

Ninth Circuit Issues Decision in Salmon Listing Case

The Ninth Circuit Court of Appeals recently issued a decision upholding the invalidation of the listing of naturally spawned Oregon Coast salmon stocks as threatened under the Endangered Species Act (ESA). The decision in *Alesea Valley Alliance v. Daley*, No. 01-36071 (9th Cir., Feb. 24, 2004), while largely procedural and not as significant as the district court opinion, has been praised by many entities who point to the underlying action in the case as one of many recent actions demonstrating a need for amendment of the ESA. The immediate impact of the decision is that the invalidation of the Oregon Coast coho listing, which had been stayed by the Ninth Circuit pending a decision in the case, is now in effect: Oregon Coast coho are no longer a protected species under the ESA.

In *Alesea Valley Alliance*, the Ninth Circuit found that the Oregon Natural Resources Council and other proponents of the listing of naturally spawned Oregon coho salmon did not have a right to appeal the U.S. District Court for the District of Oregon's invalidation of the listing of wild stocks of the species. In *Alesea Valley Alliance v. Evans*, 161 F.Supp.2d 1154 (D. Or. 2001), the district court had invalidated the National Marine Fisheries Service's (NOAA Fisheries) decision to list only "naturally spawned" Oregon Coast coho salmon, finding that the agency's distinction between naturally spawned coho salmon and "hatchery spawned" salmon violated the ESA. In reaching its conclusion, the court noted that NOAA Fisheries had discovered that hatchery-raised population excluded from the listing comprised the same evolutionarily significant unit (ESU) of salmon as the natural populations that were included in the listing. Thus, instead of finding that hatchery fish should be excluded from the listing because of genetic or geographic differences, NOAA Fisheries excluded the hatchery populations because they were not deemed "essential to recovery" of the species. The court found that this determination by the agency made an "improper distinction," below the subspecies level authorized by the ESA. This distinction created the unusual and impermissibly arbitrary "circumstance of two genetically identical coho salmon swimming side-by-side in the same stream, but only one receives ESA protection while the other does not," (*Id.* at 1162).

After the district court remanded the listing, NOAA Fisheries determined that it would not appeal the decision, but instead would review the status of as many as 23 West Coast listings. The agency also began a public process to review the artificial propagation policy.

The Oregon Natural Resources Council and other proponents of the listing decision sought to intervene in the action with a goal of appealing the remand in light of the agency's refusal to do so. The Ninth Circuit has now concluded, however, that the federal government is the only entity that could challenge the remand.

At present, naturally spawned stocks of Oregon Coast salmon are not a protected species under the ESA and the action has been remanded to the agency for reconsideration. Other similar listing determinations are also of questionable validity. There are pending cases to invalidate the listing of Klamath Basin coho salmon and Central Valley steelhead. Cases were also filed in early March to invalidate the listing of three steelhead populations in Washington and Oregon. NOAA Fisheries is also continuing its status review of most of the West Coast salmon listings, including several steelhead listings in California, although agency officials have stated that this is a result of the regular five year status review required by the ESA. In its decision, the Ninth Circuit put forth a range of options available to the agency, including a recirculation of the policy interpreting the ESA's authorization for listing "distinct population segments" or ESUs of species. NOAA Fisheries has not yet sought public review of the 1991 ESU policy, and the agency is continuing its review of the draft policy on considering hatchery populations in listing decisions.

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If you have any questions about the issue discussed in this Advisory, including how it may affect you or your company or firm, please contact Thomas M. Berliner or Karen L. Donovan in the San Francisco office at 415.371.2200 or tberliner@duanemorris.com or kldonovan@duanemorris.com. Duane Morris' Energy and Water & Natural Resources Practice Group is actively engaged before numerous federal agencies and represents public and private water and power agencies and a variety of other clients on Endangered Species Act issues and other resource matters, environmental compliance matters and related fields.