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CASENOTE

THE NINTH CIRCUIT'S "TAKE" ON INCIDENTAL TAKE STATEMENTS: A STEP IN THE WRONG DIRECTION?

*Arizona Cattle Growers' Assn. v. U.S. Fish & Wildlife, Bureau of Land Mgt.*¹

I. INTRODUCTION

Of all environmental laws, the Endangered Species Act ("ESA") is renowned as perhaps the most potent.² With the ability to halt massive multi-million dollar construction and development projects in the name of wildlife preservation, the ESA was designed to be extremely wildlife friendly, with little or no room for compromising the continued existence of an endangered species.³ Nonetheless, there are limits to the government's power to regulate the use of land, and to protect species in peril of extinction, as evidenced by a recent Ninth Circuit case.

This note focuses on an Arizona appellate case dealing with the government's authority to issue incidental take statements pursuant to the Endangered Species Act. The court's interpretation of the Act, in pertinent part, is commonsensical and probably consistent with Missouri law. However, the court's decision can also be seen as a potential threat, as it clearly marks a step away from an interpretation of the ESA emphasizing wildlife preservation toward a more pro-industry stance.

II. FACTS AND HOLDING

The court in *Arizona Cattle Growers' Assn. v. U.S. Fish & Wildlife, Bureau of Land Mgt.* ("ACGA III") had before it the consolidated appeals of two lower court decisions involving the issuance of incidental taking statements ("ITS").⁴ The taking statements precluded ranchers from grazing cattle on government land for fear of adverse consequences on endangered species of wildlife.⁵ The original plaintiff in both cases leading to the consolidated appeals was the Arizona Cattle Growers' Association;⁶ the original respondents in the first case ("ACGA I")⁷ were the U.S. Fish and Wildlife Service ("FWS") and the Bureau of Land Management.⁸ The second case ("ACGA II") was against the FWS and the U.S. Forest Service.⁹

A. ACGA I

In ACGA I, rancher Jeff Menges petitioned the Bureau of Land Management ("BLM") for a grazing permit¹⁰ on allotments of land under the BLM's Saffold and Tucson field offices' supervision.¹¹ In response, the FWS issued incidental take statements¹² in a Biological Opinion respecting the lands at issue.¹³ The Biological Opinion studied twenty species of plant and animal life and concluded that the livestock grazing program administered by the BLM would not

¹ *Arizona Cattle Growers' Assn. v. U.S. Fish & Wildlife, Bureau of Land Mgt.*, 273 F.3d 1229 (9th Cir. 2001).

² See Rafe Petersen, *Environmental Law Update*, 15-DEC Prob. & Prop. 30, 30 (2001).

³ *Id.*

⁴ *Arizona Cattle Growers' Assn.*, 273 F.3d at 1233.

⁵ *Id.*

⁶ The Arizona Cattle Growers' Association is a non-profit organization established in 1904. Its mission is to represent Arizona ranchers and protect the Arizona cattle industry. *The Arizona Cattle Growers' Association, Homepage*, <<http://www.arizonabeef.org/azcattlegrower.htm>> (accessed March 21, 2002).

⁷ *Arizona Cattle Growers' Assn. v. U.S. Fish & Wildlife Service*, 63 F.Supp.2d 1034 (D. Ariz. 1998).

⁸ *Arizona Cattle Growers' Assn.*, 273 F.3d 1229.

⁹ *Arizona Cattle Growers' Assn. v. U.S. Forest Service*, No. 99-0673 (D. Ariz. Dec. 14, 1999).

¹⁰ The grazing program includes 288 allotments, encompassing almost 1.6 million acres. *Arizona Cattle Growers' Assn.*, 273 F.3d at 1233.

¹¹ *Id.*

¹² For an explanation of incidental take statements, see p. 7, *infra*.

¹³ *Arizona Cattle Growers' Assn.*, 273 F.3d at 1233.

likely threaten the existence of these species, nor adversely affect their habitats.¹⁴ Nonetheless, the FWS issued ten incidental take statements for certain listed species of endangered or potentially endangered fish and wildlife.¹⁵ Menges and the Arizona Cattle Growers' Association (collectively "ACGA") challenged both the incidental take statements and their terms and conditions.¹⁶ The ACGA motioned for summary judgment on two of the ten incidental take statements, involving the razorback sucker¹⁷ and the cactus ferruginous pygmy-owl.¹⁸ The ACGA I court held that both of the challenged incidental take statements were arbitrary and capricious and set them aside since FWS had failed to show the endangered species were actually found on the land in question.¹⁹ The court did not find it necessary to discuss the ACGA's challenge to terms and conditions of the incidental take statements.²⁰ The BLM and the FWS appealed this ruling and, at their request, the parties agreed to postpone the appeal pending resolution of the second related action, ACGA II.²¹

B. ACGA II

In ACGA II,²² the ACGA challenged six incidental take statements, corresponding to six allotments: Cow Flat, East Eagle, Montana, Sears-Club/Chalk Mountain, Sheep Springs, and Wildbunch.²³ These Incidental Take Statements resulted from a second Biological Opinion issued by the FWS concerning the effects of grazing on public lands managed by the United States Forest Service ("USFS").²⁴ For each of these Statements, the FWS concluded that although continued grazing would not threaten the existence of endangered species, it would incidentally take one or more members of endangered species.²⁵ The issue was decided on cross motions for summary judgment.²⁶

