



United States Department of the Interior

OFFICE OF THE SOLICITOR

Southwest Regional Office  
505 Marquette Ave. NW, Suite 1800  
Albuquerque, NM 87102  
Phone 505-248-5600; Fax 505-248-5623

**FAX**

**Date:** July 30, 2002

**To:** Rod Walston, Deputy Solicitor  
Hugo Teufel, Associate Solicitor, Division of General Law  
Pete Raynor, Associate Solicitor, Division of Parks and Wildlife  
Regional Solicitor, Alaska  
Regional Solicitor, NE Regional Office, Boston  
Regional Solicitor, Pacific NW Regional Office, Portland  
Regional Solicitor, Pacific SW Regional Office, Sacramento  
Regional Solicitor, Rocky Mountain Regional Office, Denver  
Regional Solicitor, SE Regional Office, Atlanta

**From:** Janet Spaulding, Acting Regional Solicitor, SW Region

**Subject:** New Arizona federal district court decision upholding FWS' use of the deliberate process privilege for e-mails exchanged among FWS employees during the process of determining critical habitat

Rod Walston suggested that I fax everyone on this list copies of a recent ruling by the Arizona district court upholding the Fish and Wildlife Service's claims of deliberative process privilege and attorney client privilege in connection with e-mails exchanged among FWS employees at the Washington, Regional, and local level as part of the deliberative process of defining the scope of critical habitat for the Mexican Spotted Owl. FWS relied upon a lengthy declaration by the new Director of FWS, Steve Williams, (but drafted by SOL) which explained that disclosure of the frank, honest opinions of employees exchanged through the e-mail would "chill" the Agency's ability to use e-mail as a tool in the future to allow discussions among employees in many different locations across the country.

Although this is a district court opinion, it may be helpful in other administrative record cases for FWS, as well as other DOI clients who use e-mail in their deliberative processes.

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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Center for Biological Diversity, Dine Care, and  
Center for Native Ecosystems,  
  
Plaintiffs,  
  
v.  
  
Gale Norton, Secretary of the Department of  
the Interior,  
  
Defendant.

No. CIV 01-409 TUC ACM

**ORDER**

Pending before the Court is the Plaintiffs' Motion to Complete and Supplement the Administrative Record (Docket No. 18). For the reasons explained below, the Motion is denied.

**I. Background**

Plaintiffs Center for Biological Diversity, Diné Care, and the Center for Native Ecosystems (collectively "the Centers") filed suit challenging the designation of "critical habitat" for the Mexican spotted owl, promulgated by Defendant Gale Norton, Secretary of the Interior ("the Secretary") pursuant to the Endangered Species Act, 16 U.S.C. §1531 *et seq.* ("the ESA"). The Centers allege that the Secretary's designation is inadequate to promote the conservation and recovery of the owl because it entirely excludes land found on the U.S. Forest Service and tribal lands, which comprise the most important habitat for the owl and where a majority of the spotted owl are found. *Complaint*, ¶ 19.

The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("the APA"), provides the standard of review in this case. Review is generally limited to the administrative record, and the Court must consider the "whole record or those parts of it cited by a party." *Id.* at § 706.

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1 The Secretary served the record on March 14, 2002. The Secretary withheld 11 documents  
2 pursuant to attorney/client privilege, and 37 documents pursuant to the "deliberative process"  
3 privilege as documented in its filing entitled "Administrative Record/Privilege Log."  
4 (Docket no. 15.)

5 In their Motion, the Centers allege that the Secretary has improperly claimed privilege  
6 for these documents and request that the Court order production so they may be reviewed by  
7 the Centers and considered by the Court. The Centers further ask that the record be  
8 supplemented with additional documents which were neither included in the record nor  
9 withheld under privilege. The Centers have listed 8 documents which allegedly were in  
10 possession of the Secretary when she issued the critical habitat rule. The FWS issued a final  
11 designation on February 1, 2001. *Complaint*, ¶ 19. Apparently, the parties have agreed that  
12 the documents attached to the Centers' opening brief as attachments 1 through 8 can properly  
13 be used during briefing on summary judgment and may be considered by the Court. As such,  
14 the Court need not decide whether or not they should be "inserted" as part of the  
15 administrative record.

