

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE; BARRY THOM, Regional
Administrator of National Marine Fisheries
Service West Coast Region; WILBUR
ROSS, Secretary of Commerce,

Defendants.

No. 2:18-cv-1201

COMPLAINT

INTRODUCTION

1. Plaintiff Center for Biological Diversity challenges the failure of the National Marine Fisheries Service, the West Coast Regional Administrator, and the Secretary of Commerce (collectively, “Fisheries Service”) to revise the critical habitat designation for the Southern Resident killer whale — one of the world’s most critically endangered marine mammals. With only 75 Southern Resident killer whales left, expanding critical habitat to protect key feeding areas off the U.S. West Coast will help prevent extinction of the Pacific Northwest’s

1 iconic killer whales and help ensure their recovery.

2 2. Time is of the essence in protecting endangered Southern Resident killer whales.
3 The population has reached its lowest point in 34 years and is continuing to decline. The most
4 recent mortality was a newborn whose mother carried the dead calf for more than two weeks, at
5 the expense of her own health.

6 3. Low availability of Chinook salmon, the whales' primary prey, is contributing to
7 their decline, and many of the animals are starving and emaciated. Southern Resident killer
8 whales have failed to reproduce successfully since 2015. The principal threats to Southern
9 Resident killer whales — starvation, contamination from toxic pollution, and harassment from
10 noise and vessels — can be reduced by better habitat protections.

11 4. To that end, the Center for Biological Diversity petitioned the Fisheries Service to
12 expand critical habitat to protect the Southern Resident's winter feeding areas off the
13 Washington, Oregon, and California coasts on January 21, 2014.

14 5. On February 24, 2015, the Fisheries Service determined that revising critical
15 habitat to protect the Southern Resident killer whale's winter habitat was warranted. Despite its
16 findings, the Fisheries Service announced it would not propose a critical habitat rule until 2017.

17 6. To date, the agency has failed to propose, much less finalize, a rule to revise
18 Southern Resident killer whale critical habitat. More than four years have now elapsed since the
19 Fisheries Service received the petition to expand critical habitat for the Southern Resident killer
20 whales. And it has been more than two years since the agency admitted that a revision was
21 warranted. This ongoing delay deprives these endangered killer whales of important legal
22 protections and the population has experienced an alarming decline in the meantime.

23 7. The Fisheries Service's inaction constitutes agency action unlawfully withheld or
24

1 unreasonably delayed under the Administrative Procedure Act and fails to ensure protections
2 required by the Endangered Species Act. 5 U.S.C. §§ 551-706; 16 U.S.C. §§ 1531-44.
3 Accordingly, the Center for Biological Diversity seeks an order from the Court establishing
4 prompt deadlines for the Fisheries Service's issuance of proposed and final rules to revise the
5 Southern Resident killer whale critical habitat designation.

6 **JURISDICTION AND VENUE**

7 8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because
8 this action arises under the laws of the United States. 16 U.S.C. § 1540(c); 5 U.S.C. § 702. An
9 actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested
10 relief is proper under 28 U.S.C. §§ 2201-2202, and 5 U.S.C. § 706(1) (unlawfully withheld
11 agency action).

12 9. Venue is proper in this district under 28 U.S.C. § 1391(e) because the legal
13 violations are occurring in this district.

14 **INTRADISTRICT ASSIGNMENT**

15 10. Pursuant to Civil Local Rule 3(e), this action is properly assigned to the Seattle or
16 Tacoma Divisions of this Court because a substantial part of the events or omissions giving rise
17 to Plaintiff's claim occurred in counties in these Divisions.

18 **PARTIES**

19 **Plaintiff**

20 11. Plaintiff the Center for Biological Diversity is a nonprofit corporation that
21 advocates for the protection of threatened and endangered species and their habitats through
22 science, policy, and environmental law. The Center's Oceans Program focuses specifically on
23 conserving marine ecosystems, and seeks to ensure that imperiled species are properly protected

1 from destructive practices in our oceans. In pursuit of this mission, the Center has been actively
2 involved in securing ESA protections for imperiled marine mammals, including Southern
3 Resident killer whales. In 2001, the Center filed a petition to list the Southern Resident killer
4 whales as an endangered species, and through legal action it secured the Endangered Species Act
5 protections for this population. The Center also has longstanding efforts to protect the habitat of
6 the Southern Resident killer whales from water and noise pollution, disturbance from vessels, the
7 risk of offshore oil drilling activities, and other threats. The Center has more than 63,000
8 members, many of whom live on the U.S. West Coast. The Center brings this action on behalf of
9 itself and its members.