The FWS argued that the term 'take' should be construed more liberally in this case dealing with section 7 of the ESA,²⁷ (which applies to consultation)²⁸ than would normally be allowed in a section 9²⁹ case for injunctive relief.³⁰ The court rejected this argument and reasoned that evidence relied on by the FWS was not rationally connected to its decision to issue the incidental take statements for five of the disputed six allotments.³¹ The court therefore granted ACGA's motion for summary judgment as to the East Eagle, Montana, Sears-Club/Chalk Mountain, Sheep Springs, and Wildbunch allotments.³² With respect to the Cow Flat Allotment, the court found that, based on the evidence, the FWS *could* rationally conclude that takings would occur as a result of cattle fording streams, and therefore granted the FWS's motion for summary judgment as to this allotment.³³ Furthermore, the court upheld the specificity of the anticipated take provision as well as its "reasonable and prudent measures" condition.³⁴ The FWS appealed the District Court's ruling

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1234. The razorback sucker is a medium-sized fish listed as endangered in November of 1991. *Id.* at 1243.

¹⁸ *Id.* The cactus ferruginous pygmy-owl is a small bird measuring roughly 6.75 inches long, listed as endangered in 1997. *Id.* at 1245.

¹⁹ *Id.* at 1234. Before considering the merits of the case, the court first found that the ACGA had representational standing to sue for injuries relating to all of the allotments of land impacted by the Incidental Take Statements. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Jeff Menges was not a party to this action. *Id.* at 1234 n.1.

²³ *Id.* at 1234.

²⁴ *Id.* The FWS studied a total of 962 allotments. For 619 allotments, the FWS concluded that the effects of grazing activities would have no effect on endangered species and that for 321 of the remaining allotments, grazing would have no adverse effects. The remaining 22 allotments measured approximately 30,000 square miles each, with several being significantly larger. For 21 of these allotments, the FWS concluded, as it had in ACGA I, that continuous livestock grazing would not threaten the existence of listed species nor destroy or otherwise adversely effect critical habitats. It concluded, nonetheless, that continued grazing on all 22 allotments would incidentally take protected species. *Id.*

²⁵ *Id.* The FWS also concluded that grazing would not destroy nor adversely affect endangered species' critical habitat. *Id.*

²⁶ *Id.*

²⁷ 16 U.S.C. §§ 1531-43 (West Supp. 1994).

²⁸ *Arizona Cattle Growers' Assn.*, 273 F.3d at 1235.

²⁹ *Id.*

³⁰ *Id.* at 1234.

³¹ *Id.*

³² *Id.* at 1235.

³³ *Id.*

³⁴ *Id.*

only as pertaining to the East Eagle, Montana, Sears-Club/Chalk Mountain and Wildbunch allotments.³⁵ The ACGA appealed the court's ruling as to the Cow Flat allotment.³⁶

C. ACGA III

In review of these consolidated appeals, and in light of a new argument advanced by the FWS,³⁷ the Ninth Circuit held the FWS is not required to make an Incidental Take Statement whenever it issues a Biological Opinion.³⁸ Moreover, the court affirmed the holdings in ACGA I and ACGA II, with the exception of the District Court's holding regarding the Cow Flat Allotment in ACGA II.³⁹ While the Ninth Circuit agreed that the issuance of the incidental take statement for the Cow Flat Allotment was not arbitrary and capricious, it held that the conditions pursuant to the incidental take statement were lacking in specificity, and failed to establish a clear standard for determining when an incidental take had occurred.⁴⁰

III. LEGAL BACKGROUND

Congress passed the Endangered Species Act in 1973 as the Nation's primary law protecting endangered species and their habitats.⁴¹ In terms of fresh-water fish and land dwelling animals, the ESA is administered by the United States Fish and Wildlife Service.⁴²

A. ESA Section 7; The Consultation Requirement

Under Section 7 of the ESA, before any administrative agency authorizes funds or implements any activity that could jeopardize the survival of an endangered species or adversely affect its habitat, it must initiate formal consultation with the FWS.⁴³ This applies any time a private party solicits a permit, license or funds from the federal government to conduct activities on federal land.⁴⁴ Once an administrative agency consults the FWS, it issues a Biological Opinion, determining whether the proposed activity will jeopardize the survival of an endangered species, destroy or adversely affect an endangered species' habitat.⁴⁵ If the FWS concludes in the affirmative, it issues a "jeopardy opinion."⁴⁶ It must issue its opinion together with a summation of the evidence upon which its conclusion is derived and a detailed analysis of

³⁵ *Id.*

³⁶ *Id.*

³⁷ The FWS disputed the ACGA I court's requirement that the FWS have evidence of the actual existence of the listed species on the land and the ACGA II court's holding that an ITS is "appropriate only when a take has occurred or is reasonably certain to occur." Citing to the ESA which requires the FWS to "issue an ITS in all non-jeopardy determinations," the FWS argued that the prior ACGA courts' rulings set "an inappropriately high burden of proof." *Id.* at 1240. The ACGA argued that since this issue had not been raised in the district courts, the court could not now rule on this question. Determining, however, that the issue was purely legal in nature and that neither party would be jeopardized, the court exercised its discretion to hear the issue. *Id.* at 1241.

