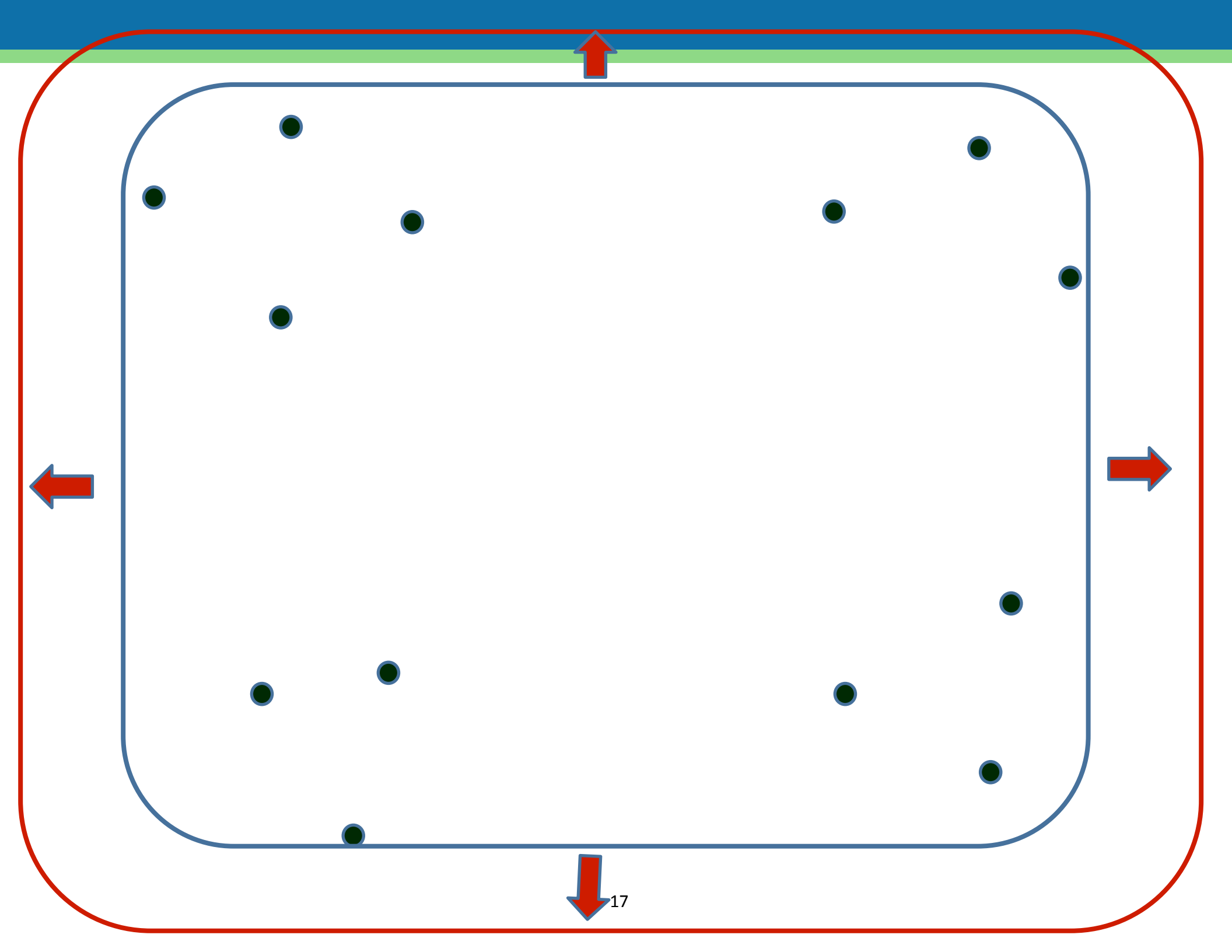
## ***THE UPSHOTS:***

- **The Federal Services can designate broad swaths of land or water as “critical habitat” so long as “essential features” are, or may in the future be, found somewhere within those broad areas, including areas unoccupied by the species.**
- **The Ninth Circuit will defer to the Services in almost all conceivable circumstances (if challenged by non-NGOs).**

