Legal Opinion Letter

**Washington Legal Foundation**
**Advocate for freedom and justice®**
2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

Vol. 14 No. 11 June 11, 2004

# COURT LIMITS ACTIVISTS' ABILITY TO DISPUTE ESA LISTING DECISIONS

by
Sandra Snodgrass

The Ninth Circuit recently dealt a blow to environmental interest groups' ability to defend listing decisions under the Endangered Species Act ("ESA"). In *Alsea Valley Alliance v. Dept. of Commerce*, 358 F.3d 1181 (9th Cir. Feb. 24, 2004), the court denied environmental intervenors the right to appeal a district court's order that remanded an ESA listing decision to the National Marine Fisheries Service ("the Service"), where the Service chose not to appeal the remand order. This decision, while consistent with those of other circuits, represents a rare limit on environmental plaintiffs' ability to protect their interests judicially under the ESA.

At issue in *Alsea Valley* was the Service's decision listing as threatened the "naturally spawned" populations of Oregon coast "Evolutionarily Significant Unit" ("ESU") coho salmon, but excluding from such listing the "hatchery spawned" populations. Alsea Valley Alliance ("Alsea") challenged this listing as invalid in federal court and prevailed on summary judgment. The district court found that the Service had distinguished between natural and hatchery-spawned populations of coho in a manner not allowed under the ESA, and therefore struck down the listing.

In granting Alsea's motion for summary judgment, the district court remanded the case to the Service for further consideration of the listing status of Oregon coast coho salmon. Rather than appealing the remand order, the Service indicated that it would comply with the order and would conduct a comprehensive review of its West Coast salmon hatchery policy and listing implications.

Concerned that the Service would choose not to appeal, Oregon Natural Resource Council and several other environmental groups (collectively referred to as "the Council") filed a motion to intervene as of right and a simultaneous notice of appeal. The district court allowed the parties to intervene solely for appeal purposes. Alsea appealed the district court's intervention order, which the Ninth Circuit considered together with the Council's appeal of the remand order. The court stayed the remand order pending appeal.

The Ninth Circuit began its analysis by noting that its appellate jurisdiction only extends to "final decisions of the district courts," 28 U.S.C. § 1291, and remand orders are generally not final orders for purposes of section 1291. The court recognized that an exception to this general rule is made where 1) the district court conclusively resolves a separable legal issue, 2) the remand order forces the agency to apply a potentially erroneous rule that may result in a wasted proceeding, and 3) review would, as a practical matter, be foreclosed if an immediate appeal were not available. The court found that an analysis of the first two criteria was unnecessary because it determined that denying the Council an immediate appeal would not, as a practical matter, foreclose review.

---

**Sandra Snodgrass** is an associate in the Denver office of the law firm Holland & Hart LLP where she is a member of the firm's Environmental Compliance Group.

The Ninth Circuit noted that the previous cases that had satisfied this requirement all involved agency appeals of orders remanding that agency's prior decision or rule for reconsideration. This underscored the fact that only agencies forced to revise their own rules would effectively be denied the right to review if not allowed to appeal, because an agency cannot appeal the result of its own decision. Thus, the Ninth Circuit concluded that, from an agency standpoint, such a remand order is final. However, the court found that, while the district court's remand order may have left the Service without an avenue for review; that alone did not entitle the Council to appeal. No aspect of the district court's ruling denied the Council access to appellate review of the eventual outcome of the district court's decision.

The court further observed that it is possible that the Service's action on remand would provide the Council with all of the relief it sought, rendering an appeal unnecessary. The district court's remand order only prevented the Service from including natural and hatchery coho in the same "distinct population segment" ("DPS") in one rule, while excluding the hatchery coho from the natural coho's threatened listing in another. The court noted that, in revisiting its rule, the Service could still take an approach that was favorable to the Council, such as defining hatchery coho as a separate DPS from natural coho (though the Ninth Circuit observed that the district court legitimately doubted this was possible), reformulating its rules for determining what constitutes a separate DPS, or forging an entirely new set of rules from scratch. Regardless of the approach the Service took, the Council would have the opportunity to provide input for the new rule in the public participation phase of the rulemaking.

The court indicated that, after the Service had reconsidered its rule on remand, the Council would have the opportunity to challenge the rule in district court, if it so desired. Then, if the Council was dissatisfied with the district court's decision, it would be able to appeal to the Ninth Circuit. However, until all of these contingencies had played out, an appeal to the Ninth Circuit could prove unnecessary, thus rendering the matter not "final" for purposes of appellate review. The court also rejected two other arguments made by the Council: 1) that the vacatur of the listing decision was a separately appealable decision, distinct from declaring the listing unlawful, and 2) that the remand order had the "practical effect" of granting an injunction and therefore was subject to an interlocutory appeal under 28 U.S.C. § 1292(a)(1).

The immediate impact of the Ninth Circuit's decision was that the stay of the remand order was lifted and the invalidation of the coho listing decision was reinstated. The long-term effect of the decision appears to be that, within the Ninth Circuit at least, environmental groups will be unable to defend ESA listing decisions at the appellate level where the agency does not appeal a decision striking down the listing. While the court's holding was apparently an issue of first impression under the ESA, it followed the holdings and rationale of a number of other circuit court decisions that similarly denied private party intervenors the opportunity to appeal judicial rejection of agency action where the agency itself did not. *See Pueblo of Sandia v. Babbitt*, 231 F.3d 878 (D.C. Cir. 2000) (intervenor could not appeal remand of opinion by Solicitor of Interior where federal appellants withdrew appeal); *Mall Properties, Inc. v. Marsh*, 841 F.2d 440 (1st Cir. 1988) (remand order of Army Corps of Engineers' permitting decision was not appealable by intervenors where the Corps did not appeal). Therefore, while environmental plaintiffs will undoubtedly claim that the *Alsea Valley* decision is unreasonable, the Ninth Circuit's approach was in line with precedent.

Since the Ninth Circuit decided *Alsea Valley*, the Service has acknowledged in a Biological Opinion issued on March 19 that it considers the listing unenforceable, given the court's decision to lift its stay of the district court's invalidation of the rule. It has also stated, in a March 25 draft hatchery listing policy leaked to the press, that in delineating an ESU to be considered for listing, the Service will identify all fish populations that are part of that ESU, including natural, hatchery, and mixed populations. Thus, draft policy recognizes that hatchery populations can affect listing decisions, by contributing to increasing abundance and productivity of the ESU. In response, the Council has asked the Ninth Circuit for a rehearing of its decision and has indicated that it will take immediate steps to enforce the listing and uphold the court's stay of the district court's remand order.