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FISH AND WILDLIFE SERVICE
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FISH AND WILDLIFE SERVICE

In Reply Refer To:
FWS/AES/008032

JUL 0 1 2002

FISH & WILDLIFE
ECOLOGICAL SERVICES

Memorandum

To: Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7
Manager, California/Nevada Operations Office

From: Director Steve Williams JUN 2 5 2002

Subject: Solicitor's Review of the Arizona Cattle Growers Association Case

Attached please find a copy of the Solicitor's review of the Arizona Cattle Growers Association case. In that case, the 9th Circuit Court of Appeals overturned as arbitrary and capricious, some aspects of incidental take statements included in biological opinions issued by the Service to the Bureau of Land Management. The review outlines the court's decision in general terms as well as discussing the specific allotments. The central message of the review is that Service biologists need to follow the implementing regulations and the consultation handbook when writing biological opinions and accompanying incidental take statements and thoroughly document their conclusions. The review also clarifies that there should be strong and clear links between the "effects of the action" section of a biological opinion and any take that is anticipated in an "incidental take statement."

The final page of the review includes a series of "lessons learned" that all Service biologists involved in section 7 consultations should read and heed. For emphasis, those points are also included below.

> An incidental take statement is not a mechanism for managing land use. If there is no reasonable certainty of take, there should be no ITS and no reasonable and prudent measures with terms and conditions.
>
> The Service does not need to issue an ITS if no incidental take is anticipated. But we still recommend that there be a section in the biological opinion with a statement to the effect that no take is anticipated.
>
> Take is very specifically and clearly defined in the regulations and is discussed in some detail in the section 7 handbook. For example, the terms "harm" and "harass" have very specific meanings and they are not synonymous. The effects analysis of a biological opinion should discuss the effects of an action with the proper take terminology in mind. Similarly, the ITS portion of a biological opinion should reflect the proper use of take terminology.

If there is a reasonable certainty of take, the biological opinion needs to connect rationally the discussion of the effects of the action and the ITS.

Site-specific discussions of effects and the anticipated take are necessary to write a proper ITS. Action agencies should be encouraged to discuss site-specific conditions and the potential effects of the action under consultation with any applicant in order to write a comprehensive biological assessment or evaluation.

Terms and conditions must have an articulated, rational connection to the taking of a species.

Terms and conditions must give clear guidance to the holder of the ITS of what is expected of them, how the condition can be met, and must provide a clear standard for determining when the authorized level of take has been exceeded.

Follow guidance in the handbook regarding use of ecological conditions as a surrogate for defining the amount or extent of incidental take.

Reinitiation may be a tool that should be used more often.

As suggested in the memorandum transmitting this review, please circulate this material to all Service employees engaged in conducting section 7 consultations. Any questions regarding this matter should be directed to Rick Sayers, Acting Chief, Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants at (703) 358-2106.

Attachment

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

MAY 21 2002

MEMORANDUM:

To: Steve Williams
Director, Fish and Wildlife Service

From: William G. Myers III
Solicitor

Subject: *Arizona Cattle Growers' Association*

As you know, on December 17, 2001, the Court of Appeals for the 9th Circuit issued its decision in the *Arizona Cattle Growers' Association* case. This decision provided a detailed analysis of incidental take statements issued as part of biological opinions for consultations under section 7(a)(2) of the Endangered Species Act. The court held that an incidental take statement must be predicated on a finding of an incidental take. Further, terms and conditions cannot be issued where there was either no evidence that the species existed on the land in question or no evidence that take would occur if the permit were issued. Finally, the court held that terms and conditions cannot be so vague as to preclude compliance therewith.