10 12. Center members and staff live in and regularly visit ocean waters, bays, beaches
11 and other coastal areas to observe, photograph, study, and otherwise enjoy Southern Resident
12 killer whales and their habitat. Center members have an interest in Southern Resident killer
13 whales and their Pacific Ocean habitat, including waters off California, Oregon, and Washington,
14 and Canada. For example, Center members frequently sail, kayak, and go whale watching to
15 enjoy the marine habitat and look for and photograph Southern Resident killer whales. Center
16 members and staff derive recreational, spiritual, professional, scientific, educational, and
17 aesthetic benefit from the presence of Southern Resident killer whales and their habitat. The
18 Center's members and staff intend to continue to use and enjoy the habitat of Southern Resident
19 killer whales frequently and on an ongoing basis in the future.

20 13. The Fisheries Service's failure to propose and finalize Southern Resident killer
21 whale critical habitat revisions deprives the species of additional statutory protections that are
22 vitally important to its survival and eventual recovery. The Fisheries Service's protracted failure
23 to act diminishes the aesthetic, recreational, spiritual, scientific, and other interests of the Center

1 and its members because Southern Resident killer whales are more vulnerable to harm and less
2 likely to recover absent the critical habitat protections. In the time the critical habitat rule has
3 been languishing, the species has remained vulnerable to injury and death in the areas the agency
4 has said warrant additional protection; new harmful projects, such as offshore oil and gas leasing
5 have been proposed; and the population has continued to decline. The Center and its members
6 are therefore injured because their use and enjoyment of Southern Resident killer whales and
7 those areas inhabited by the whales are threatened, degraded, and harmed by the Fisheries
8 Service's failure to revise and expand critical habitat off the Pacific Coast of the United States.

9 14. In addition, the Center and its members are also suffering procedural and
10 informational injuries. The Center and its members regularly comment on agency actions
11 affecting Southern Resident killer whales. The Fisheries Service's ongoing failure to publish a
12 proposed critical habitat rule subverts the ability of the Center and its members to meaningfully
13 participate in the rulemaking process. It also deprives the Center and its members of additional
14 scientific and other information regarding the habitat areas that are most essential for the survival
15 and recovery of Southern resident killer whales.

16 15. The above-described cultural, spiritual, aesthetic, recreational, scientific,
17 educational, procedural, and other interests of the Center and its members have been, are being
18 and, unless the relief prayed herein is granted, will continue to be adversely affected and
19 irreparably injured by the Fisheries Service's continued refusal to comply with their obligations
20 under the Endangered Species Act and the Administrative Procedure Act.

21 16. The relief sought in this case will redress these injuries. Expanded critical habitat
22 for Southern Resident killer whales will likely contribute to better habitat protections, such as
23 reducing water and noise pollution, restricting vessel traffic, and improving foraging habitat.

1 These will improve the chances of survival and recovery for Southern Resident killer whales that
 2 are enjoyed by the Center and its members.

3 **Defendants**

4 17. Defendant National Marine Fisheries Service is an agency within the United
 5 States Department of Commerce. The Fisheries Service is the agency to which the Secretary of
 6 Commerce has delegated the authority to implement the Endangered Species Act for most
 7 threatened and endangered marine species (including Southern Resident killer whales).

8 18. Defendant Barry Thom is named in his official capacity as the West Coast
 9 Regional Administrator of the National Marine Fisheries Service. Mr. Thom has responsibility at
 10 the regional level for implementing and fulfilling the agency's duties under the Endangered
 11 Species Act.

12 19. Defendant Wilbur Ross is named in his official capacity as the Secretary of
 13 Commerce. The Secretary is charged with implementation of the Endangered Species Act for
 14 most threatened and endangered marine species (including Southern Resident killer whales), and
 15 is responsible for the violations alleged in this case. The Secretary has the ultimate duty and
 16 authority to issue the relief requested in this complaint.