16 The remaining two attachments (numbers 9 and 10) post date the challenged decision.  
17 The documents are: an April 10, 2001, FWS biological opinion on the Forest Services Wild-  
18 Urban Interface ("WUI") program, and the June 11, 2001, Forest Service proposal to amend  
19 Land and Resource Management Plans ("LRMP") in New Mexico and Arizona for WUI.  
20 On June 19, 2002, the Court ordered that the Secretary submit the disputed documents to the  
21 Court for an in-camera inspection. These documents will be sealed and filed with the Clerk  
22 for appeal purposes.

23 The Secretary has agreed to waive the attorney/client privilege as to document  
24 numbers 1, 4, and 6 in the privilege log, and has provided copies of those documents to the  
25 Centers. Additionally, the Deliberative Process Privilege documents identified as numbers  
26 13-16 in the privilege log were listed in error. The parties' positions with respect to the  
27 remaining documents are discussed below.

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**II. Discussion**

**A. The Deliberative Process Privilege**

The Centers' initial argument is that the Secretary has not invoked the deliberative process privilege as required by law. They argue that the deliberative process privilege must be invoked by the head of the agency or a delegated subordinate and that the Secretary has the burden of explaining the precise reasons for preserving the confidentiality of each document withheld. In response, the Secretary has filed the declaration of Steve Williams, Director of the U.S. Fish and Wildlife Service ("USFWS"), explaining the reasons for the invocation of the privilege as to each document and showing that he, in his official capacity as director of USFWS, has invoked the deliberative process privilege on behalf of the USFWS and the Department of Interior. *Williams Declaration*, p. 2, ¶ 3. The information offered in the declaration satisfies the Secretary's initial burden supporting the invocation of the deliberative process and attorney/client privileges. As such, the Court must review whether the invocation of the privileges is appropriate and, if so, whether the Centers' need for the documents outweighs the Secretary's need to keep confidential the information contained in the documents.

The parties basically agree on the key issue on this point. The Secretary views the Centers' claims as follows: (1) that the designation of critical habitat for the Mexican spotted owl was based on the faulty legal premise that incorporation of the December, 1995, recovery plan for the Mexican spotted owl into forest service and tribal land management plans avoids the need to designate critical habitat in those areas; and (2) that the designation of critical habitat for the Mexican spotted owl was based on the faulty factual premise that the recovery plan has been fully incorporated into the land management plans. *Defendant's Memorandum in Opposition*, p. 2. Similarly, the Centers state that the key issue is "whether the secretary may be permitted to exclude the primary habitat for the Mexican spotted owl

1 from the critical habitat designation, which is Forest Service and Tribal Lands." The  
2 Secretary's invocation of the privileges must be evaluated against this factual backdrop.

3 The Centers argue that the deliberative process privilege does not apply to this case.  
4 Specifically, they argue that where existing law and policy has merely been applied to  
5 specific scientific facts, rather than involving the development of new agency policy, the  
6 privilege does not apply. Citing *Greenpeace v. National Marine Fisheries Service*, 198  
7 F.R.D. 540, 543 (W.D. Wash. 2000) (*Greenpeace II*). The Court, however, agrees with the  
8 Secretary that the Centers' definition of "deliberative", which appears to focus solely on  
9 "policy" decisions is overly narrow. The deliberative process privilege is intended to protect  
10 "documents that reflect advisory opinions, recommendations and deliberations comprising  
11 part of a process by which government decisions and policies are formulated." *FTC v.*  
12 *Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9<sup>th</sup> Cir. 1984) (emphasis added). As  
13 pointed out by the Secretary, documents containing non-binding recommendations on law  
14 or policy, as well as factual materials that reveal the mental processes of the decisions  
15 makers, are exempt from disclosure. The Court agrees with the Secretary that *Greenpeace*  
16 *II*, which emphasizes that the deliberative process privilege is limited to protecting only  
17 agency processes in which "policy" is formulated, is inconsistent with Ninth Circuit  
18 precedent and should not be followed by this Court. The Centers' definition of  
19 "deliberative" ignores the terms "government decision" and "law" out of the relevant judicial  
20 decisions.