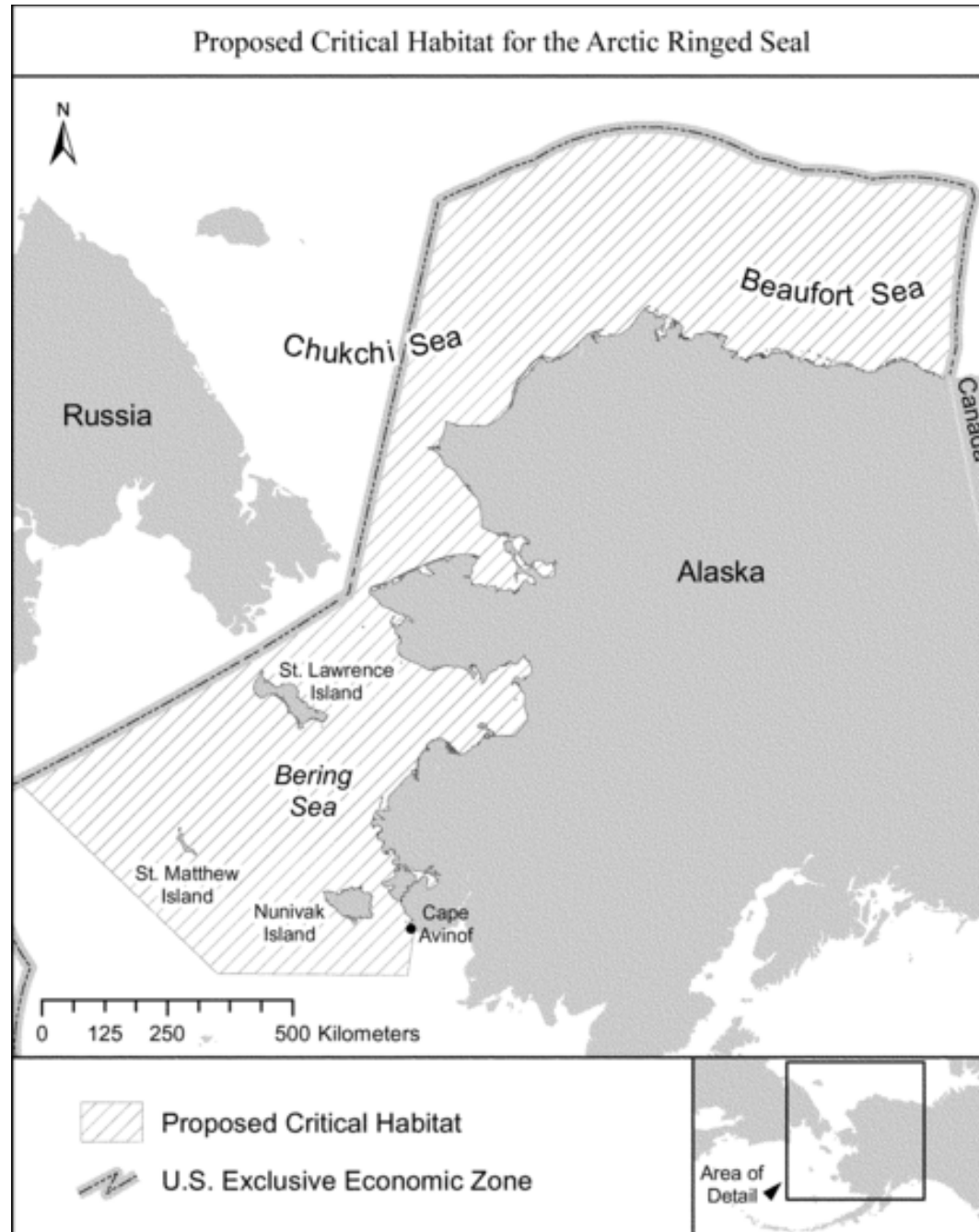








# RINGED SEAL PROPOSED CH (12/3/2014)



# *ESA Listings*

# BEARDED & RINGED SEALS

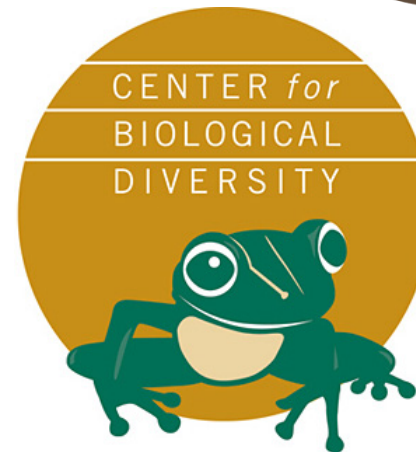
## Two Lawsuits Challenging “Threatened” Listings



(and other ANCs)



VS.