17 **STATUTORY BACKGROUND**

18 **Endangered Species Act**

19 20. The Endangered Species Act is the "most comprehensive legislation for the
 20 preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*,
 21 437 U.S. 153, 180 (1978). Its primary purposes are to provide a "means whereby the ecosystems
 22 upon which endangered species and threatened species depend may be conserved . . . [and] a
 23 program for the conservation of such endangered species and threatened species." 16 U.S.C.

1 § 1531(b).

2 21. Section 4 of the Endangered Species Act requires the Service to list species as
3 “endangered” or “threatened” when they meet the statutory listing criteria. *Id.* § 1533. An
4 “endangered” species is “in danger of extinction throughout all or a significant portion of its
5 range,” and a “threatened” species is “likely to become an endangered species within the
6 foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20).

7 22. Critical habitat means “the specific areas within the geographical area occupied
8 by the species . . . on which are found those physical or biological features (I) essential to the
9 conservation of the species and (II) which may require special management considerations or
10 protection;” and unoccupied areas “essential for the conservation of the species.” 16 U.S.C.
11 § 1532(5).

12 23. Congress recognized the importance of habitat protections to the conservation and
13 recovery of endangered species. The legislative history of the Act shows Congress clearly
14 recognized the importance of timely critical habitat designation in conserving listed species:

15 [C]lassifying a species as endangered or threatened is only the first step in
16 insuring its survival. Of equal or more importance is the determination of the
17 habitat necessary for that species’ continued existence. . . . If the protection of
18 endangered and threatened species depends in large measure on the preservation
19 of the species’ habitat, then *the ultimate effectiveness of the Endangered Species*
20 *Act will depend on the designation of critical habitat.*

21 H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

22 24. Concurrent with listing a species, the Endangered Species Act requires the
23 designation of critical habitat. “The Secretary . . . shall, concurrently with making a
24 determination . . . that a species is an endangered species or a threatened species, designate any
25 habitat of such species which is then considered to be critical habitat.” 16 U.S.C.

1 § 1533(a)(3)(A)(i); *see also id.* § 1533(b)(6)(C).

2 25. Once designated, any interested person may file a petition with the Fisheries
3 Service to revise a species' critical habitat. *Id.* § 1533(b)(3)(D); 50 C.F.R. § 424.14(c). The
4 Fisheries Service must, to the maximum extent practicable within 90 days after receiving the
5 petition, "make a finding as to whether the petition presents substantial scientific information
6 indicating that the revision may be warranted." 16 U.S.C. § 1533(b)(3)(D)(i); 50 C.F.R. §
7 424.14(i).

8 26. If the Fisheries Service makes a positive 90-day finding, within 12 months after
9 receiving the petition it must "determine how . . . to proceed with the requested revision,"
10 and promptly publish that determination in the Federal Register. 16 U.S.C. § 1533(b)(3)(D)(ii);
11 50 C.F.R. § 424.14(i)(2).

12 27. When revising a critical habitat designation, the Fisheries Service must publish a
13 proposed rule providing the regulatory text, a summary of data upon which the proposal is based,
14 and an explanation of how the data supports the proposed rule, as well as an opportunity for
15 public comment and a hearing. 16 U.S.C. § 1533(b)(5); 50 C.F.R. § 424.16. Within one year of
16 the proposed rule to revise critical habitat, the Fisheries Service must publish either a final rule, a
17 finding that the revision will not be made, or a notice extending the period by "not more than 6
18 months." 16 U.S.C. § 1533(b)(6); 50 C.F.R. § 424.17(a)(1).

19 28. Once designated, critical habitat provides important protections for imperiled
20 species beyond those provided by listing alone. For example, the Endangered Species Act
21 requires each federal agency to insure that its actions will not "result in the destruction of adverse
22 modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). If any federal agency action
23 may adversely affect designated critical habitat, the agency must formally consult regarding the

1 action's effects. 50 C.F.R. § 402.14(a). If the action will result in the destruction or adverse
 2 modification of critical habitat, the Fisheries Service must set forth reasonable and prudent
 3 alternatives to the action. *Id.* § 402.14(h)(3).