A detailed summary of the *Arizona Cattle Growers' Association* case, prepared by my office, is attached. Further, guidance that I think is appropriate for Service biologists to use when preparing incidental take statements is also attached. I recommend that each of the Service's Regional Directors and the Regional section 7 coordinators receive a copy of both the summary and the guidance. If you have any questions about this case, the summary, or the guidance please contact Peg Romanik at (202) 208-6172.

attachments

bcc: SOL Docket
SOL PW-Chron
Sol PW-FWEP Files
Prepared by PRomanik:208-6172:05/21/02

S:\PW/WP\CBURCH/AZ Cattle Grower's Association

SUMMARY OF ARIZONA CATTLE GROWERS' 9th CIRCUIT CASE

On December 17, 2001, the Court of Appeals for the 9th Circuit issued its decision in the Arizona Cattle Growers' Association case. This case consolidated appeals from two district court cases. At issue in these cases was the validity of incidental take statements that were part of biological opinions given to the Forest Service and the Bureau of Land Management for grazing permits under section 7 of the ESA. The Court of Appeals held that an incidental take statement (ITS) must be predicated on a finding of an incidental take. Further, terms and conditions could not be issued where there was either no evidence that the species existed on the land in question or no evidence that take would occur if the permit were issued. Finally, the court held that terms and conditions cannot be so vague as to preclude compliance therewith.

Background

In the first district court opinion (ACGA I), the Arizona Cattle Growers' Association (ACGA) and Jeff Menges (a rancher who sought a grazing permit) sued the Service and the Bureau of Land Management (BLM) over the ITS for certain grazing allotments. The Service had issued a non-jeopardy decision with an ITS to BLM. ACGA challenged the ITS and its terms and conditions. The district court concluded that the Service's ITS was arbitrary and capricious because it "failed to provide sufficient reasons to believe that listed species exist in the allotments in question." In the second district court opinion (ACGA II), ACGA and Mr. Menges challenged the ITS for six allotments that were part of a biological opinion with the Forest Service as the action agency. Arguments presented in this case centered around whether there was a different standard for take under section 7 and section 9 and whether the evidence relied upon by the Service was rationally connected to its decision to issue an ITS for the six allotments in question. The district court concluded that for five of the six allotments the Service failed to show that a take was reasonably certain to occur. The court upheld the 6th allotment (Cow Flat) ITS, including its reasonable and prudent measures and terms and conditions. The Service appealed the court's finding with regard to four allotments and the ACGA cross-appealed the court's findings with regard to one allotment.

Circuit Court Opinion

The Court of Appeals for the 9th Circuit consolidated appeals and cross-appeals of ACGA I and II. The court first made several broad rulings then it specifically discussed the allotments in question. The findings of the court and its rationale are discussed below.

"Take" as used in section 9 and section 7

The court analyzed "take" under sections 9 and 7. The court discussed the ESA's definitions of take, as well as the regulatory definitions of "harm" and "harass." Further, the court noted that they had elaborated in an earlier opinion on the question of when habitat modification would

constitute harm. The court concluded that harm may be caused by habitat modification when it actually kills or injures wildlife. The court noted that the Service's regulations adopted this definition of harm. The court reviewed legislative history, relevant regulations, and case law to determine that "the structure of the ESA and the legislative history clearly show Congress's intent to enact one standard for 'taking'." The court rejected the argument that taking should be applied differently because of the different purposes of sections 7 and 9. The court focused on the legislative history of section 7(b)(4), which was enacted to resolve the conflict between sections 7 and 9. Specifically the court cited to the legislative history that stated that the purpose of
section 7 was "to resolve the situation in which a Federal agency or a permit or license applicant has been advised that the proposed action will not violate Section 7(a)(2) . . . but . . . will result in the taking of some species incidental to that action -- a clear violation of Section 9 . . . " The court stated that "absent an actual or prospective taking under section 9, there is no 'situation' that requires" a section 7 ITS. Finally, the court concluded that a broader interpretation of take would allow the Service "to engage in widespread land regulation even where no section 9 liability could be imposed."

