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7. SALMON: Court affirms Calif. listing for coho (11/29/2007)

Arthur O'Donnell, *Land Letter* editor

A California appeals court this month rejected attempts to nullify California Endangered Species Act protections for coho salmon, upholding the state Fish and Game Commission's listing in 2004 of Northern California Coast coho as threatened and Central California Coast coho as endangered under state law. The ruling, issued Nov. 20, affirmed a trial court's finding on the matter.

The challenge to that earlier ruling was brought by the California Forestry Association and other business groups, which argued that the state's action was unnecessary and duplicative of federal protections for the fish. In particular, the plaintiffs also claimed that while the regional coho populations covered by the listing are "evolutionarily significant units" (ESUs), they should not be considered "species or subspecies" as described in the laws.

Although coho are found in many parts of the Pacific Ocean ecosystem, California populations have diminished by about 70 percent since the 1960s, the judges noted. Central coast fish were "near extinction" and while northern coast coho were more abundant, there is a declining trend "and a high likelihood that the declines will continue," said the court. "Reasons for the declining coho salmon population include forestry activities, industrial discharges, agricultural discharges, urban development and harvesting," the ruling observed.

In June 2005, the National Marine Fisheries Service elevated its protections for California's coastal coho from threatened to endangered under the federal ESA.

Damian Schiff, an attorney with the Pacific Legal Foundation, which represents the forestry association in the case, told *Land Letter* that "the state act does not recognize ESUs" and that putting coho under state protections amounts to "another layer of regulation we contend is unnecessary, given the protections already afforded under the federal laws."

Broad interpretation warranted

On both of those counts, the court disagreed with the plaintiffs. It determined that ESUs may be considered as part of the "species or subspecies" covered by the law and that the state commission's interpretation should be given deference, given the agency staff's "central role in the listing process, their scientific expertise, and their long-standing adherence to the policy that the CESA allows listings of evolutionarily significant units."

In addition, the court found that the state Legislature likely wanted the commission to employ a broad definition in its actions and is "consistent with the liberal construction we accord laws such as the CESA" in order to conserve, enhance or restore threatened or endangered species.

The ruling also found good cause for maintaining California-level protections for local coho populations in the event that the federal government might someday remove the fish from its protections. "What matters in the final analysis is that the commission's and the department's interpretation of the range provision furthers the Legislature's intent of protecting native species and their habitat for the value of Californians," the court found.

Finally, the court rejected the plaintiffs' argument that the state "improperly distinguished between naturally spawning and hatchery fish" in deciding that coho are threatened. That distinction was also an issue in a recent federal case related to Northwest salmon, in which a judge found that hatchery fish should not count toward recovery goals set out under the federal ESA ([E&ENews PM](#), June 14).

In this instance, the appeals court determined that the California Legislature had narrowed the definition of fish within the state act to mean "wild fish" and not hatchery fish.

Tom Weseloh, North Coast manager for California Trout, one of several environmental groups that intervened in the case,

said that upholding state protections for the coho is important because "federal listing doesn't necessarily require states to take certain actions." A state-level listing means that many types of activities considered detrimental to coho survival, including logging or development, will come under review for their impacts, he said.

Jason Flanders, an attorney representing the intervenors, praised the appeals court for quickly reaching a decision that strongly upheld the trial court's conclusions that CESA listings for coho are warranted. He added that since many of these state-level ESA issues have not been determined at trial in the past, the ruling will provide a strong precedent.

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