New Court Decision On Section 7 Issues

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On December 17, 2001, the Ninth Circuit decided Arizona Cattle Growers v. United States Fish and Wildlife Service. The case involved a challenge to a series of Section 7 consultations on grazing allotments in Arizona. **The Arizona Cattle Grower's decision strongly supports efforts to ensure that actions by regulatory agencies must be supported by the record and their conclusions must be explained in a clear manner.** The decision holds that the Fish and Wildlife Service cannot require mitigation in a biological opinion unless it can demonstrate that there is a rational basis on which to conclude that the proposed action will cause a take of a listed species and that any standards allowing take of a listed species must be related to the take of the species and must not be so vague as to preclude compliance with the condition. I briefly summarize the case below. The case arises from Section 7 consultations by the Bureau of Land Management with the Service on the effect of grazing permits in Arizona on certain listed species. The first major issue the Cattle Growers raised was a challenge to the decision of the Service to impose land management terms and conditions in the incidental take statements for various Section 7 biological opinions for grazing allotments. The biological opinions imposed restrictions on otherwise lawful uses of land. The basis of the Cattle Growers challenge was that the Service did not have the authority to include such terms and condition in the incidental take statement because the Service had not demonstrated that a take of a listed species would occur. The terms and conditions at issue applied broad management actions in situations where the record was not clear that the action involved would actually cause a "take" of a listed species. The Service argued that it could place limits on activities even where there was no showing of actual take. The Service argued that "take" for the purpose of Section 7 was broader than "take" under Section 9 in light of the fact that Section 7 was protective and Section 9 was punitive. Therefore, the Service could require mitigation where take was "possible" or "likely" and in the absence of any actual take that would rise to the level of a Section 9 take. The Service argued that it should be permitted to issue an incidental take statement where there is any possibility, no matter how small, that a listed species will be taken. The Ninth Circuit rejected the Service's position. It held that "take" under Section 7 and Section 9 are identical and that the Service may **not** issue an incidental take statement and require mitigation for a project **unless** it can show that there is a "rational basis to conclude that a take will occur incident to an otherwise lawful activity." The Ninth Circuit also stated that there is no evidence "that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely "capable" of supporting a protected species," and that "speculative evidence, without more, is woefully inadequate to meet the standards imposed by the governing statute". In other words, the Service does not have the authority to place terms and conditions in a biological opinion unless it first shows a "rational connection between the facts shown" and its conclusion that take of a listed species is reasonably certain to occur. Further, the Service has the burden to prove that take of a listed species will occur and the applicant is not required to "prove a negative." The second major issue concerned the Cattle Growers challenge to an anticipated take provision for the Cow Creek Allotment. In the Section 7 opinion for the Cow Creek Allotment, the Service included a condition that stated that authorized incidental take would be exceeded if "ecological conditions" in this 22,000 acre allotment did not "improve". The Cattle Growers argued

that the incidental take statement did not specify the amount of take with the required degree of exactness and was therefore arbitrary and capricious. The Ninth Circuit first held that the Service was not required to set a numerical limit for take (e.g. six bears or five fish) for take. If numerical limits are not set, however, the Ninth Circuit held that surrogate conditions are acceptable only if the amount or extent of the take is linked to the take of the protected species. The Ninth Circuit further held that the condition based on ecological conditions was arbitrary and capricious. The condition did not meet that causal standard both because there was a lack of an articulated rational connection between the condition and the taking of a listed species and because the condition was vague. Specifically, the Court said the condition was not proper "because compliance with this vague directive is within the unfettered discretion of the Fish and Wildlife Service, leaving no method by which the applicant or the action agency can judge their performance". Please let me know if you have any questions. You can find the case at the link that follows: http://www.cnrgonline.com/