4 29. Time has proven Congress's wisdom in requiring that the Fisheries Service
 5 designate critical habitat for listed species. Studies show that species with critical habitat are
 6 more than twice as likely to be in recovery than those without it.

7 **Administrative Procedure Act**

8 30. The Administrative Procedure Act provides general rules governing the way
 9 federal agencies propose and establish regulations. 5 U.S.C. §§ 551–706.

10 31. Regulations promulgated to carry out the Endangered Species Act must be issued
 11 in compliance with Administrative Procedure Act rulemaking procedures, except as expressly
 12 provided for by the Endangered Species Act. 16 U.S.C. § 1533(b)(4); 5 U.S.C. § 553.

13 32. The Administrative Procedure Act requires that, “within a reasonable time, each
 14 agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b).

15 33. Absent narrow circumstances, a federal agency must publish a notice and allow
 16 public comment on any proposed rulemaking. 5 U.S.C. § 553(b), (c). The Administrative
 17 Procedure Act defines a “rule making” to mean the “process for formulating, amending, or
 18 repealing a rule.” *Id.* § 551(5).

19 34. Under the Administrative Procedure Act, a person may seek judicial review to
 20 “compel agency action unlawfully withheld or unreasonably delayed . . .” 5 U.S.C. § 706(1).

21 **FACTUAL BACKGROUND**

22 **The Southern Resident Killer Whale**

23 35. The Southern Resident killer whale, or orca, is genetically distinct from others,

1 with a unique dialect and one of the only orca populations to feed primarily on salmon. This
2 intelligent predator is known to form lasting social bonds. It lives in highly organized pods where
3 whales take care of the young, sick, or injured. Because of its unique behaviors and social bonds,
4 it has become an icon in the Pacific Northwest, adorning everything from coffee mugs to long-
5 houses.

6 36. The Fisheries Service listed the Southern Resident killer whale as endangered in
7 2005. 70 Fed. Reg. 69903 (Nov. 18, 2005). The population remains small and vulnerable, with
8 no net increase in abundance.

9 37. The Southern Resident killer whale is one of the world's best-studied and most
10 critically endangered marine mammals. As of June 2018, the current population estimate is only
11 75 individual Southern Resident killer whales. Three deaths since 2016 have resulted in the
12 population declining to its lowest population in 34 years.

13 38. There are three primary threats to Southern Resident killer whales: (1) prey
14 limitation, (2) contamination from toxic pollution, and (3) vessel noise and disturbance.

15 39. Southern resident killer whales feed extensively on salmon. Salmon availability
16 impacts the whales' reproductive rates, survival, and population growth.

17 40. The Southern Resident killer whale population has not produced a successful
18 offspring since 2015.

19 41. High levels of contaminants also threaten Southern Resident killer whales and
20 exacerbate the problem of inadequate availability of salmon. When whales are nutritionally
21 deprived, release of toxins in their fat reserves may contribute to reproductive failure.
22 Contaminant sources may include contaminated prey, urban runoff, sewage, pesticides, and other
23 sources.

1 42. Disturbance from vessels impairs the behavior and feeding of Southern Resident
2 killer whales by increasing expended energy, reducing effectiveness of their hunting techniques,
3 and reducing the time Southern Resident killer whales forage.

4 43. The Southern Resident population now is so small that inbreeding might be
5 affecting individual's fitness. Federal scientists studying the whale's genetics found that only
6 two adult males sired more than half of the individuals born since 1990; one of those males is no
7 longer alive.

8 44. In 2008 the Fisheries Service published its *Recovery Plan for Southern Resident*
9 *Killer Whales (Orcinus orca)* ("Recovery Plan"). The Recovery Plan noted that seasonal
10 mortality is believed to be highest during the winter and early spring, based on the numbers of
11 animals missing from pods returning to inland waters each spring. Recovery Plan at II-42.
12 Higher winter and spring stranding rates reported for all killer whales in Washington and Oregon
13 support that conclusion. *Id.*

14 45. Southern Resident killer whales have poorer body condition and higher rates of
15 mortality in winter than in summer, suggesting that access to food is limited in the winter. A
16 decline in body condition between 2008 and 2013 was observed to precede the death of two
17 Southern Resident killer whales, suggesting a link between body condition and mortality.