³⁸ *Id.* at 1242. Specifically, the FWS argued that it was entitled to issue an ITS whenever there is even a minute possibility that a protected species would be taken. *Id.* The court also held that the "reasonable certainty standard" which the ACGA II court applied, and that the FWS had complained of, was a lower standard of proof than if the FWS were required to show actual harm to listed species as a prerequisite to issuing an ITS. Regardless, the court reasoned that it need not specifically decide this issue because its review of the matter is *de novo*, and therefore, the way in which the lower ACGA II had reviewed the matter was irrelevant. *Id.* at 1243.

³⁹ *Id.* at 1251.

⁴⁰ *Id.*

⁴¹ See 16 U.S.C. § 1531(b) (1994). "The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species...." *Id.*

⁴² See 16 U.S.C. § 1532(15) (1994). The National Marine Fisheries Service administers the Act in relation to marine life. See 50 C.F.R. § 222.23.

⁴³ 16 U.S.C. § 1536(a)(2) (1994).

⁴⁴ Jay Tutchton, *An Endangered Species Act Summary*, SG039 ALI-ABA 131, 138 (2001).

⁴⁵ 50 C.F.R. § 402.14(g)(4) (2001). Upon the FWS opinion that a proposed activity will jeopardize the survival of an endangered species or destroy or adversely affect its habitat, the ensuing Biological Opinion must include: (1) A summary of the information upon which the decision is based; (2) A detailed analysis of the effects of the action on endangered species or their habitat; and (3) An opinion on whether the proposed activity will jeopardize the survival of an endangered species or jeopardize its critical habitat. 50 C.F.R. § 402.14(h) (2001).

⁴⁶ *Id.*

the effects of the proposed action on an endangered species and/or its habitat.⁴⁷ The FWS must also formulate reasonable and prudent alternatives for the federal agency or the applicant to take in implementing the proposed activity to avoid placing an endangered species or its habitat in peril.⁴⁸

B. ESA Section 9; The Taking Prohibition

Section 9 of the ESA makes it a federal crime to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct” toward a protected species, or what is otherwise called a “taking.”⁴⁹ Whereas Section 7 of the ESA applies to federal agencies and those individuals seeking permission to conduct activities on federal lands or soliciting federal funds, Section 9 applies to all individuals.⁵⁰

C. ESA Section 7(b)(4) Incidental Take Statements

Once formal consultation under Section 7 of the ESA has begun, if the FWS determines that the proposed activity will not jeopardize the survival of a species, but that a take will otherwise occur, Section 7(b)(4) requires the FWS to issue incidental take statements as part of its Biological Opinion.⁵¹ This entails defining the geography where the imperiled species exist, and includes an advisory opinion specifying: the (1) degree of harm that the incidental taking will inflict on the species; (2) the alternative measures to mitigate such harm; and (3) the terms and conditions that the applicant or Federal Agency must comply with to implement any specified alternative measures.⁵²

Thus, incidental take statements allow the taking of protected species, provided the taking is not the object of the proposed activity, but only incidental to it.⁵³ The incidental take statement shields would-be violators of ESA Section 9 from criminal and/or civil liability.⁵⁴ The incidental take statement, however is not a blanket authorization, it comes with conditions.⁵⁵ It must specify the allowable extent of incidental take, along with reasonable and prudent measures that must be taken to minimize the potential environmental impact, and conditions that must be met in order to implement those measures.⁵⁶

D. The Definition of “Taking” in ESA Section 7 vis-à-vis Section 9

The two main issues which arise from *Arizona Cattle Growers’ Association v. U.S. Fish & Wildlife Service*⁵⁷ are the scope of the FWS’s authority to issue incidental take statements, and the amount of specificity required for conditions attached to them. The first issue addressed by the *ACGA III* court was the breadth and meaning of the term “taking” as found in the ESA Section 7(b)(4), as compared to the same term found in Section 9⁵⁸ of the ESA.⁵⁹ The FWS argued that in Section 7, “taking” should connote a more liberal understanding than in Section 9 because of the different purposes of the sections; Section 7 serving a protective function as opposed to Section 9’s punitive nature.⁶⁰ The FWS contended that “taking” in terms of Section 7 is inclusive of all situations where a protected species would “likely” or “possibl[y]” be harmed due to a proposed action, i.e., livestock grazing.⁶¹ The court, however, rejected this interpretation of the ESA,

⁴⁷ *Id.*

⁴⁸ 16 U.S.C. § 1536(b)(3)(A) (1994); 50 C.F.R. § 402.14(h) (2001).

⁴⁹ 16 U.S.C. § 1532(19) (1994).

⁵⁰ 16 U.S.C. § 1538(a)(1) (1994).

⁵¹ 16 U.S.C. § 1536(b)(4) (1994).

⁵² *Id.* at 21-2 (citing 16 U.S.C. § 1536(b)(4)(i)-(iv) (subsection iii omitted)).

