DECISION LIMITS FWS AUTHORITY

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Under a recent court ruling, the U.S. Fish and Wildlife Service must have hard evidence - not just a theoretical possibility - that an endangered species will be harmed before it can regulate development on private land. In *Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service*, the U.S. Court of Appeals for the Ninth Circuit held that under the Endangered Species Act (ESA) the Service cannot require a permit to "incidentally take" a species unless the Service can show that the species is likely to be harmed.

Incidental Take Under the ESA: The ESA prohibits the "take" (*e.g.*, harming or killing) of threatened or endangered animals. There are exceptions to that "section 9 prohibition." Federal agencies must "consult" with the Service before authorizing or funding activities that may affect listed species. Following this "section 7 consultation," the Service issues a "biological opinion." The biological opinion is often accompanied by an incidental take statement, which permits the "incidental take" of a listed animal. ("Incidental take" is a take that is incidental to otherwise lawful activity.) The incidental take statement is subject to project-specific conditions. In the absence of any federal permit or funding, a landowner can obtain an incidental take permit from the Service by preparing and agreeing to implement a Habitat Conservation Plan (HCP).

Facts of *Arizona Cattle Growers*: The Arizona Cattle Growers Association challenged two Service decisions. In the first, the Service issued incidental take statements for impacts to two listed species on 1.6 million acres of Bureau of Land Management grazing land in Arizona. Although the Service acknowledged in its biological opinion that no listed species existed in the area, the Service speculated that the two species might be found there in the future. The district court held that the Service could not issue an incidental take statement based on such speculation—the Service must have some evidence that the species exist in the area before imposing project-specific conditions through an incidental take statement.

The second decision involved grazing allotments on National Forest Land in Arizona. Listed species were generally present in the allotment area, but the Service acknowledged in its biological opinion that grazing would not jeopardize the species on five of the six allotments. The Service nonetheless issued incidental take statements for all allotments. The lower court held that the Service could not require an incidental take statement where the biological opinion failed to show that take was "reasonably certain to occur."

The Ninth Circuit's Decision: At issue in *Arizona Cattle Growers* was the Service's ability to issue incidental take statements (and associated project-specific conditions) in the absence of credible evidence that the grazing activity at issue would

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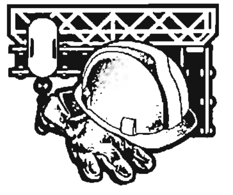

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Decision Limits

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actually take listed species. The Ninth Circuit upheld the lower courts in overturning the Service's decisions. It ruled that requiring an incidental take statement when a protected species is not present or a take is not likely to occur is arbitrary and capricious. The Service had argued that the ESA requires it to issue an incidental take statement in any case where the Service prepares a section 7 biological opinion, regardless of whether protected species are present. The Ninth Circuit, after considering the ESA's language and the Service's regulations, disagreed. The court held that the Service has no authority to issue an incidental take statement unless it can provide a rational basis that a take will occur.

The Service also argued that it should be permitted a broader view of "take" when engaging in section 7 consultations than in the context of enforcing the section 9 take prohibition, because section 7 is designed to anticipate and prevent impacts to species, whereas the section 9 prohibition is punitive. The court disagreed, holding that neither the ESA's language nor the legislative intent supported the Service's argument for two different definitions of a take. To adopt the Service's argument, the Ninth Circuit explained, would allow the Service to use the ESA "to engage in widespread land regulation . . . where no section 9 liability could be imposed."

The Consequences of the Court's Decision: *Arizona Cattle Growers* sends a tough message to the Service with regard to its authority to impose conditions and limitations on land use. The Service can no longer issue an incidental take statement – and associated project-limiting conditions – whenever it issues a biological opinion, or whenever it speculates about prospective harm to a listed species. The Service now must show that take is reasonably certain to occur. Although this decision was limited to a section 7 situation, landowners will also find the broad language in the opinion very useful in any dispute with the Service regarding take and incidental take permits.

We have consistently counseled landowners, developers and local governments not to simply accept the Service's presumption that it can impose its ESA authority. The Service's biological conclusions and interpretations be should be scrutinized, both technically and legally, before submitting to the Service's jurisdiction. *Arizona Cattle Growers* demonstrates why that approach is valuable.

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