18 46. The Fisheries Service identified the Southern Resident killer whale as a Species in
19 the Spotlight, meaning that it is among only a few species the agency considers at most at risk of
20 extinction and a priority for actions aimed at conserving and recovering the species.

21 **The Critical Habitat Designation for the Southern Resident Killer Whale**

22 47. In 2006, the Fisheries Service designated critical habitat for Southern Residents
23 for three specific areas in the inland waterways of Washington State: Haro Strait and the waters

1 around the San Juan Islands (the “Summer Core Area”); Puget Sound; and the Strait of Juan de
2 Fuca. 71 Fed. Reg. 69054 (Nov. 29, 2006). Southern Residents reside in these areas principally
3 during the late spring, summer, and fall. *Id.* They travel outside of these inland areas to coastal
4 sites off Washington, Oregon, and California in the winter.

5 48. The Fisheries Service has acknowledged that the currently designated critical
6 habitat boundaries insufficiently protect Southern Resident’s habitat. Even at the time of
7 designation in 2006, the Fisheries Service contemplated a future expansion of critical habitat to
8 include coastal and offshore waters. In 2006 the U.S. Marine Mammal Commission commented
9 on the proposed rule that “it is possible, if not likely, that habitat used by killer whales in the
10 winter will prove to be as important as summer habitats for the recovery of the population.” The
11 Fisheries Service responded that it would “consider any new information on coastal and offshore
12 habitats that becomes available.” 71 Fed. Reg. 69054, 69057.

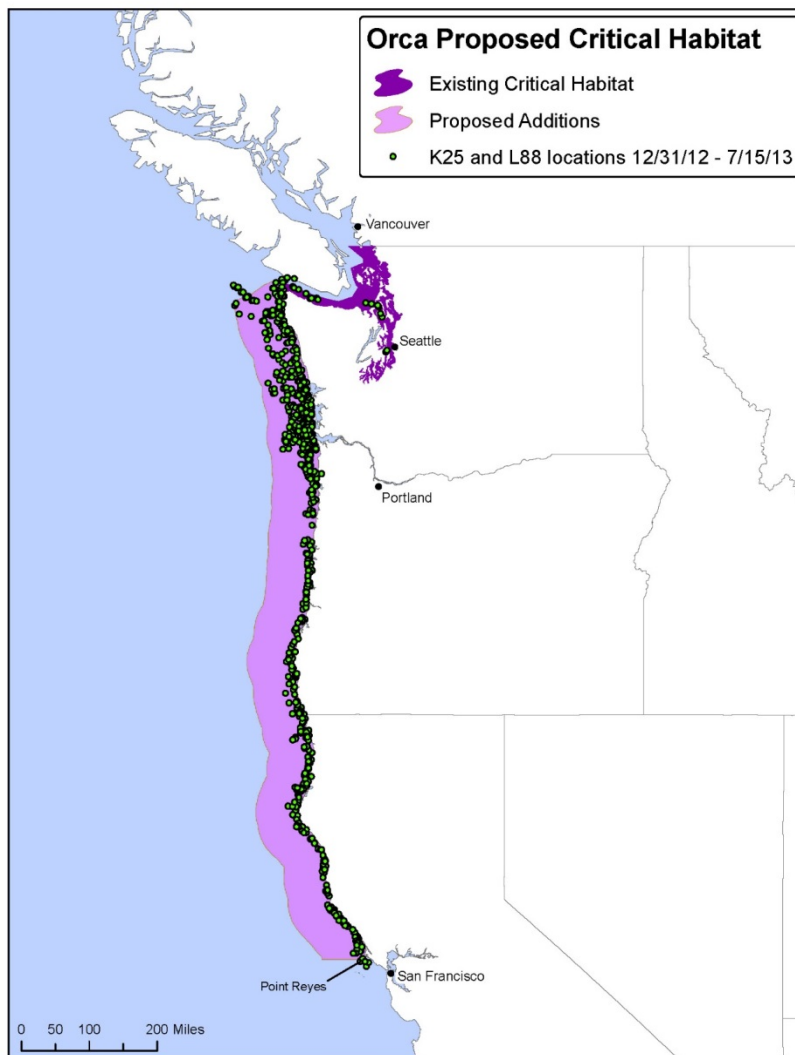
13 49. For more than a decade, there have been sightings of Southern Resident killer
14 whales using coastal habitat off of Washington, Oregon, and northern California. Several years
15 of tracking and satellite tagging data have confirmed that these areas are important for Southern
16 Residents’ winter habitat and foraging.