⁵³ *Id.*

⁵⁴ 50 C.F.R. § 402.14(7)(o)(2) (2001).

⁵⁵ 50 C.F.R. § 402.14(i)(1) (2001).

⁵⁶ 50 C.F.R. § 402.14(i)(1) (2001). Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes. 50 C.F.R. § 402.14(i)(2) (2001).

⁵⁷ 273 F.3d 1229 (9th Cir. 2001).

⁵⁸ 16 U.S.C. §§ 1531-1544 (1994).

⁵⁹ *Arizona Cattle Growers’ Assn.*, 273 F.3d at 1237.

⁶⁰ *Id.*

⁶¹ *Id.*

finding that deference⁶² to the FWS's interpretation of the ESA was not appropriate because Congress had spoken directly to the issue.⁶³

The *ACGA III* court first analyzed Section 9 of the ESA and noted that the definition of "taking" is restricted to those circumstances where *actual* harm or injury will result from a proposed action.⁶⁴ The court noted that the ESA includes "to harm"⁶⁵ as a condition tantamount to a "taking" and in turn, that the Supreme Court's definition of "harm" is "an act which *actually* kills or injures wildlife. "Such an act may include significant habitat modification or degradation where it *actually* kills or injures wildlife..." (emphasis added).⁶⁶ The *ACGA III* court also cited to Arizona precedent, indicating a synonymous meaning.⁶⁷ A FWS statement reflects this understanding as well: "Such act [constituting a taking] may include significant habitat modification or degradation where it actually kills or injures wildlife."⁶⁸

Unlike Section 9 of the ESA, which imposes civil and criminal penalties, Section 7 bestows the responsibility on federal agencies to affirmatively prevent violations of the ESA.⁶⁹ As noted earlier, this responsibility extends to agencies like the FWS and the BLM in charge of reviewing petitions for grazing permits.⁷⁰

To resolve the dispute over the definitions of the term "taking" as used in Sections 7 and 9, the *ACGA III* court pointed to legislative history to show that Congress intended the same meaning for the term in both Sections.⁷¹ The court cited to a 1982 Amendment that resolved a conflict between the two sections for support.⁷² Prior to 1982, under Section 7, the FWS might have issued an incidental take statement, indicating that an incidental take would occur and authorize the action pursuant to that Section;⁷³ this authorization, however, would not absolve the actor from liability under Section 9, which makes even incidental takings a crime.⁷⁴ The purpose of the 1982 Amendment was to eliminate any potential for Section 9 liability to be imposed in such a circumstance. In this light, the court held that if the word "taking" has different meanings in Sections 7 and 9, it would effectively "turn the purpose behind the 1982 Amendment on its head."⁷⁵

Moreover, the court found that were it to accept the FWS's interpretation of the statute that it would lend almost unlimited power to the FWS to regulate the use of land even where no Section 9 liability could be incurred and would allow the FWS to stop the cattle grazing program completely.⁷⁶

The *ACGA III* court also rejected the FWS's contention that as a matter of plain text, it is *required* under the ESA to issue incidental take statements every time there is even a remote possibility that a taking will occur.⁷⁷ The FWS specifically challenged the *ACGA I* court's insistence that it provide evidence of endangered species in areas where proposed activities will occur as a prerequisite to issuing an incidental take statement.⁷⁸ The FWS also challenged the *ACGA II* court's ruling that "an incidental take statement is 'appropriate only when a take has occurred or is reasonably certain to occur,'" arguing that these two holdings set an unreasonably high standard of proof.⁷⁹ Even though these

⁶² *Chevron* deference would normally be afforded to agency interpretations of statutes administered by that agency, but only if Congress had not specifically addressed the issue.

⁶³ *Arizona Cattle Growers' Assn.*, 273 F.3d at 1237. The court noted that "The Supreme Court...has 'explicitly limited' *Chevron's* deference 'to cases in which congressional intent cannot be discerned through the use of the traditional techniques of statutory interpretation.'" *Id.* (citing *Chem. Mfr. Assn. v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 152 (1985)).

⁶⁴ *Id.* at 1238. "The word 'actually' before the words 'kills or injures'...makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to Section 9." *Id.*

⁶⁵ *Id.* at 1237, (citing 16 U.S.C. § 1532(19)).

⁶⁶ *Id.* at 1237-38.

⁶⁷ *Id.* at 1238. Habitat modification constitutes "harm," thus becoming a "taking" within the definition of Section 9, when it "actually kills or injures wildlife." *Id.* citing *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25 (9th Cir. 1996). The court, however, also found that habitat degradation alone would not constitute harm. "[S]ignificant impairment of the species' breeding or feeding habits" together with proof that "habitat degradation prevents or...retards, recovery of the species" would also have to be shown. *Id.*

⁶⁸ *Id.* at 1238 (citing 50 C.F.R. § 17.3).

⁶⁹ *Id.* at 1238 (citing 16 U.S.C. § 1536(a)(2)).

⁷⁰ *Id.*

⁷¹ *Id.* at 1239.

⁷² *Id.* at 1239-40.

