Arizona Cattle Growers Association v. U.S. Fish & Wildlife Service: Has the Ninth Circuit Weakened the Take Provisions of the Endangered Species Act

Paul Stinson

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol30/iss3/6

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38VN85

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Paul Stinson*

In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, the United States Supreme Court held that indirect injury to an endangered or threatened species through habitat modification could constitute a "take" for purposes of the Endangered Species Act. In Arizona Cattle Growers Association v. U.S. Fish & Wildlife, the Ninth Circuit robbed this holding of much, if not all, of its significance. The U.S. Fish & Wildlife Service (FWS) had determined that cattle grazing on certain federally managed range lands would indirectly take listed species through disruption of stream flows, sedimentation, destruction of foraging area, and other habitat degradation. It therefore issued incidental take statements (ITs) for species in those areas, and set terms and conditions on the cattle ranchers' use that would halt or limit the destruction. The Ninth Circuit, stepping into the shoes of FWS biologists, invalidated the statements, finding no rational connection between the scientific data and the conclusion that takes would occur as a result of the cattle grazing. According to the Court of Appeal, FWS had acted arbitrarily and capriciously, both in issuing the ITs, and in broadly defining the conditions and terms of use. The court's opinion suggest three new limitations on FWS's ability to demonstrate takes: (1) the listed species' presence on the land under review at the time the ITS is issued must be

Copyright © 2003 by the Regents of the University of California

* J.D. Candidate, University of California at Berkeley School of Law (Boalt Hall) 2004; B.A., University of California at Santa Barbara 1991. I would like to thank Margo Hasselman for her dedicated guidance in the writing and editing of this piece, as well as Michael Shields and the ELQ editorial staff for their efforts in preparing it for publication. I would also like to thank Dean John Dwyer for proposing the topic and for providing me with valuable editorial advice.
documented; (2) the species must be immediately and directly susceptible to injury from the proposed activity; and (3) the terms of the ITS must provide a specific, directly quantifiable standard for determining compliance. This Note suggests that these three conditions will prevent FWS from issuing ITSs in instances of habitat degradation, will undermine its scientific authority in general, and will lead to a further erosion of the protections envisioned by Congress when it passed the Endangered Species Act.

Introduction .............................................................................................................. 498

I. Background ........................................................................................................... 499
A. ESA Sections 7 and 9, and Incidental Take ..................................................... 499
B. The "Take" Controversy: Sweet Home, Habitat Modification, and Indirect Injury .......................................................... 501

II. The Arizona Cattle Growers Decision ............................................................ 503
A. Background: The Incidental Take Statements in ACGA I and II .............. 503
B. Decisions of the District Courts .................................................................... 508
C. Decision of the Ninth Circuit ......................................................................... 508

III. Discussion ......................................................................................................... 510
A. A Restrictive Evidentiary Standard for Issuing an ITS .. 510
B. What Are the Requirements for a Valid ITS? .............................................. 512
   1. Existence of the Species on the Land under Review .................................. 513
   2. Direct and Immediate Susceptibility to Injury or Death from Proposed Activity .................. 514
   3. Compliance Terms and Conditions of an ITS Must Provide a Clear, Directly Quantifiable Standard....... 515
C. Implications of the Court's New Standards ................................................. 516

Conclusion ............................................................................................................. 519

INTRODUCTION

In 1995, the U.S. Supreme Court in Babbit v. Sweet Home Chapter of Communities for a Great Oregon confirmed that indirect injury to a listed species through habitat modification could constitute a "take" prohibited by the Endangered Species Act (ESA or Act). But it left for case-by-case determination what degrees of proof and causation are required before the indirect injury threshold is met. In Arizona Cattle

the Ninth Circuit revisited the "take" discussion, this time in the context of Incidental Take Statements (ITSs) issued by the U.S. Fish & Wildlife Service (FWS) in connection with cattle grazing on public lands. FWS had determined that the deleterious effects of cattle grazing in riparian habitat could result in the "take" of listed species in adjacent areas. The Ninth Circuit, rejecting FWS's evidence and its standard of causation, disagreed and found the issuance of the ITSs arbitrary and capricious.