17 50. In 2014, the Center for Biological Diversity petitioned the Fisheries Service for
18 revised and expanded critical habitat, including coastal and offshore waters. The petition
19 included ample scientific information in support of the requested critical habitat designation.

20 51. The following map depicts the areas that the Center proposed for critical habitat
21 designation and the locations of tagged killer whales.

22 //

23 //



52. In response, the Fisheries Service found that the petition presented substantial information indicating that revising critical habitat may be warranted, and initiated a formal review of the current critical habitat designation. 79 Fed. Reg. 22933 (Apr. 25, 2014).

53. On February 24, 2015, the Fisheries Service published a 12-month finding that revising critical habitat was in fact warranted and stated it “intend[s] to proceed with the petitioned action to revise critical habitat for Southern Resident killer whales.” 80 Fed. Reg. 9682, 9685-86 (Feb. 24, 2015). The Fisheries Service stated that it “anticipate[s] developing a proposed rule for publication in the *Federal Register* in 2017.” *Id.* at 9687.

54. To date, the Fisheries Service has failed to issue proposed and final rules to revise

critical habitat for Southern Resident killer whales.

55. In the time that the Fisheries Service has failed to expand Southern Resident's critical habitat, the species has remained vulnerable to injury in death, particularly in its winter habitat. The population has also declined to only 75 individual animals, sliding closer to extinction.

56. Moreover, new activities that may destroy or adversely modify the species' habitat have been proposed in the areas for which the Center requested critical habitat designation, including military activities, oil and gas leasing, water pollution permits, coastal construction, hydroelectric operations, fishing activities, and wind and wave energy development.

57. The Fisheries Service's inaction and extensive delay in proposing critical habitat is denying the Southern Resident killer whales statutorily-mandated protections. If the Fisheries Service expanded critical habitat as requested, it would be required to more closely review the activities listed above, and any other activities that could affect that habitat, and mitigate any destruction of or adverse modification to that habitat. The Fisheries Service's delay in publishing proposed and final rules expanding critical habitat for Southern Resident killer whales is degrading the species' habitat and depriving this critically endangered marine mammal of significant legal protections that are essential for its survival and recovery. The Fisheries Service's delay is wholly unreasonable.

CLAIM FOR RELIEF

Violations of the Endangered Species Act and the Administration Procedure Act

58. Plaintiff re-alleges and incorporates, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

59. The Fisheries Service’s protracted and ongoing failure to take final action on the petition to revise critical habitat for the critically endangered Southern Resident killer whale and to propose and finalize such a revision constitutes an agency action “unlawfully withheld or unreasonably delayed” within the meaning of the APA. 5 U.S.C. § 706(1). The agency’s failure violates the APA and the Endangered Species Act. *Id.*; 16 U.S.C. § 1533(b).

60. Plaintiff and its members are harmed and will continue to be harmed by the Fisheries Service’s violations of law as described herein. This Court has jurisdiction to adjudicate these claims and grant Plaintiff’s requested relief to remedy these harms.

REQUEST FOR RELIEF

For the reasons stated above, Plaintiff respectfully requests that this Court:

1. Declare that the Fisheries Service has violated and is violating the Endangered Species Act and the Administrative Procedure Act by failing to revise critical habitat for endangered Southern Resident killer whales;
2. Direct the Defendants to propose and finalize a revised critical habitat rule by December 1, 2018, and June 1, 2019, respectively;
3. Award Plaintiff the costs of this litigation, including reasonable attorney’s fees; and
4. Provide such other relief as may be just and proper.

Respectfully submitted this 16th day of August,

s/ Sarah Uhlemann
Sarah Uhlemann (WA Bar No. 41164)

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