

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMANE SOCIETY OF THE UNITED STATES; WILD FISH CONSERVANCY; BETHANIE O'DRISCOLL; ANDREA KOZIL,

Plaintiffs-Appellants,

v.

CARLOS M. GUTIERREZ, Secretary of Commerce; JAMES W. BALSIGER; JAMES LECKY,

Defendants-Appellees,

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE; STATE OF OREGON DEPARTMENT OF FISH AND WILDLIFE,

Defendants-Intervenors-Appellees.

No. 08-36038
D.C. No.
3:08-cv-00357-MO
ORDER

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Filed February 26, 2009

Before: Alex Kozinski, Chief Judge, Michael Daly Hawkins
and Ronald M. Gould, Circuit Judges.

ORDER

Appellants challenge the decision of the National Marine Fisheries Service ("NMFS") to authorize the states of Oregon, Washington and Idaho to lethally remove certain California

sea lions preying on endangered or threatened salmon and steelhead fish at the Bonneville Dam (“NMFS Approval”).

Appellants move for a stay of the NMFS Approval pending appeal. Appellees oppose the motion.

A party seeking a stay must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip in his favor, and that a stay is in the public interest. *See Winter v. Natural Resources Defense Council, Inc.*, ___ U.S. ___, 129 S.Ct. 365, 374, 172 L. Ed. 2d 249 (2008).

Appellants challenge the NMFS Approval under the Administrative Procedure Act (“APA”). The APA requires a reviewing court to set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). We have held that review under the arbitrary and capricious standard “is narrow, and [we do] not substitute [our] judgment for that of the agency.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006)).

Given the narrow and deferential standard of review, and the district court’s well-reasoned decision granting summary judgment to appellees, we conclude that appellants have not met their burden of demonstrating a likelihood of success on the merits. They therefore fail to meet the threshold for a stay pending appeal. Accordingly, appellants’ motion is denied.

The briefing schedule established previously shall remain in effect.

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
BY THOMSON REUTERS/WEST—SAN FRANCISCO

The summary, which does not constitute a part of the opinion of the court, is copyrighted
© 2009 Thomson Reuters/West.