21 The Court of Appeals for the Ninth Circuit has adopted a "process-oriented" or  
22 "functional" test that focuses on whether a document in question is a part of the "deliberative  
23 process," instead of basing such a determination strictly on the type of information allegedly  
24 secreted in a document. *National Wildlife Federation v. U.S.F.S.*, 861 F.2d 1114, 1118-19  
25 (9<sup>th</sup> Cir. 1988). Documents containing non-binding recommendations on law or policy, as  
26 well as factual materials that reveal the mental processes of the decisions makers are exempt  
27 from disclosure. The Court has reviewed the documents withheld under the deliberative  
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1 process privilege and finds them deliberative in nature and that they were created and  
2 maintained as privileged documents.

3 For the deliberative process privilege to apply, a document must also be pre-  
4 decisional. It must have been generated before the adoption of the agency's decision or  
5 policy. *Federal Trade Commission v. Warner Communications, Inc.*, 742 F.2d 1156, 1161  
6 (9<sup>th</sup> Cir. 1984). The Centers do not dispute that the disputed documents are pre-decisional,  
7 so that requirement is met.

8 The deliberative process privilege is a qualified one. A litigant may obtain  
9 deliberative materials if his or her need for the materials and the need for accurate fact-  
10 finding override the Government's interest in non-disclosure. *Id.* Among the factors to be  
11 considered in making this determination are: 1) the relevance of the evidence; 2) the  
12 availability of other evidence; 3) the Government's role in the litigation; and 4) the extent to  
13 which disclosure would hinder frank and independent discussion regarding contemplative  
14 policies and decisions. *Id.*

15 I have reviewed the documents withheld under the deliberative privilege, keeping in  
16 mind that the privilege should be applied "as narrowly as consistent with efficient  
17 government operation." *Plaintiffs' Motion to Complete and Supplement the Administrative*  
18 *Record*, p. 7. It is difficult for a party to argue relevance, availability of other evidence, etc.,  
19 never having seen the disputed documents. I felt that it was equally difficult for the Court  
20 to rule without seeing the withheld documents themselves, therefore, I ordered production  
21 for in camera review.

22 Many of the documents withheld under the deliberative privilege are not relevant to  
23 the key issue, i.e., "whether the Secretary may be permitted to exclude the primary habitat  
24 for the Mexican spotted owl from the critical habitat designation, which is found on the forest  
25 service and tribal land." For example, DP1, 2, and 3 deal only with deadlines to be met in  
26 view of the Court's Order. The remaining documents at issue are 29 e-mails between FWS  
27 staff or FWS staff and agency attorneys, 4 documents containing handwritten notes by FWS  
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1 designated as both attorney client and deliberative process privilege. The document  
2 identified as AC2 is also DP3. The document identified as AC9 is also DP25. As to AC2,  
3 the document is clearly privileged under the deliberative process privilege. The Court will  
4 not need to address the attorney/client privilege with respect to this document.

5 AC9 is clearly protected under both privileges. The Ninth Circuit has laid out the  
6 following "essential elements" for assertion of the attorney/client privilege: 1) where legal  
7 advise of any kind is sought, 2) from a professional legal advisor in his capacity as such; 3)  
8 the communication relating to that purpose, 4) made in confidence, 5) by the client, 6) are  
9 at this instance permanently protected, 7) from disclosure by himself or by his legal advisor,  
10 8) unless the protection is waived. *Arizona Rehabilitation Hospital, Inc. v. Shalala*, 185  
11 F.R.D. 263, 268 (D. Az. 1998). The Courts have applied the attorney/client privilege to  
12 communications between government agencies and their counsel as well. *Id.* at 269.

13 The Williams Declaration contains a clear explanation as to why the attorney/client  
14 privilege is claimed as to each document. The Court has reviewed the documents and finds  
15 that the documents are intra-agency, pre-decisional, and created and maintained as privileged  
16 documents and the attorney/client privilege has been properly invoked. The documents are  
17 to and from legal counsel acting as legal counsel, seeking and obtaining legal advice  
18 regarding the critical habitat designation and the statements were made in confidence and the  
19 documents have been maintained as privileged documents. In sum, the Court finds that all  
20 of the elements of the attorney/client privilege have been established and the documents are  
21 exempt from inclusion in the administrative record as a result of the privilege and they  
22 should not be released.

### 23 C. Post-Decisional Documents

24 The Centers final request is the inclusion of two post-decisional documents in the  
25 Administrative Record. As discussed in *Southwest Center v. U.S. Forest Service*, 100 F.3d  
26 1443 (9<sup>th</sup> Cir. 1996), judicial review of an agency decision typically focuses on the record in  
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