SALMON Spawning + Recovery Alliance v. Nat'l Marine Fisheries Service (9th Cir Aug 14, 2009)



U.S.C. § 706(2)(A); *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) ("[A] decision [i]s arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (internal quotation marks and citation omitted)).

NMFS was required to perform two related actions in this case: it was asked to approve or deny a resource management plan ("RMP"), and it was asked to draft a biological opinion ("BiOp"). In both cases, NMFS's determination rested on whether or not implementation of the RMP would "appreciably reduce the likelihood of survival and recovery" of the Puget Sound Chinook salmon. 50 C.F.R. § 223.203(b)(6)(iv); *id.* § 402.02.

QUESTION:

The Conservation Groups assert that NMFS did not properly factor "recovery" into its analysis. We disagree. While *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 931–33 (9th Cir. 2008), precluded NMFS from "simply avoid[ing] any consideration of recovery impacts," *id.* at 932, it was careful not to require NMFS to "import ESA's separate recovery planning provisions into the section 7 consultation process," *id.* at 936. Attention

to recovery "simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger." *Id.* Ultimately, the RMP need not boost the Chinook's chances of recovery; NMFS must only determine those chances are not "appreciably" diminished by the plan. *See id.* at 930 ("Agency action can only 'jeopardize' a species existence if that agency action causes some deterioration in the species' pre-action condition.").

Here, we conclude that NMFS employed "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), and correctly interpreted 50 C.F.R. § 223.203(b) when it assessed the impact of the RMP on the recovery prospects of the Puget Sound Chinook ESU. Deciding how to assess, and indeed the assessment of, the impact of a RMP on an ESU's potential for recovery "involves a great deal of predictive judgment. Such judgments are entitled to particularly deferential review." *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009) (citing *The Lands Council*, 537 F.3d at 993). The conclusion NMFS reached in this case was that insofar as total recovery was unachievable under current habitat conditions, the RMP did not appreciably reduce the Chinook's chances of eventually reaching that goal. This conclusion—and the methods adopted to reach it—was reasonable and entitled to substantial deference. *See id.* at 959 (noting that