Unfortunately, the court failed to clearly specify or analyze its newly imposed limitations on the "indirect injury" component of the "take" definition. A careful reading of the opinion, however, suggests that the court created daunting new restrictions on FWS's ability to prove takes resulting from habitat modification. Moreover, by rejecting FWS's studied determination that the direct and indirect effects of livestock grazing in riparian areas could result in death or injury to listed species, the Ninth Circuit opened the door to a much broader assault on FWS's regulatory authority and the ESA's incidental take provisions more generally.

This Note examines the implications of the Ninth Circuit's invalidation of seven ITSs issued by FWS. Section I of this Note describes the ESA's Section 9 take provision and Section 7 consultation and "incidental take" provisions. Section II sets forth the facts and holdings of the ACGA case. Section III discusses the broader implications of the Ninth Circuit's holding for future incidental take cases. The Note concludes that, while acknowledging the essence of Sweet Home, the court's decision suggests that indirect injury to a listed species through habitat modification will rarely, if ever, qualify as a take for ITS purposes.

I. BACKGROUND

A. ESA Sections 7 and 9, and Incidental Take

Section 9 of the ESA makes it unlawful for any person to "take" endangered species of fish or wildlife within the United States. "Take" is defined in the Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The Secretary of the Interior (Secretary) has further defined "harm" to include "significant habitat modification or degradation where it actually
kills or injures wildlife by significantly impairing essential behavioral
patterns, including breeding, feeding or sheltering.\(^5\)

Section 7 imposes affirmative duties upon federal agencies to
conserve listed species and to avoid actions that would jeopardize listed
species' "continued existence" or adversely affect critical habitat.\(^6\) When
an agency proposes an action in an area where "listed species or critical
habitat may be present," it must prepare a biological assessment
specifying the action's likely adverse effects.\(^7\) If the action "may affect"
listed species or critical habitat, the agency must initiate formal
consultation with FWS.\(^8\) FWS then must issue a Biological Opinion (BO)
that summarizes the relevant findings and determines whether the
proposed action is likely to jeopardize the continued existence of listed
species or adversely affect critical habitat.\(^9\) If jeopardy is likely, the
agency may not take the proposed action, and the BO must list any
"reasonable and prudent alternatives" that would avoid jeopardy or
destruction or adverse modification of critical habitat.\(^10\)

Even if jeopardy is not likely, FWS nonetheless must specify whether
the action will result in a take that is "incidental to, and not the purpose
of," an otherwise lawful activity.\(^11\) If such an "incidental take" will occur,
FWS must issue an ITS that (1) identifies areas where members of the
particular species are at risk; (2) specifies the impact of the incidental
taking on the species; (3) provides reasonable and prudent measures to
minimize such impact; and (4) sets forth terms and conditions for
compliance with those alternatives.\(^12\)

---

\(^5\) 50 C.F.R. § 17.3 (2003).
\(^6\) 16 U.S.C. § 1536(a) (2003). "Critical habitat" for a threatened or endangered species is
defined as:

(i) the specific areas within the geographical area occupied by the species, at the time
it is listed ..., on which are found those physical or biological features (I) essential to
the conservation of the species and (II) which may require special management
considerations or protection; and (ii) specific areas outside the geographical area
occupied by the species at the time it is listed ..., upon a determination by the
Secretary that such areas are essential for the conservation of the species.

\(^7\) Id. § 1532(5)(A).

\(^8\) 50 C.F.R. § 402.12(d)(2); 16 U.S.C. § 1536(c).

\(^9\) 50 C.F.R. § 402.14(a). Generally, the Secretary of the Interior and her designee, FWS,
has responsibility for all terrestrial species, while the Secretary of Commerce, through his
designee the National Marine Fisheries Service (NMFS), has responsibility for marine species.

From a Litigator's Perspective*, 21 ENVTL. L. 499, 502 (1991). Because this case deals only with
terrestrial, non-marine species, all references are to the FWS.

\(^10\) 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h).


\(^12\) 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 17.3 (2002) (definition of incidental take).
Incidental takes occurring within the terms and conditions of an ITS "shall not be considered to be a prohibited taking of the species concerned." Agencies are thus immunized from Section 9 liability and penalties for incidentally taking listed species, so long as they adhere to the strictures of the ITS. If the terms and conditions of the ITS are breached, the action agency must immediately reinitiate consultation, and any further takings are considered Section 9 violations.

