

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

MAR 16 2009

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ALSEA VALLEY ALLIANCE;  
BUILDING INDUSTRY ASSOCIATION  
OF WASHINGTON; COALITION FOR  
IDAHO WATER; IDAHO WATER  
USERS ASSOCIATION; IDAHO FARM  
BUREAU FEDERATION;  
WASHINGTON FARM BUREAU;  
WASHINGTON ASSOCIATION OF  
REALTORS; CENTRAL COAST  
FOREST ASSOCIATION; CALIFORNIA  
STATE GRANGE; OREGON STATE  
GRANGE; GREENHORN GRANGE;  
JACKSON COUNTY POMONA  
GRANGE; PIONEER IRRIGATION  
DISTRICT; SENATOR SKIP BRANDT,

Plaintiffs - Appellants,

v.

CONRAD LAUTENBACHER, NOAA  
Administrator; D. ROBERT LOHN,  
NMFS Regional Director, Northwest  
Region; CARLOS GUTIERREZ,  
Secretary, U.S. Department of Commerce;  
NATIONAL MARINE FISHERIES  
SERVICES; WILLIAM T. HOGARTH,  
NMFS Director,

No. 07-35824

D.C. No. CV-06-06093-HO

MEMORANDUM\*

---

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants - Appellees,

TROUT UNLIMITED; PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
ASSOCIATIONS; INSTITUTE FOR  
FISHERIES RESOURCES; AMERICAN  
RIVERS; OREGON NATURAL  
RESOURCES COUNCIL; KLAMATH  
FOREST ALLIANCE; NORTHCOAST  
ENVIRONMENTAL CENTER;  
HEADWATERS; PACIFIC RIVERS  
COUNCIL; SIERRA CLUB,

Defendant-intervenors -  
Appellees,

v.

JACK MARINCOVICH; JAMES  
NORMAN WELLS; IRENE MARTIN;  
BRIAN TARABOCHIA; STEVE FICK,

Plaintiff-intervenors.

Appeal from the United States District Court  
for the District of Oregon  
Michael R. Hogan, District Judge, Presiding

Argued and Submitted October 20, 2008  
Seattle, Washington

Before: O'SCANNLAIN, RYMER, and KLEINFELD, Circuit Judges.

Alsea Valley Alliance ("Alsea") appeals the district court's grant of  
summary judgment to the government in Alsea's challenge to the listing of sixteen

distinct population segments (“DPSs”) of West Coast salmon as well as to the modified § 4(d) “take” regulations. The facts are known to the parties and need not be repeated here, except as necessary to explain our decision.

Alsea alleges that the National Marine Fisheries Service (“NMFS”) violated the Endangered Species Act by “(1) distinguishing between hatchery stocks and ‘natural’ salmon populations in its listing process, (2) promulgating a protective [§ 4(d)] regulation that distinguishes between hatchery stocks and natural populations, and (3) including salmon populations that do not interbreed in listed population segments.”

For the reasons discussed in our opinion in *Trout Unlimited v. Lohn*, Nos. 07-35623, 07-35750, filed concurrently with this disposition, the district court’s rulings as to claims (1) and (2) are affirmed.

As to the third claim, Alsea contends that the listed DPSs are overbroad because they include fish that do not interbreed “with regularity.” This claim is based on the Endangered Species Act’s definition of “species”—a definition which includes “any subspecies of fish . . . , and any distinct population segment of any species of vertebrate fish . . . *which interbreeds when mature.*” 16 U.S.C. § 1532(16) (emphasis added). Alsea reads this definition to require members of a

DPS to interbreed with reasonable regularity. NMFS's interpretation of the statute, on the other hand, does not require regular interbreeding.

Notably, nothing in the text of 16 U.S.C. § 1532(16) specifies the frequency at which interbreeding must occur and the phrase "interbreeds when mature" is plausibly subject to the interpretations put forth by Alsea and NMFS. We are satisfied that the agency's interpretation, which focuses on "reproductive isolation" rather than regular interbreeding, is "a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Absent any language in § 1532(16) requiring a particular level of interbreeding, we conclude that NMFS, relying on the best available science, acted reasonably in applying a construction calling for a low, rather than a high, rate of interbreeding.

**AFFIRMED.**