# BEARDED & RINGED SEALS

## Premise of Listings

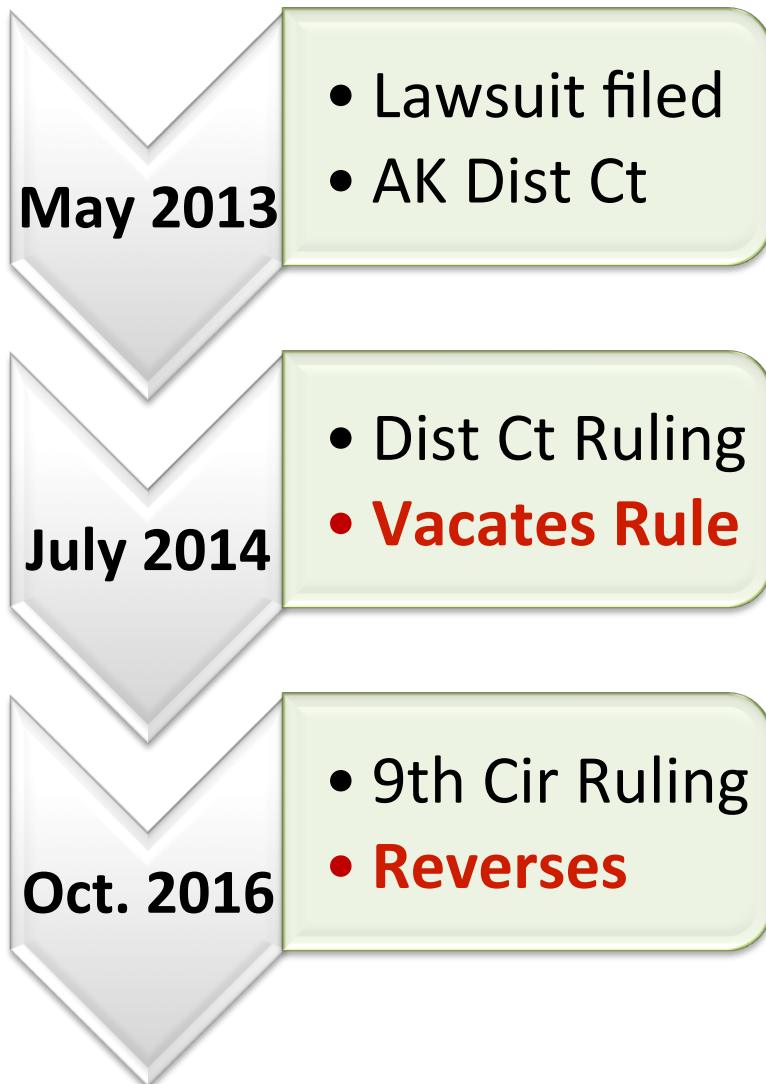
- Ice dependent species
- Climate change forecasts to year 2100
- Forecasted reduction of Arctic ice habitat
- “Likely” to become in danger of extinction by 2100