B. The "Take" Controversy: Sweet Home, Habitat Modification, and Indirect Injury

Because so much rides on the word "take" in the ESA, there has been intense controversy over its definition. In Sweet Home, the Supreme Court addressed a circuit split over whether "harm," in the form of habitat modification resulting in indirect injury or death to a species, was sufficient to constitute a "take." The Ninth Circuit had upheld the Secretary's definition in Palila v. Hawaii Department of Land and Natural Resources. The D.C. Circuit, however, had interpreted the statutory definition of "take" to require direct injury to a listed species, and rejected as impermissibly broad the Secretary's expansion of that term to include indirect injury through habitat modification.

Specifically, the Sweet Home Court considered whether the Secretary had exceeded his authority under the ESA by defining "harm" to include "significant habitat modification or degradation where it

13. Id. § 1536(o)(2).
15. See 51 Fed. Reg. 19,926, at 19,954 (June 3, 1986) (preamble to 1986 consultation regulations); Kilbourne, supra note 8, at 555. Of course, in the context of grazing permits it is the ranchers who ultimately bear the burden of the ITS restrictions. See infra, note 35.
19. 852 F.2d 1106, 1108 (9th Cir. 1988) (affirming district court's determination that the maintenance of Mouflon sheep in the endangered Palila bird's critical habitat constituted an unlawful taking because the sheep fed on the seeds of the mamane trees, upon which the Palila depended).
20. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 17 F.3d 1463, 1464 (D.C. Cir. 1994) (respondents loggers and landowners challenged the regulation on its face, alleging that the Secretary's inclusion of habitat modification and degradation in the definition of "harm," as applied to the red-cockaded woodpecker and the northern spotted owl, had injured them economically).
actually kills or injures wildlife." The Court's answer was "no": the plain text of the statute, and the legislative history supported such an interpretation. Hence, the Court rejected the D.C. Circuit's invalidation of the definition, holding that habitat modification resulting in either direct or indirect injury or death to a listed species constitutes a take for purposes of Section 9 of the ESA.

The Sweet Home decision, however, is no "icon of clarity, and the outer parameters of [FWS's] proper enforcement of the harm regulation remain nebulous." Justice Stevens' majority opinion raised certain questions, most crucially concerning the level of causation required before habitat destruction amounts to an indirect-injury take under Section 9. Responding to a lengthy dissent by Justice Scalia charging that the majority's opinion made "nonsense" of the word "harm" by extending it to indirect injuries, Justice O'Connor's concurring opinion sought to clarify that the Court's formulation only encompassed "actual, as opposed to hypothetical or speculative" death or injury. In so doing, she also called into question Palila, inasmuch as that case seemed to allow such hypothetical or speculative injury to constitute a take.

In the end, while Sweet Home upheld Palila, the Court established no bright line rule for finding a take under section 9 of the ESA.

25. Id. at 708-09 (O'Connor, J., concurring).
26. Id. at 709 (O'Connor, J., concurring). The Ninth Circuit, however, interpreted Sweet Home as a complete affirmance of Palila. Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir. 1996) (stating, in regard to Sweet Home and Palila, that the U.S. Supreme Court "has reaffirmed our court's long held position that the [ESA] protects listed species from harm caused by habitat destruction.")
27. Palila itself has been cited as establishing a "but-for" standard of causation in take cases — a standard which seems to have been approved by Sweet Home. See, e.g., Desiderio, supra note 24, at 748-49 (In Palila, the court found that Hawaii's "land management practices violated the harm regulation because they 'could drive the Palila to extinction'" and, "in other words, 'but for' the grazing animals... 'the Palila might have prospered.'") (quoting Palila v. Haw. Dep't of Land & Natural Res., 852 F.2d 1106, 1108 (9th Cir. 1988)). Yet, it is clear that there are limits to this approach. The Ninth Circuit in Defenders of Wildlife v. Bernal, for instance, found no take of the cactus ferruginous pygmy owl in the absence of a showing that owls were present in the area in which the proposed activities were to occur. 204 F.3d 920, 925-27 (9th Cir. 1999). But cf. Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (finding take based on but-for causation); United States v. Glenn Colusa Irrigation Dist., 788 F. Supp. 1126, 1133-34 (E.D. Cal. 1992) (rejecting proposition that the take prohibition depends on proximate causation, and instead adopting a "substantial factor" test in determining whether a take has occurred); Nat'l Wildlife Fed'n v. Hodel, 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. 1985) (adopting but-for causation). See also Sierra Club v. Yeutter, 926 F.2d 429, 437-38 (5th Cir. 1991) (affirming district court's determination that Forest Service timber management practices
Recognizing that “all persons who must comply with the [ESA] will confront difficult questions of proximity and degree,” the Court asserted that questions regarding the Act’s enforcement and meaning must be addressed “through case-by-case resolution and adjudication.” Such a statement left federal agencies with little guidance in implementing and enforcing the ESA, and set the stage for further litigation.