⁷³ *Id.*

⁷⁴ *Id.* at 1240.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1240-41.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1240.

contentions were not raised at the district court level, the Court of Appeals heard them anyway, reasoning that the issues were purely legal in nature and that neither party would be harmed for its decision to do so.⁸⁰ After reviewing the relevant text of the ESA,⁸¹ the *ACGA III* court concluded that the FWS is not required to issue an incidental take statement regardless of whether an incidental take will occur.⁸² When read in context, the court found persuasive the fact that the statute calls for a written notice indicating the impact of the incidental take and argued that this provision would be meaningless unless an incidental take were actually anticipated.⁸³ The court also pointed to an implementing regulation within the ESA, which specifically instructs the FWS to issue an incidental take statement only “if such take may occur” (emphasis added).⁸⁴ Further, the *ACGA III* court noted that since Section 7 of the ESA is supposed to shield people from Section 9 incursions, to hold that incidental take statements are required even when no takings would occur is nonsensical.⁸⁵ The *ACGA III* court brushed off the fact that the FWS Handbook anticipates incidental take statements to be issued even when no take is actually contemplated by reasoning that such activity, barring rare circumstances, is arbitrary and capricious.⁸⁶ Thus, the court found that the FWS is not required to issue an incidental take statement whenever it issues a Biological Opinion and consistent with that holding, proceeded to analyze each incidental take statement at issue.⁸⁷

In terms of the issues raised in *ACGA I*, the court found that the ITS regarding the razorback sucker was arbitrary and capricious because the FWS admitted that there have been no reported sightings of the species on the land in question since 1991, but issued the incidental take statement anyway.⁸⁸ The FWS justified its action on the basis of prospective harm. The court, however, rejected this rationalization, pointing out that the ESA provides for alternative measures if new evidence of a species’ existence is found at a later date.⁸⁹ The court also rejected the FWS’s only speculative conclusion that a taking might occur because “small numbers of the juvenile fish ...likely survived” in an ill-fated attempt to repopulate the species in 1981-1987.⁹⁰ According to the *ACGA III* court, this type of rationalization falls short of the standards explained in the governing statute, 50 C.F.R. § 402.14(g)(8), which calls for biological opinions to be based on “the best scientific and commercial data available.”⁹¹ Having held that a taking would not occur absent evidence of the razorback sucker’s existence on the proposed grazing land, the court further held that the FWS had also failed to show that any incidental taking of the fish would occur as a result of habitat modification, again rejecting the sufficiency of speculative evidence.⁹² The court further rejected the FWS’s suggestion that the *ACGA* prove that the fish does not exist on the proposed grazing land because the burden of proof is on the FWS as prescribed by statute and it would require the *ACGA* to prove a negative.⁹³ Consequently, the court found that it was arbitrary and capricious for the FWS to issue an incidental take statement as to the razorback sucker when the record only points to speculative evidence to show that the fish even exists on the proposed land.⁹⁴

⁸⁰ *Id.* at 1241.

⁸¹ ESA Section 7(b)(4).

⁸² *Arizona Cattle Growers’ Assn.*, 273 F.3d at 1241.

⁸³ *Id.* If after consultation under subsection (a)(2) of this section, the Secretary concludes that—(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the secretary believes would not violate such subsection; (B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and (C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1317(a)(5) of this title; the secretary shall provide the federal agency and the applicant concerned, if any, with a written statement that—(i) specifies the impact of such incidental taking on the species, ...” 16 U.S.C. § 7(b)(4).

⁸⁴ *Arizona Cattle Growers’ Assn.*, 273 F.3d at 1242 (citing 50 C.F.R. § 402.14(g)(7)).

⁸⁵ *Id.*

⁸⁶ *Id.* “We hold that absent rare circumstances such as those involving migratory species, it is arbitrary and capricious to issue an Incidental Take Statement when the Fish and Wildlife Service has no rational basis to conclude that a take will occur incident to the otherwise lawful activity.” *Id.*

⁸⁷ *Id.* Preliminarily, however, the court addressed the FWS’s argument that the *ACGA II* court improperly applied a “reasonable certainty” standard in determining whether the issuance of an ITS by the FWS is arbitrary and capricious. Ultimately the court decided not to “definitively resolve the question” because the appeals court sits in *de novo* review. Nonetheless, the court did point out that the “reasonable certainty” standard is actually more lenient than if the FWS were required to show that an actual taking would occur requisite to issuing an ITS. *Id.* at 1243.

⁸⁸ *Id.* at 1244-45.

⁸⁹ *Id.* at 1244 (citing 50 C.F.R. § 402.16).

⁹⁰ *Id.* at 1244.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1245.

The court similarly found that the incidental take statement for the cactus ferruginous pygmy-owl was arbitrary and capricious, lacking evidence that the bird actually exists on the land at issue.⁹⁵ Even though the FWS attempted to show surveys subsequent to issuing the incidental take statement proved that the bird in fact does dwell on the proposed grazing land, the court interjected that it is not allowed to consider evidence outside the record.⁹⁶ Similarly, the *ACGA III* court also agreed with the lower court that the FWS had failed to show how habitat modification resulting from the proposed activities would “actually kill or injure” the owl, provided that there is no evidence the owl even uses that habitat.⁹⁷

Next, the court turned to the issues raised in *ACGA II*, addressing the validity of the incidental take statement issued for the Montana Allotment, the Sears-Club/Chalk Mountain Allotment, the Wildbunch Allotment, the East Eagle Allotment, and the Cow Flat Allotment.