## Premise of Lawsuits

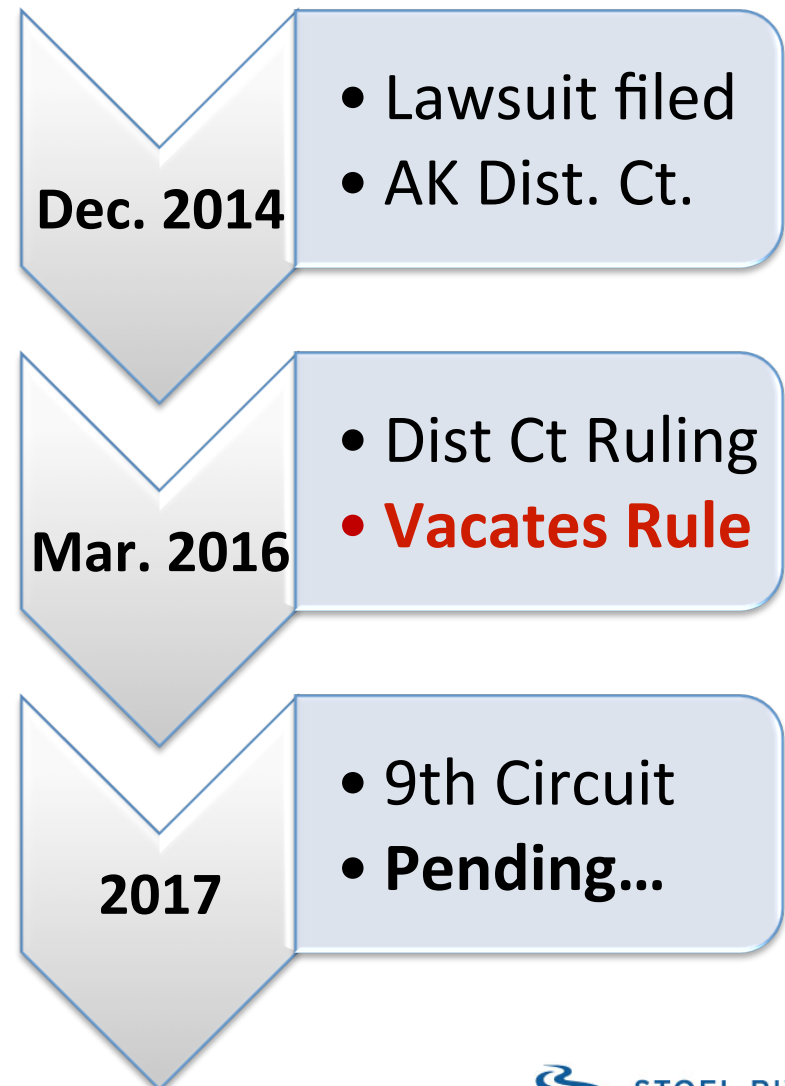
- Highly abundant
- Occupy full historical ranges
- No present adverse effects
- Magnitude of risk to species is unknown
- No basis to determine if “likely” to become in danger of extinction

# BEARDED & RINGED SEALS

## Bearded Seal Litigation



## Ringed Seal Litigation



# BEARDED & RINGED SEALS

## Alaska District Court:

“Troubling to this Court is that it does not appear from the Listing Rule that any serious threat of a reduction in the population of the Beringia DPS, let alone extinction, exists prior to the end of the 21st century. Indeed, the Listing Rule itself concedes that, at least through mid-21st century, there will be sufficient sea-ice to sustain the Beringia DPS at or near its current population levels.”

# BEARDED & RINGED SEALS

## Ninth Circuit:

“[N]either the ESA nor our case law requires the agency to calculate or otherwise demonstrate the ‘magnitude’ of a threat to a species’ future survival before it may list a species as threatened.”



# Compensatory Mitigation

# COMPENSATORY MITIGATION

***Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment***

**November 2015**

# PRESIDENTIAL MEMORANDUM

- Directs federal agencies to implement new mitigation policies
- “Agencies shall each adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and the projects they approve.”
- “To the extent permitted by each agency’s legal authorities”

# PRESIDENTIAL MEMORANDUM - GOAL

***“Net benefit” or “at a minimum, no net loss”***



# USFWS PROPOSED RULE

- **U.S. Fish and Wildlife Service**
- ***Sept. 2016: Proposed Rule – ESA mitigation policy***
  - “necessitate a shift from project-by-project to landscape-scale approaches to planning and implementing compensatory mitigation”
  - Net benefit or no net loss
  - Mitigation in advance