II. THE ARIZONA CATTLE GROWERS DECISION

A. Background: The Incidental Take Statements in ACGA I and II

In 1998, the Bureau of Land Management (BLM) administered approximately 288 livestock grazing allotments over 1.6 million acres of public land in southeastern Arizona—primarily for ranching operations. On September 26, 1997, FWS issued a Biological Opinion (BO) for the BLM’s Safford and Tucson Field Offices’ Livestock Grazing Program in southeastern Arizona. FWS analyzed twenty or so species of listed or proposed-to-be-listed plants and animals present on BLM-administered lands and concluded that the livestock grazing program was not likely to jeopardize the continued existence of these species, nor was it likely to result in the destruction or adverse modification of critical habitat. However, FWS issued ten ITSs for various species of fish and wildlife listed or proposed for listing as endangered. To control the taking of the listed species, FWS imposed terms and conditions on grazing operations, including a ban on cattle grazing for all BLM-administered lands within the hundred-year flood plain of the Gila River and in certain riparian corridors.

The Arizona Cattle Growers’ Association (ACGA) and Jeff Menges, the owner of a private cattle ranch, brought suit against FWS, claiming that compliance with the ITSs would cause severe economic losses to in non-critical habitat had “harmed” the red-cockaded woodpecker in Texas forests, in violation of Section 9).

30. *ACGA, supra* note 2, at 1233 (9th Cir. 2001).
31. *Id.*
32. *Id.* at 1033-34.
33. *ACGA I, supra* note 29, at 1036 (termination date of project is December 31, 2006).
34. To clarify, incidental take *statements*, which are issued to federal agencies pursuant to ESA Section 7, are similar to incidental take *permits*, which are issued under Section 10 to “any party, public or private, whose actions might otherwise violate section 9(a)(1).” Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23
ranchers in southeastern Arizona, and to Menges in particular (ACGA I). The parties filed cross-motions for summary judgment, with ACGA’s motion focusing on the ITSs for the razorback suckerfish and the cactus ferruginous pygmy owl. ACGA and Menges sought injunctive and declaratory relief on the basis of six counts, only two of which were appealed: (1) FWS acted arbitrarily and capriciously in issuing the ITSs because it applied an overbroad and unlawful definition of “take”; (2) FWS acted arbitrarily and capriciously in issuing the ITSs because it failed to specify the amount or extent of the anticipated take, and provided no clear standard for determining when the authorized level of take would be exceeded.

In a separate action, ACGA alone challenged ITSs set forth in a second BO concerning livestock grazing on public lands administered by the United States Forest Service (ACGA II). In that case, FWS

35. ACGA I, supra note 29, at 1036-37. Menges’ ranch consists of 135 acres privately held by Menges, and 220 acres held by a private corporation. The remainder consists of public lands administered by BLM, for which Menges holds grazing permits. Id. at 1037. The ranchers claimed that the “reasonable and prudent measures and mandatory terms and conditions” contained in the ITSs “would significantly reduce and, in some cases, require the elimination of livestock grazing on allotments in southeastern Arizona in derogation of the rights and privileges of ranchers holding grazing preferences established under federal laws.” Id. at 1040.

36. ACGA, supra note 2, at 1233-34.

37. Plaintiffs also claimed that: (3) the reasonable and prudent measures and mandatory terms and conditions imposed by FWS through the ITSs unlawfully modified the basic design, scope, timing and duration of the grazing permits, in violation of 50 C.F.R. § 402.14(i); (4) the reasonable and prudent measures and mandatory terms and conditions imposed by FWS contained requirements that could not be satisfied; (5) FWS failed to utilize the best scientific and commercial information in developing the ITSs; and (6) FWS failed to comply with the National Environmental Policy Act (NEPA) in issuing the ITSs. ACGA I, supra note 29, at 1037. The ACGA I Court dismissed claim 4 for lack of standing. Id. Because the ACGA I Court held that FWS had acted arbitrarily and capriciously in merely issuing the ITSs, it did not reach plaintiffs’ objections to their terms and conditions (claim 3), and in light of their success on the arbitrary and capricious grounds, ACGA stipulated to a dismissal without prejudice of claims 3, 5, and 6. Id. at 1045, n.3; ACGA, supra note 2, at 1234.