Issuance of an ITS

The Service argued in district court that is was statutorily required to issue an ITS in all non-jeopardy situations. The court concluded that the plain language of the ESA does not dictate that the Service must issue an ITS irrespective of whether any incidental takings will occur. The court held that it is arbitrary and capricious to issue an ITS when the Service has no "rational basis" to conclude that take will occur.

Review of ITS's

As a preliminary manner the court addressed the district court's application of a "reasonable certainty" standard in ACGA II. The court held that the Service "misapprehends" the lower court standard; the court held that the lower court's standard "merely" held that if the Service cannot satisfy the court to a reasonable certainty that a take will occur, then it is arbitrary and capricious for it to issue an ITS imposing conditions on use of the land. The court noted that this is a "more lenient" standard than if the record were required to include evidence of an actual taking.

The court then reviewed the ITS's at issue in the two lower court cases to determine if there was a "rational connection" between the facts found and the choices made by the Service. First, the court reviewed the Service's biological opinion at issue in ACGA I by reviewing the findings as it related to two species - the Razorback Sucker and the Cactus Ferruginous Pygmy-owl. In the biological opinion the Service admitted that there have been no reported sightings of the razorback sucker in the area in question since 1991. The Service argued that it should be able to issue an ITS based upon prospective harm. The court concluded that while prospective orientation is important, the regulations mandate reinitiation of consultation if different evidence

is later developed after the issuance of the biological opinion. Further, the court held that absent designation of critical habitat, there is no evidence that Congress intended to the allow the Service to regulate land that is merely capable of supporting a protected species. The court observed that while habitat modification resulting in actual killing or injury may constitute a taking, the Service only presented speculative evidence that grazing may impact the sucker. The court again stated that the Service had a "very low bar" to meet but that it did not meet it. With regard to the pgymy-owl, the court stated that the record did not support a claim that the species exists in the allotment in question and failed to demonstrate how any habitat modification would "actually kill or injure" the pgymy-owl. The Service attempted to supplement the record with subsequent surveys that demonstrated that the Service correctly anticipated that the owl was present. The court concluded that it could not review this evidence as it was outside of the administrative record and again pointed to the value of reinitiation when new data are discovered.

The court then reviewed each of the five allotments at issue in ACGA II. They are discussed in turn below.

Montana Allotment

For this allotment, the issue centered around the Sonora chubs that were present in the allotment but were essentially confined to a specific gulch. The court found the biological opinion to be "sparse" with respect to projected indirect harms. The court specifically commented on the lack of site specific data that connects grazing to the enclosure (the gulch) in question and sedimentation. The court concluded that the biological opinion provided "little factual support" for its conclusion that incidental take was anticipated. The court agreed with the lower court's holding that the issuance of the ITS was based on "very speculative" potential for effects and was arbitrary and capricious.

Sears-Club/Chalk Mountain Allotment

In this allotment the Gila topminnow was not found in the allotment in question but was found in a spring of a nearby allotment. The Service concluded that grazing on the upper spring could affect its suitability for any possible future reintroduction of the Gila topminnow or any recolonization from the lower spring. The court stated that the Service presented only speculative evidence as to how these small fish could travel upstream, across 1, 000 feet of dry streambed and over waterfalls to recolonize the area in the allotment. Again, the court found the ITS to be arbitrary and capricious.

The East Eagle Allotment

The court determined that for this allotment the Service did not have sufficient evidence of a take of either listed species to issue an ITS.

The Wildbunch Allotment

The court affirmed the district court's finding that the Service was arbitrary and capricious to issue the ITS. The court stated that the Service considered "only general evidence of the possible effects" of grazing on aquatic habitats and proffered no basis to conclude that these negative effects were occurring on the aquatic habitats located on this allotment or that the habitat modification would actually kill or injure the species.