# USFWS PROPOSED RULE

## ***Problem:***

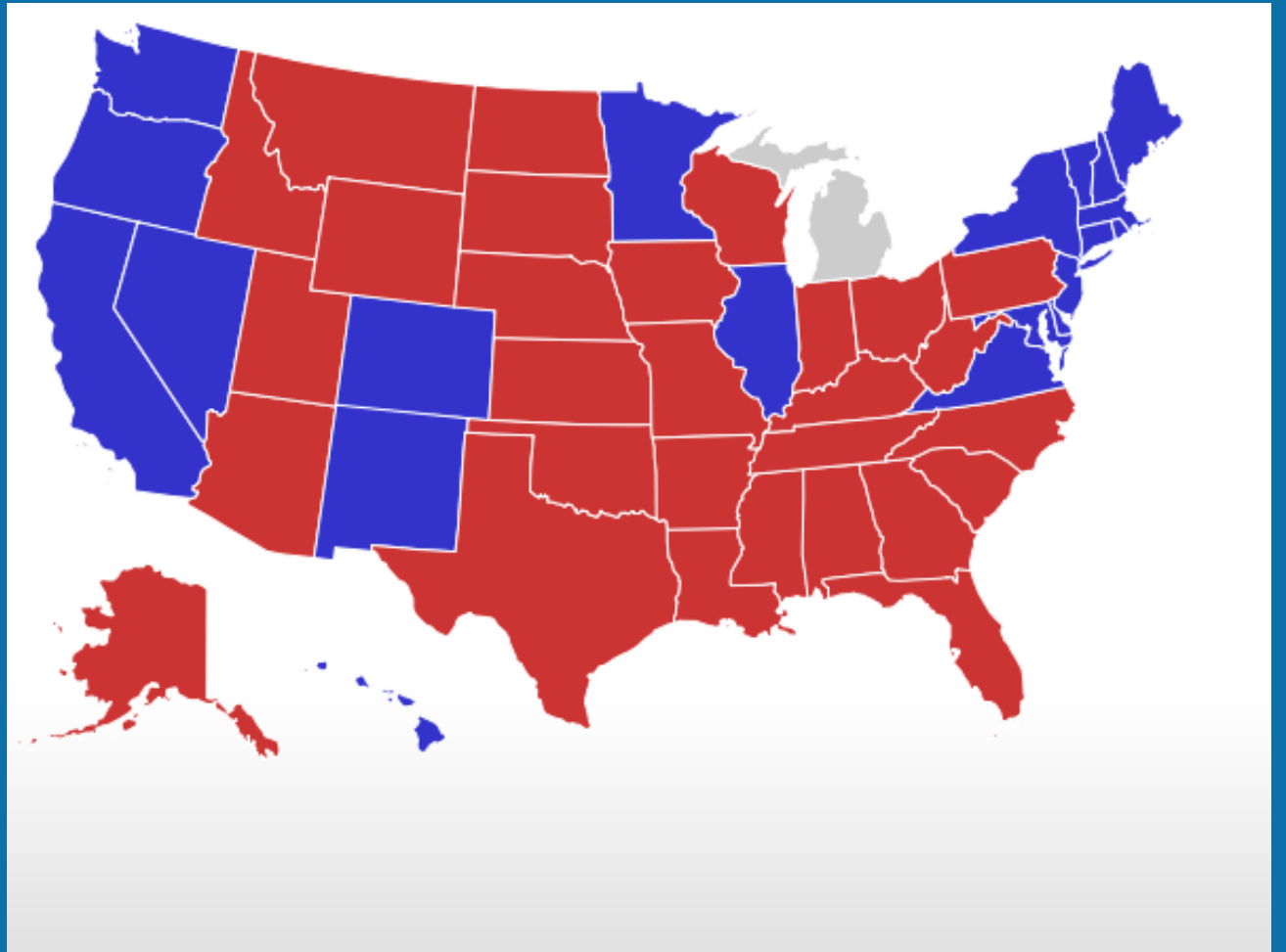
***No ESA authority for “no net loss” or “net benefit” compensatory mitigation***

# USFWS PROPOSED RULE

- **Example: Section 7 Consultation**

- Avoid jeopardy to species or adverse modification of critical habitat
  - “reduce appreciably” likelihood of survival/recovery
  - “appreciably diminish” habitat value
- Biological Opinion + “incidental take statement”
- Terms and conditions to minimize impacts
- *ESA Consultation Handbook*: “objective of incidental take analysis under section 7 is minimization not mitigation”

# Politics





# HOW TO UNDO STUFF

- **Executive Orders & Presidential Memoranda – EASY (new President rescinds)**
- **Regulations – it depends...**

Proposed Rule	Final Rule but not effective	Final Rule after ~May 2016	Any Final Rule
<ul style="list-style-type: none"><li>• Withdraw</li><li>• Quick &amp; easy</li></ul>	<ul style="list-style-type: none"><li>• 30-60 days</li><li>• Rescind</li></ul>	<ul style="list-style-type: none"><li>• Congressional Review Act</li><li>• “Resolution of disapproval” passed by Congress</li></ul>	<ul style="list-style-type: none"><li>• New rulemaking</li><li>• Held to APA standards</li><li>• Can be challenged in court</li></ul>

# OTHER POSSIBILITIES

- **Statutory Amendments**
- **U.S. Supreme Court Justice appointment**
- **Sue and settle litigation**



**Thanks for your time.**