38. ACGA I, supra note 29, at 1037.

concluded in its BO that grazing activities on twenty-one out of twenty-two assessed grazing allotments would not jeopardize the continued existence of any protected species or result in the destruction or adverse modification of any critical habitat.\(^{40}\) It also determined, however, that ongoing grazing activities would incidentally take protected species on each of the twenty-two allotments.\(^{41}\) ACGA challenged the ITSs for six of these allotments: Cow Flat, East Eagle, Montana, Sears-Club/Chalk Mountain, Sheep Springs and Wildbunch.\(^{42}\)

The ITSs for the challenged allotments in both cases imposed strict requirements for the containment and monitoring of cattle grazing,\(^{43}\) and in many instances specified that the authorized take level would be exceeded "if habitat conditions deteriorated."\(^{44}\) Because the terms and conditions of the ITSs would be incorporated into the BLM and Forest Service-issued grazing permits, ranchers would be liable for exceeding authorized take levels should any habitat degradation in the specified areas occur on their watch. ACGA and Menges alleged that the terms and conditions of the ITSs would "reduce and even eliminate livestock grazing" on the allotments.\(^{45}\)

ACGA and Menges also alleged that the ITSs were deficient in that they did not demonstrate sufficient evidence that grazing would actually result in incidental take. In four instances, FWS had been unable to document the species on the allotments covered by the ITSs at the time the BO and ITSs were issued.\(^{46}\) In two other cases, FWS documented the listed species on the allotments, but cattle were physically or

40. *Id.* at *5.
41. *Id.* at *5-*6.
42. *Id.* at *6.
43. *ACGA I, supra* note 29, at 1036.
44. *ACGA, supra* note 2, at 1245 (authorized take for pygmy owl would be exceeded "if habitat conditions deteriorated."); *id.* at 1247 (authorized take for loach minnow and spikedace on East Eagle Allotment will be exceeded if "ecological conditions do not continue to improve or maintain good or better status."); *id.* at 1248 (authorized take for loach minnow on Wildbunch allotment, and for loach minnow and spikedace on Cow Flat allotment, would be exceeded if "ecological conditions do not improve under the proposed livestock management plan.") (citing ITSs). In general, FWS described the incidental take in terms of habitat characteristics. *Id.* at 1243 ("the construction of fences, the construction and existence of stock tanks for non-native fish, as well as 'other activities in the watershed' could result in a take of the razorback sucker"); *id.* at 1245 (take of the pygmy owl was anticipated due to habitat degradation that would "significantly impair essential behavioral patterns . . . ."); *ACGA II, supra* note 39, at *9 (incidental take of loach minnow and spikedace on East Eagle allotment was defined "in terms of habitat characteristics"); *id.* at *11-*12 ("FWS used habitat characteristics to define incidental take" for chub on Montana Allotment); *id.* at *13 ("FWS again used habitat characteristics to define incidental take" of the Gila topminnow on Sears-Club/Chalk Mountain Allotment); *id.* at *16 (FWS "again defined incidental take of loach minnow [on Wildbunch Allotment] in terms of habitat characteristics").
45. *ACGA I, supra* note 29, at 1037.
46. *ACGA, supra* note 2, at 1243, 44-45, 46, 47.
geographically excluded from accessing the particular areas where the species had been found. Only on the Cow Flat allotment was a listed species (the loach minnow) actually documented and directly accessible by cattle. These results are summarized in Table A below.