In the Montana Allotment, the FWS identified the presence of the Sonora Chub, a small fish related to the minnow, on the Allotment, albeit in an area where cattle are excluded. Nonetheless, the incidental take statement concluded that the cattle grazing activities would constitute an incidental take of the species, either because of fish migration downstream or because of adverse habitat modification appearing upstream. The *ACGA III* court, however, summarily excused these bases as speculative, citing to a lack of evidence on the part of the FWS to back their claims.⁹⁸ The court also excused the notion that cattle could gain access to the areas inhabited by the Sonora Chub by crossing over the Mexican-American border, since the FWS failed to produce evidence that this has actually happened.⁹⁹

In the Sears-Club/Chalk Mountain Allotment (“Sears Allotment”), the concern manifest in the incidental take statement was over the Gila Topminnow, another small fish accustomed to life in the shallow waters in a spring on this and an adjoining allotment.¹⁰⁰ The problem resulting from this incidental take statement, however, is that the fish is only found in the lower portion of the spring on the abutting allotment, and not in the upper portion of the spring located on the Sears Allotment.¹⁰¹ 1,000 feet of dry creekbed separate the upper and lower portions of the stream.¹⁰² Despite the FWS’s belief that certain conditions could make it possible for the gila topminnow to migrate into the upper portion of the spring, the court noted that the FWS did not say exactly how this would be possible and therefore denied this reasoning.¹⁰³ Moreover, the court rejected the FWS’s justification for the incidental take statement on grounds that cattle grazing would jeopardize any future attempt to repopulate the upper portion of the spring because mere potential for harm is not sufficient to warrant an incidental take statement.¹⁰⁴

In the East Eagle Allotment, the FWS issued incidental take statements for the loach minnow and the spikedace, both small fishes, which the evidence indicated to the court do not exist on this Allotment. For this reason, the court also struck down the incidental take statement as arbitrary and capricious.¹⁰⁵

The Wildbunch Allotment involved the loach minnow, however, the only places loach minnows are found on this allotment are in areas where cattle do not have access.¹⁰⁶ The FWS reasoned that the effects of cattle fording streams would negatively impact the fish’s habitat and therefore constitute a taking, but the court disagreed.¹⁰⁷ Because the FWS failed to show that such negative impacts were occurring on the loach minnow’s habitat and that grazing activities would actually result in the killing or injury of the loach minnow, the court struck down this provision as well.¹⁰⁸

The Cow Flat Allotment was treated differently by the court because the FWS proffered direct evidence lacking in the previous allotments that the listed species, the loach minnow, actually exists on the allotment and that the cattle have access to the area inhabited by the species.¹⁰⁹ Because of these reasons, the court found that the FWS could have

⁹⁵ *Id.* at 1245.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1246.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1247.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1248.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

reasonably concluded that a taking of the loach minnow would occur as a result of the proposed grazing activities.¹¹⁰ The court therefore upheld the issuance of the ITS on grounds that it was not arbitrary and capricious, but it failed on other grounds.¹¹¹

The ITS for the Cow Flat Allotment failed because it did not sufficiently specify the degree to which incidental take would occur, and subsequently failed to establish a clear guideline indicating when the authorized amount of take had been exceeded.¹¹² The court explained that when an ITS is issued, generally an acceptable number of take is quantified, i.e., 200 loach minnows, etc.¹¹³ After this number is surpassed, then Section 7's ability to shield violators of Section 9 from criminal and/or civil sanction is surpassed as well.¹¹⁴ While it is not always necessary to express an acceptable amount of take as a numerical value, this is the default rule.¹¹⁵ To diverge from this rule, the FWS would have to have shown that it would not be practical to calculate the take as a numerical value.¹¹⁶ Instead of using a numerical value, the FWS expressed the level of unacceptable take in terms of ecological conditions.¹¹⁷ The court held that take can sometimes be determined by using these means, however, only when a causal link can be established between the ecological condition and the permitted activity on the land.¹¹⁸ Specifically, the FWS's incidental take provision provided the condition that a take would occur if "ecological conditions do not improve."¹¹⁹ The court said that this standard was too vague to establish the necessary causal link and further failed for lack of an "articulated, rational connection between [the] condition [stated] and the taking of species."¹²⁰ For these reasons, even though the issuance of the ITS was not itself arbitrary and capricious, the court held that it must nevertheless be set aside because the condition attached to it was arbitrary and capricious.¹²¹

IV. INSTANT DECISION

In *Arizona Cattle Growers' Association v. U.S. Fish & Wildlife Service*,¹²² the FWS offered two theories to justify its issuance of the disputed incidental take statements, the second of which was raised for the first time in the Court of Appeals.¹²³ First, the FWS argued that the ESA Section 7 definition of the term "taking" extends to all situations where there is a *possibility* for harm to an endangered species by a proposed action.¹²⁴ The FWS thus reasoned that it had acted within the scope of this definition by issuing incidental take statements even absent evidence that a take would *actually* occur.¹²⁵ In the appeals court, the FWS extended their interpretation of the ESA and contended that the ESA *requires* it to issue incidental take statements even absent a finding that a take will occur.¹²⁶

The court rejected both arguments.¹²⁷ First, the Court held that "take" includes only instances where the FWS finds that proposed activities *will* result in the taking of an endangered species.¹²⁸ Speculation that a take will occur is not sufficient to authorize the FWS to issue an incidental take statement.¹²⁹ Second, the court held that the ESA does not *require* the FWS to issue an incidental take statement absent evidence that a take will actually occur. The court noted that

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1251.