The Cow Flat Allotment

The court agreed with the district court that issuance of an ITS for this allotment was not arbitrary and capricious. The court pointed out that unlike the other allotments, for this allotment the Service provided evidence that the species existed on the allotments and that the cattle have access to the species' habitat. Further, the Service provided "extensive site-specific information that discussed not only the topography of the relevant allotment but the indirect effects of grazing on the species due to the topography." The court explained that the "the specificity of the Service's data, as well as the articulated causal connections between the activity and the 'actual killing or injury'" of the species "distinguished" this allotment from the others.

Cow Flat Allotment ITS' Conditions

The final issue the court analyzed was whether it was proper for the Service to fail to specify the amount of anticipated take in the ITS for the Cow Flat Allotment and whether a clear standard was provided for determining when the authorized level of take had been exceeded. The court determined that the ideal would be for there to be a specific trigger number that when reached resulted in the need to reinitiate consultation. The court noted, however, that they have never held that a numerical limit is required and cited to several cases that upheld ITS's that used a combination of numbers and estimates. The court cited to legislative history that while Congress indicated a preference for a numerical value, it anticipated situations in which effects could not be contemplated in terms of precise numbers. The court agreed with the lower court's ruling that the "use of ecological conditions as a surrogate for defining the amount or extent of incidental take is reasonable" as long as the conditions are linked to the take of the listed species. The court noted that this finding was consistent with the guidance set out in the Services' section 7 handbook. The court specifically stated that by causal link "we do not mean that the . . . Service must demonstrate a specific number of takings; only that it must establish a link between the activity and the taking of species before setting forth specific conditions."

The condition in question for this allotment concluded that take would be exceeded if "Ecological conditions do not improve under the proposed livestock management. Improving management conditions can be defined through improvement in watershed, soil condition, trend and condition rangeland . . . " Upon review, the court determined that the Service did not

sufficiently discuss the causal connection between this condition and the taking of the species at issue. Further, the court found that whether there had been compliance with this "vague directive" was within the "unfettered discretion" of the Service, leaving no method by which the applicant or the action agency can gauge their performance. Based on the "lack of articulated, rational connection" between this condition and the taking of species as well as the vagueness of the condition, the court held it to be arbitrary and capricious.

GUIDANCE TO THE SERVICE

THRESHOLD POINT: Focus on the purposes of an Incidental Take Statement: First, it exempts the holder of the ITS from section 9 liability. Second, it minimizes the impact of the incidental take associated with the action under consultation. Any take discussed in the ITS should have been discussed and analyzed in the effects portion of the biological opinion. ITS's are not to be used to avoid jeopardy. A non-jeopardy call should have been made before the ITS is written.

Lessons from the Arizona Cattle Growers' Association decision:

- An ITS is not a mechanism for managing land use. If there is no reasonable certainty of take, there should be no ITS and no reasonable and prudent measures with terms and conditions.

- The Service does not need to issue an ITS if no incidental take is anticipated. But we still recommend that there be a section in the biological opinion with a statement to the effect that no take is anticipated.

- Take is very specifically and clearly defined in the regulations and is discussed in some detail in the handbook. For example, the terms "harm" and "harass" have very specific meanings and they are not synonymous. The effects analysis of a biological opinion should discuss the effects of an action with the proper take terminology in mind. The ITS portion of a biological opinion should reflect the proper definition of take terminology.

- If there is a reasonably certainty of take, the biological opinion needs to rationally connect the discussion of the effects of the action with the ITS.

- Site-specific discussions of effects and the anticipated take are necessary to write a proper ITS. Action agencies should be encouraged to discuss site-specific conditions and the potential effects of the action under consultation with any applicant in order to write a comprehensive biological assessment or evaluation.

- Terms and conditions must have an articulated, rational connection to the taking of a species.

- Terms and conditions must give clear guidance to the holder of the ITS of what is expected of them, how the condition can be met, and must provide a clear standard for determining when the authorized level of take has been exceeded.

- Follow guidance in the handbook regarding use of ecological conditions as a surrogate for defining the amount or extent of incidental take.

- Reinitiation may be a tool that should be used more often.