<table>
<thead>
<tr>
<th>Allotment/Species</th>
<th>Present?</th>
<th>Location of Species</th>
<th>Projected Injury</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACGA I/ PYGMY OWL</td>
<td>N O</td>
<td>Nine sightings in area northwest of Tucson in 1996. Owls found on allotment subsequent to district court decision.</td>
<td>Indirect through destruction of owls’ habitat/overgrazing.</td>
</tr>
<tr>
<td>EAST EAGLE/ LOACH MINNOW, SPIKEDACE</td>
<td>N O</td>
<td>Loach minnow found in Eagle Creek, three miles downstream from the allotment, and in Middle Prong Creek, one mile downstream. Nearest spikedace habitat twelve miles from allotment.</td>
<td>Direct through crushing of minnows or eggs. Indirect through sedimentation, removal of vegetative cover.</td>
</tr>
<tr>
<td>MONTANA/ SONORA CHUB</td>
<td>Y ES</td>
<td>In California Gulch, an area from which cattle are excluded by an enclosure. This allotment is part of the Coronado National Forest, the only known</td>
<td>Direct should cattle cross Mexican-American border to avoid enclosure. Indirect through sedimentation, removal of</td>
</tr>
</tbody>
</table>

47. Id. at 1246, 47.
48. Id. at 1248 ("loach minnow exist on the allotment" and "are vulnerable to direct harms resulting from cattle crossings, such as tramplings.")
49. See id. at 1243-48; Appellants-Cross-Appellees’ Opening Brief at 51-72. Ariz. Cattle Growers Ass’n v. United States Fish & Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001) (Nos. 99-16102, -16103, 00-15322, -16611). FWS did not appeal the district court’s grant of ACGA’s summary judgment motion as to the Sheep Springs Allotment. ACGA, supra note 2, at 1235.
| **SEARS CLUB-CHALK MOUNTAIN/GILA TOPMINNOW** | **NO** | Documented in a spring on allotment in 1996, but now present only in a spring on adjacent Red Creek allotment. | Direct should high stream flows allow Gila topminnow to repopulate allotment. Indirect through sedimentation, removal of vegetation. |
| **WILDBUNCH/LOACH MINNOW** | **YES** | Loach minnow live in Blue and San Francisco Rivers, but cattle geographically excluded from the portion of the Blue River within allotment. San Francisco River adjacent to, but not actually part of, the allotment. | Indirect through sedimentation, soil and vegetative degradation of tributary canyons, which can lead to exacerbation of flood damage to minnow’s habitat. |
| **COW FLAT/LOACH MINNOW** | **YES** | Loach minnow live in Blue River, which is directly accessible to cattle on the allotment. | Direct through crushing of minnow or eggs. Indirect through sedimentation, removal of vegetative cover. |

Consistent with its focus on habitat degradation, FWS authorized take levels in broad terms, looking to changes in habitat conditions rather than specific numbers of animals harmed. In the case of the razorback sucker, for instance, the court noted, “because the [FWS] could not directly quantify the level of incidental take, it determined that authorized take would be exceeded if range conditions in the allotment deteriorated and cattle grazing could not be ruled out as a cause of deterioration.”\(^{50}\) The other ITSs contained similar statements.\(^{51}\)

---

50. *ACGA*, *supra* note 2, at 1243.
51. *See supra* note 44.
B. Decisions of the District Courts

The district court in *ACGA I* held that FWS had acted arbitrarily and capriciously in issuing ITSs for the razorback sucker and the pygmy-owl, and set aside the ITSs for these species. The court concluded that FWS had failed to establish sufficient evidence showing that those species actually existed on the allotments in question.\(^{52}\) It therefore did not reach ACGA’s objections to the terms and conditions of the ITSs, and ACGA voluntarily dismissed its other claims.\(^{53}\) FWS and BLM, in turn, filed notice of appeal. At the request of the BLM, the parties agreed to stay the appeal pending judgment in *ACGA II*.\(^{54}\)

In *ACGA II*, the district court rejected the government’s contention that a Section 7 incidental take should be found where harm to a listed species is merely “likely” or “possible.”\(^{55}\) Instead, the court held that FWS must have some “reasonable certainty” that a take will occur before issuing an ITS.\(^{56}\) The district court found this reasonable certainty in, and therefore upheld, only one of the five challenged ITSs—that for the Cow Flat allotment.\(^{57}\) With respect to the other four challenged allotments, the court found that the evidence in the BO regarding the effects of grazing on habitats was not “rationally connected”\(^{58}\) to a finding of incidental takes.\(^{59}\) Hence, the court held that FWS had acted arbitrarily and capriciously in issuing ITSs for those four allotments.\(^{60}\)

FWS appealed the district court’s rulings as to four of the allotments: East Eagle, Montana, Sears-Club/Chalk Mountain and Wildbunch. ACGA cross-appealed the district court’s Cow Flat ruling. The Ninth Circuit then consolidated the appeals from *ACGA I* and *ACGA II*.

