



# Ninth Circuit Affirms Steelhead Listing Decision that Excludes Resident Rainbow Trout

08.26.2010 | By **Benjamin Z. Rubin, Paul S. Weiland**

On August 20, 2010, the United States Court of Appeals for the Ninth Circuit held that the National Marine Fisheries Service ("NMFS") did not violate the law when it omitted resident rainbow trout in its decision to list the Central Valley steelhead ("CV Steelhead") under the Endangered Species Act. Steelhead trout and rainbow trout are part of the same species (*Oncorhynchus mykiss*), commonly occupy the same freshwater streams, and can interbreed. *Modesto Irrigation District v. Gutierrez*, Case No. 09-15214, Slip Op. at 12408 (9th Cir. Aug. 20, 2010). The Ninth Circuit's decision will make it easier to list individual populations of species under the Endangered Species Act, and may lead to additional restrictions on public and private activities that impact the habitat of listed steelhead in California, Oregon and Washington.

Adult steelhead trout spawn in coastal watersheds and their progeny rear in freshwater prior to migrating to the ocean. Rainbow trout are genetically the same species as steelhead, but they usually do not migrate to the ocean. Nevertheless, steelhead and rainbow trout can interbreed, and their progeny can complete their life-history cycle either completely in freshwater, or by migrating to the ocean, where they will spend two to four years in the marine environment before returning to freshwater streams to spawn. It is also possible for rainbow trout which have completed their life history entirely in freshwater to produce progeny which migrate to the ocean. NMFS, Draft Southern California Steelhead Recovery Plan, 10 (July 2009).

The ESA authorizes the listing of species, subspecies and "distinct population segments" of vertebrate species. Since the enactment of the ESA in 1973, NMFS has struggled with whether separate "runs" or populations of salmon and steelhead qualify for listing under the ESA. Seven Pacific salmon species are native to the North American coast. Several of these species support a robust commercial and sport fishery. A number of individual "runs" of salmon and steelhead in California, Oregon and Washington are, however,

greatly reduced from historic levels due to impacts from human activities and from changing ocean conditions.

In 1991, in an attempt to define what would qualify as a "distinct population segment" under the ESA for Pacific salmon, NMFS decided that a salmon stock will qualify for listing under the ESA if (1) it is "substantially reproductively isolated from other nonspecific population units"; and (2) it "represents an important component in the evolutionary legacy of the species." 56 Fed. Reg. 58,612 (1991). In 1996, however, NMFS and the U.S. Fish & Wildlife Service ("FWS") adopted a different joint policy setting forth multiple factors to consider when determining whether a distinct population of animal, bird or fish species will qualify for listing under the ESA. 61 Fed. Reg. 4,722, 4,725 (1996). And, unlike the 1991 policy, which required that a salmon species be "substantially reproductively isolated," the 1996 policy authorized placing a species in its own distinct population segment so long as it was markedly separated. Despite the adoption of the new policy, NMFS continued to apply the 1991 policy to Pacific salmon. Slip Op. at 12409-10.

In 1997, NMFS determined that interbreeding steelhead and rainbow trout should be classified in the same population for the purposes of the ESA because they were not "substantially reproductively isolated." The agency with jurisdiction over rainbow trout, the FWS, objected to NMFS's determination because it resulted in applying the ESA to thriving rainbow trout populations. NMFS attempted to side-step this controversy by limiting the listing of populations of *O. mykiss* (including rainbow trout) to areas below impassible barriers (such as dams).

In 2006, NMFS once again changed its approach to the listing of co-occurring steelhead and rainbow trout and decided not to include rainbow trout in the listing of steelhead populations. Slip. Op. at 12411-14.

A group of central valley irrigation districts filed a lawsuit in federal court challenging both NMFS's policy shift and the decision to list the Central Valley steelhead. Slip Op. at 12415. The Ninth Circuit rejected the challenge, finding that NMFS's interpretation of the ESA was entitled to *Chevron* deference,<sup>1</sup> and concluding that "under the ESA, interbreeding is not alone determinative of whether organisms must be classified alike where, as here, they develop and behave differently." *Id.* at 12408, 12418. While the Ninth Circuit held that NMFS was required by law to provide an explanation for its policy shift, the court went on to find that the "record reflects that NMFS engaged in a careful decision-making process and provided a sufficient explanation for its decision to apply the DPS Policy." *Id.* at 12419.

By affirming NMFS's interpretation, the Ninth Circuit has reaffirmed that the California Central Valley steelhead is a threatened species subject to the protections afforded by the ESA.

<sup>1</sup> In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), the Supreme Court held that if a statutory term is ambiguous, "the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." And, if the agency's interpretation is not arbitrary, capricious, or manifestly contrary to the statute, the agency's interpretation shall control.