Arizona Cattle Growers Association v.
United States Bureau of Land Management,
(CV-97-02416-DAE/CV-99-0673-RCB (9th Cir, December 17, 2001).

On December 17, 2001, the Ninth Circuit issued its opinion in Arizona Cattle Growers Association v. United States Bureau of Land Management, (CV-97-02416-DAE/CV-99-0673-RCB (9th Cir, December 17, 2001) (ACG). This opinion, addressing the scope of federal authority to issue Incidental Take Statements (ITS) under the Endangered Species Act (ESA), is important to both government and private sector practitioners. The case bears especially close notice for those dealing with state, local and regional government application of the ESA in the context of Oregon's land use system, especially those situations where the ESA is applied under Statewide Planning Goal 5. The Ninth Circuit determined it was arbitrary and capricious for the federal government to (1) issue an ITS not predicated on an actual "take," (2) impose land use conditions under the ESA where there was no evidence that the species occupied the territory at issue or that a take would occur if the land use permit (here grazing permits) were issued, and (3) issue an ITS that included terms that were "so vague as to preclude compliance therewith."

At issue were several species listed under the ESA including a sucker fish, a chub and pygmy owl. The "take" issue principally emerged under Fish and Wildlife Service (FWS) ITS' expressed concerns regarding modifications to ESA "critical habitat." The FWS first argued the term "take" should be interpreted differently for Section 7 consultations, than Section 9 which imposes penalties for ESA "take". FWS argued that Section 7 is protective and therefore the term "take" under Section 7 should be more broadly construed than Section 9 FWS contrasted Section 7's protective purposes with Section 9's punitive purposes. The FWS argued that the term "take" under Section 7 should allow it to issue an ITS when "harm to a listed species was 'possible' or 'likely' in the future due to the proposed action." The court disagreed, determining that a "take" is a "take" and that there was no justification under the ESA for differential interpretation of the same term. Specifically, the court held:

"We reject the argument that 'taking' should be applied differently because the two sections serve different purposes. Such a broad interpretation would allow the [FWS] to engage in widespread land regulation even when no Section 9 liability could be imposed. This interpretation would turn the purpose behind the [ESA] on its head."

"As the district court held 'if [FWS] could issue an [ITS] even when a taking in violation of Section 9 was not present, those engaging in legal activities would be subjected to the terms and conditions of such statements." The court finds no authority for this result nor do we." (Emphasis supplied.) Slip Op. 16939.

Next, the FWS argued "it should be permitted to issue an [ITS] whenever there is any possibility, no matter how small, that a listed species will be taken." Slip op 16940. Again, the court disagreed. "If the sole purpose of the [ITS] is to provide shelter from Section 9 penalties, it would be nonsensical to require the issuance of an [ITS] when no takings cognizable under Section 9 are to occur. Slip op 16943. In this regard, the court

expressly stated the FWS handbook explaining a contrary interpretation of obligations under Section 7 and an ITS, is incorrect, holding "[t]he [FWS] handbook instruction to issue an [ITS] when no take will occur as a result of permitted activity is contrary to the plain meaning of the statute as well as the agency's own regulations." Id. The court noted there may be "rare circumstances such as those involving migratory species" where the result might be different.

Regarding the placement of conditions on land use permits, such as the grazing permits at issue, the court determined: "[I]t would be unreasonable for the [FWS] to impose conditions on otherwise lawful land use if a take were not reasonably certain to occur as a result of that activity." The FWS argued that conditions placed on the grazing permits were necessary because the grazing was to occur in "critical habitat' and grazing harm to the riparian area "may harm" the listed sucker fish. Again, the court disagreed. The court stated the appropriate way to deal with "prospective harm" to a listed species was through reinitiating consultation, if specific events set out in the ESA occur in the future. Slip op 16946-47. The court determined it was not enough for the FWS to determine that a parcel of land is "merely capable of supporting protected species." Slip op 16947. The court also stated that "speculative evidence" of future take was inadequate to justify imposing conditions on land use permits. Id. Regarding who must prove the area is occupied by a species, the court made the following important statement: "It would be improper to force [ACG] to prove that the species does not exist on the permitted area as the [FWS] urges, both because it would require [ACG] to meet the burden statutorily imposed on the [FWS], and because it would be requiring [ACG] to prove a negative." Id. This reinforces that under the ESA, it is the burden of the agencies implementing the act to prove that a listed species exists in an area in order to justify issuing an ITS and to condition land use permits. Moreover, the court rejected FWS' argument that anticipated "cumulative effects" of cattle grazing in critical habitat would cause a take under the ESA, for the same reason that there was no evidence that that take would in fact occur. Slip op 16950-51. Further, the court was disenchanted with FWS' argument that FWS plans to reintroduce Gila topminnow would be jeopardized under the proposed grazing activity, stating:

"The [FWS] provided only speculative evidence as to how these two-inch fish could travel upstream across 1,000 feet of dry streambed and over waterfalls (up to three feet high) to recolonize the area ."

For the one ITS where the FWS "articulated a rational connection between harm to species and the land grazing activities" and the issuance of the ITS sustained, the court nevertheless determined that the ITS failed to provide a standard for determining whether the approved level of take has been exceeded. While the court was clear "we have never held that a numerical limit is required," it also stated : "[i]n the absence of a specific numerical value, the [FWS] must establish that no such numerical value could be practically obtained." Slip op 16957-58. The court finally held that the directive in the ITS that a take would occur if "ecological conditions do not improve." was arbitrary and capricious and left the FWS with impermissible "unfettered discretion" to determine whether a take occurs. Slip op 16959.

Oregon regulators as well as private practitioners struggling with the ESA in the context of listed salmonids based on often vague written guidelines from NMFS, will likely find this ninth circuit opinion helpful. When the object is avoidance of ESA liability, the opinion reinforces two important points. First, that it is actual take that forms the basis both for ESA consultation and liability -- that speculative or non existent evidence of take is inadequate. Second, this case reinforces it is up to the federal government, not private landowners, to establish a listed species occupies property, in order to be "taken" in the ESA context. Obviously, each practitioner should read this case for themselves and draw their own conclusions. However, no one can dispute that the rules of the ESA are becoming clearer as the courts begin to weigh in, and this is helpful to all parties in understanding this important federal statute.

Wendie L. Kellington, Esq.