¹¹² *Id.*

¹¹³ *Id.* at 1249

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1250.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1249.

¹¹⁸ *Id.* at 1250.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1250-51.

¹²¹ *Id.* at 1251.

¹²² 273 F.3d 1229 (9th Cir. 2001).

¹²³ *Id.* at 1241.

¹²⁴ *Id.* at 1237-40. The FWS based this interpretation on the purpose of Section 7 of the ESA as compared to Section 9, Section 7 serving as a protective function and Section 9 being punitive in nature. *Id.* at 1237

¹²⁵ *Id.* at 1237.

¹²⁶ *Id.* at 1240-41.

¹²⁷ *Id.* at 1237, 1242.

¹²⁸ *Id.* at 1237.

¹²⁹ *Id.* In support of its argument the court resorted to Supreme Court Precedent to shed light on the meaning of the relevant statutory text. It also pointed to Arizona case law, which mirrored the Supreme Court's stance. *Id.* at 1237-39.

the FWS's interpretation of the statute was not credible when viewed within the context of the statute as a whole, nor in light of legislative history.¹³⁰

The court consequently overturned five of the six disputed incidental take statements.¹³¹ The court found that with respect to these statements, the FWS failed to show either that the endangered species exists on the land in question or that the endangered species will be harmed by the proposed activity, i.e., cattle grazing.¹³² The sixth incidental take statement was also overturned, but on grounds that the conditions attached to it were too vague to conclude when an acceptable taking of the endangered species at issue was exceeded and was thus arbitrary and capricious.¹³³

V. COMMENT

In *Arizona Cattle Growers' Association v. United States Fish and Wildlife, Bureau of Land Management*, the court established a relatively low burden of proof to be met requisite to the issuance of an incidental take statement. The court requires actual proof of the existence of an endangered species on regulated land. Absent this proof, prospective or potential harm to an endangered species or its habitat is not a sufficient justification for issuances of incidental take statements.¹³⁴

In reaching this decision, the court had first to determine which types of actions constitute a taking under the ESA, because presumably only if a "taking" were to occur, could a finding of "incidental taking" be justified, along with the ensuing incidental take statement. While according to the pertinent text of the ESA, a taking includes actions that "harm" endangered species, the real dispute lies in the precise meanings of this term. The court here concluded that "harm" to endangered species is limited to circumstances in which a species will *actually* be injured or killed. Consequently, if an endangered species will not be *harmed* by a proposed action, then the FWS will not be allowed to issue an incidental take statement in protection of that species.

The court, however, did recognize that the harm requirement can be met indirectly via adverse habitat modification and the mere prospective threat of injury or death to an endangered species by a proposed activity. Nonetheless, even when habitat is thus affected, an endangered species must still actually be injured or killed to meet the requirement. This cannot possibly happen unless an endangered species is in fact present on the regulated land. Under the facts of *ACGA III*, the court's logic is sound, especially in light of Supreme Court precedent, which specifically holds, that harm is "an act, which actually kills or injures wildlife. Such an act may include significant habitat modification...where it actually kills or injures wildlife..."¹³⁵ Because the FWS failed to show that endangered species existed on the lands in question, the court's decision to invalidate the incidental take statements should not be surprising. What is surprising, however, is that the FWS would argue for such an expansive ruling in light of a contrary argument raised by the U.S. Forest Service a few years earlier in Missouri.

In *Bensman v. U.S. Forest Service*,¹³⁶ the U.S. Forest Service came under fire for contracting with companies to salvage several thousand trees that had fallen in the Mark Twain National Forest as a result of a storm.¹³⁷ The salvage operations, however, were scheduled to take place near caves used by the Indiana Bat, an endangered species. Studies conducted by the FWS indicated that during the summer months the bats roosted in dead or dying trees, with females using the trees as maternity colonies to raise their young.¹³⁸ The U.S. Forest Service defended its decision to salvage the fallen trees by arguing that the concerned area was not a known habitat of the Indiana Bat, an argument in striking contrast to that raised by the FWS in *ACGA III*.¹³⁹

In a praiseworthy stand in favor of the ESA, the court noted a lack of evidence to show that the area was *not* inhabited by the Indiana Bat. The court further pointed to studies showing that the bats had been found roosting in trees

¹³⁰ *Id.* at 1241-42.

¹³¹ *Id.* at 1243-49.

¹³² *Id.*

¹³³ *Id.* at 1250-51.

¹³⁴ *Id.* at 1244. "Where the agency purports to impose conditions on the lawful use of...land without showing that the species exists on it, it acts beyond its authority in violation of 5 U.S.C. § 706. *Id.*

¹³⁵ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

¹³⁶ 984 F. Supp. 1242 (W.D. Mo. 1997).