C. Decision of the Ninth Circuit

The question before the Ninth Circuit was whether FWS’s issuance of the challenged ITSs was arbitrary and capricious.\(^{61}\) The Court of Appeals upheld the *ACGA I* court’s conclusion that the issuance of ITSs for the razorback sucker and the pygmy owl was arbitrary and capricious

\(^{52}\) *ACGA I*, *supra* note 29, at 1045.

\(^{53}\) *ACGA*, *supra* note 2, at 1234.

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 1237.

\(^{56}\) *Id.* at 1240.

\(^{57}\) *Id.* at 1235.

\(^{58}\) The "rational connection" standard is one provided under the terms of the Administrative Procedure Act for a court’s de novo review of agency action. 5 U.S.C. § 706 (2003). See *infra* notes 80 and 87 and accompanying text.

\(^{59}\) *Id.* at 1234.

\(^{60}\) *Id.* at 1234-35.

\(^{61}\) *Id.* at 1233.
in light of the lack of evidence that grazing in those areas would result in actual take of those species.\textsuperscript{62} It similarly upheld the \textit{ACGA II} court's judgment that the issuance of ITSs for four of the challenged allotments was arbitrary and capricious, again due to the lack of evidence connecting grazing to the taking of species in those areas.\textsuperscript{63} The Court also upheld the \textit{ACGA II} court's finding that issuance of the Cow Flat Allotment ITS was not arbitrary and capricious, agreeing that FWS had established that grazing activities would take loach minnows on that allotment.\textsuperscript{64}

The Court of Appeals rejected the notion that the word "taking" as used in ESA section 7(b)(4) should be interpreted more broadly than in the context of Section 9. Finding that "Congress has spoken to the precise question at issue," and that deference was therefore not due the agency's interpretation, the Ninth Circuit agreed with the district court that the definition of "take" in Sections 7 and 9 of the ESA "are identical in meaning and application."\textsuperscript{65}

FWS had argued that the ESA required it to issue an ITS whenever there was the slightest possibility that a listed species would be taken.\textsuperscript{66} The court also rejected this contention, finding that "[i]f 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."\textsuperscript{67} The court concluded that "absent rare circumstances such as those involving migratory species," it is arbitrary and capricious for FWS to issue an ITS where it has no "rational basis" for concluding that an incidental taking will occur.\textsuperscript{68}

Finally, although the court upheld FWS's issuance of the Cow Flat allotment ITS, it found that FWS had failed to specify with the "required degree of exactness" when authorized incidental take levels would be exceeded.\textsuperscript{69} Condition 1 of the ITS for the Cow Flat allotment specified that incidental take levels for the loach minnow would be exceeded if "[e]cological conditions do not improve under the proposed livestock

\begin{footnotes}
\item[62.] \textit{Id.} at 1244-45.
\item[63.] \textit{Id.} at 1246, 47, 48 (Montana, Sears-Club/Chalk Mountain, East Eagle, and Wildbunch Allotments).
\item[64.] \textit{Id.} at 1249.
\item[65.] \textit{Id.} at 1237. The court applies the \textit{Chevron} standard here. Under step one of \textit{Chevron}, the court must decide independently whether Congress "has directly spoken to the precise question at issue." If so, then, as the Ninth Circuit decided here, no further inquiry is necessary. However, if the court is unable to conclude that Congress has precisely spoken, it is to defer to any "permissible" or "reasonable" interpretation of the agency. \textit{Id.} (citing \textit{Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837 (1984)).
\item[66.] \textit{Id.} at 1240-41.
\item[67.] \textit{Id.} at 1242.
\item[68.] \textit{Id.}
\item[69.] \textit{Id.} at 1249, 51.
\end{footnotes}
The court accepted ACGA's claim that this criterion was prohibitively vague. It gave FWS "unfettered discretion" to determine compliance, left no method by which ACGA could gauge its fulfillment of the condition, and left ACGA and the Forest Service "responsible for the general ecological improvement" of the 22,000-acre allotment. Although FWS need not specify numerically the members of the species that can be taken, this is the preferred method because it sets a clear criterion for compliance. Where an agency uses changes in "habitat characteristics" as its guide, it must demonstrate a "causal link" between the proposed activity (e.g., cattle grazing) and the actual taking of species before setting forth conditions for compliance. Because FWS had failed to show such a causal link, the court found its Cow Flat ITS arbitrary and capricious.