¹³⁷ *Id.* at 1244.

¹³⁸ *Id.* at 1245.

¹³⁹ *Id.* at 1248.

up to ten miles from caves used as seasonal mating grounds; the fallen trees were well within this distance.¹⁴⁰ Thus reasoning, the court preliminarily enjoined the planned salvage operations, holding that prospective and potential harm to an endangered species was sufficient to issue a preliminary injunction.¹⁴¹

In support of its holding the *Bensman* court quoted from a Hawaii case:

A finding of "harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.¹⁴²

This quotation returns us the issue of defining the term "harm." At first glance, it could easily appear that Missouri law is at odds with the court's ruling in *ACGA*. Upon closer examination, however, the two rulings can be seen as consistent. Nonetheless, their underlying inconsistencies should serve as a voice of warning to Missouri environmentalists.

In *Bensman*, conservation efforts at preserving the Indiana bat prior to the court's ruling had focused primarily on caves, the bats' winter and mating habitat.¹⁴³ These efforts had failed dismally over a twenty-year period.¹⁴⁴ The new focus for preserving the species was on protecting the bats' summer habitat of fallen trees, which was in peril. Scientists speculated this was the true reason for the decline in bat populations. In contrast to *ACGA*, there was no such alternative hypothesis to the potential demise of the endangered species concerned, nor would the proposed grazing activities at issue in the *ACGA* cases have hampered the comeback of these species.

More importantly, and perhaps pivotal to the question at issue, is that fact that in *Bensman*, there was a very strong likelihood that Indiana Bats would in fact use the fallen trees to roost and to raise their young during summer months. After all, there was no evidence to the contrary and all indications pointed out that this would be the case. Thus, to remove the fallen trees could easily be seen to have a strong likelihood of adversely affecting the bat species. In *ACGA*, the likelihood that the proposed cattle grazing would adversely affect the endangered species in question was next to zero. The endangered species were all either non-existent on the land in question, without a likelihood of returning, or were geographically isolated from the cattle altogether.

But while these rationales distinguish *ACGA* from *Bensman*, *ACGA* can still be viewed as somewhat of a concern for Missouri environmental law. While the specific facts of these cases differ and can be seen to distinguish one from the other, the warning lies in the markedly different definitions the courts assign to the term "harm." The major holding in *ACGA III* was that "harm" for purposes of "takings" under the ESA is limited only to instances where it can be shown that an endangered species will actually be injured or killed. The *Bensman* court's understanding of harm, as exemplified in the above quotation, i.e., "A finding of "harm" does not require death to individual members of the species," is entirely different. If Missouri were to adopt the understanding of the *ACGA III* court, future cases similar to *Bensman* could reach totally opposite conclusions, all to the demise of Missouri's endangered species.

For the present time, Missouri has avoided the politically charged issues of environmental protection versus economic and developmental interests.¹⁴⁵ This is due in large part to Missouri's support and concern for the environment in terms of allocation of resources. Missouri has acquired "top-rated" biologists for the Department of Conservation¹⁴⁶ and provides economic assistance for programs to create environmentally friendly stream crossings for cattle and to manage pastureland.¹⁴⁷ Despite great efforts by the state, however, Missouri currently has 23 federally listed endangered

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1250.

¹⁴² *Bensman*, 984 F.Supp. at 1248 (quoting *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F.Supp. 1070, 1076-77 (D.Haw.1986), *aff'd*, 852 F.2d 1106 (9th Cir.1988)).

¹⁴³ *Bensman*, 984 F.Supp. at 1245.

¹⁴⁴ In 1983 the FWS began a twenty year recovery plan for the Indiana Bat. Since that time, its population has decreased by 82% in Missouri. *Id.*

¹⁴⁵ *Id.* "In all my years here," said U.S. F& WS acting field supervisor, Rick Hansen, "I cannot recall a single project that we've stopped in Missouri." *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Harold Kerns, *More Than a Minnow*, Missouri Department of Conservation Homepage, <<http://www.conservaion.state.mo.us/conmag/1999/02/4.html>> (accessed March 6, 2002).

or threatened species of wildlife.¹⁴⁸ Decisions like that in *ACGA III* raise concern about the future of these and other species of Missouri wildlife. *ACGA III* should serve to keep our eyes open for similar trends in our home state.

VI. CONCLUSION

The *ACGA III* court's reading of the ESA is clearly a step toward a pro-industry interpretation of that Act. While the court's reasoning is logical, it should also serve as a warning for environmentalists to be wary of similar trends indicating a step away from a liberal understanding of the ESA in favor of protecting endangered species. We certainly cannot afford to ignore the warning signs, for in the words of the Missouri court for the Western District, "death is certainly an irreparable harm and the extinction of a species is incalculable."¹⁴⁹

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¹⁴⁸ Tom Cwynar, *On Behalf of Endangered Species*, Missouri Department of Conservation Homepage, <<http://www.conservation.state.mo.us/conmag/1999/02/1.html>> (accessed March 6, 2002).

¹⁴⁹ *Bensman*, 984 F.Supp at 1250.