III. DISCUSSION

"[A]n Incidental Take Statement must be predicated on a finding of an incidental take." This tautology, the ultimate holding of the Ninth Circuit, does little to further our understanding of the provisions of the ESA. The Court of Appeal's opinion is, like Sweet Home before it, no "icon of clarity." Yet while Sweet Home upheld the letter and spirit of the ESA by recognizing the threat posed to endangered species through habitat modification and indirect injury, ACGA may undermine the ability of the FWS to prevent loss of species through the ITS process because it comes dangerously close to reading the indirect injury component out of the Secretary's Court-approved definition of "take."

A. A Restrictive Evidentiary Standard for Issuing an ITS

The court first held that the meaning of "take" is identical in ESA Sections 7 and 9. Hence, the Secretary's definition of "take" as including "harm" from habitat modification that results in either direct or indirect injury or death to a listed species applies equally to the issuance of an ITS under Section 7 and the prohibition of "take" under Section 9. While the Ninth Circuit approved of this definition, it emphasized that indirect harm through habitat modification will only amount to a take where it "actually kills or injures wildlife." In this sense, the court echoed Justice O'Connor's warning in Sweet Home that mere "hypothetical" or

70. Id. at 1249 (quoting ITS).
71. Id. at 1250-51.
72. Id. at 1250.
73. Id. at 1251.
74. Id. at 1233.
75. Id. at 1238.
"speculative" injury will not do. Thus, FWS may issue an ITS only when a listed species will "actually" be killed or injured as an incidental result of the proposed activity.

Similarly, the court held that the standard of proof under each section should be the same. While reaffirming the principle that "the reviewing court may set aside only those conclusions that do not have a basis in fact, not those with which it disagrees," the Ninth Circuit allowed FWS little latitude in exercising its scientific authority when issuing ITSs. The "arbitrary and capricious" standard of judicial review of agency action requires that an agency demonstrate "a rational connection between the facts found and the choices made" in a decision, although the outcome of such a review depends greatly upon the court's reading of the underlying statutory provisions. While FWS attempted to distinguish between the policies behind Sections 7 and 9, the District Courts and the Ninth Circuit found no reason to distinguish between the evidentiary standards imposed by the two provisions.

FWS had argued that the language of Section 7(b)(4) "expressly directs" it to issue an ITS in every case. Indeed, FWS's own handbook

77. "The structure of the ESA and the legislative history clearly show Congress’s intent to enact one standard for ‘taking’ within both Section 7(b)(4), governing the creation of [ITSs], and Section 9, imposing civil and criminal penalties for violation of the ESA." ACGA, supra note 2, at 1239.
78. Id. at 1236 (citing Bureau of Indian Affairs v. Fed. Labor Relations Auth., 887 F.2d 172, 176 (9th Cir. 1989)).
79. Id. The "rational connection" standard is one provided under the terms of the Administrative Procedure Act for a court's de novo review of agency action. 5 U.S.C. § 706 (2003). See infra note 86.
80. See ACGA, supra note 2, at 1239-40. In its brief to the Ninth Circuit, the government tried to make clear that it was not arguing over the definition of "take." Appellants-Cross-Appellees' Opening Brief at 31, Ariz. Cattle Growers Ass'n v. United States Fish & Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001) (Nos. 99-16102, -16103, 00-15322, -16611). Rather, the real issue was the standard of proof the district courts were now insisting upon for demonstrating incidental takes. The penalty and enforcement provisions of Section 11 of the ESA, 16 U.S.C. §1540 (2003), are designed to "halt ongoing or prevent imminent takes violating Section 9 . . . ." Id. at 31-32. Section 11 thus "addresses immediate harm. Section 7, by contrast, serves to insulate action agencies and permitees from liability for prospective, and possibly distant, takes by providing terms and conditions which allow for take incidental to the otherwise lawful action as long as the terms and conditions are complied with." Id. at 32. In the context of halting activities alleged to be currently causing takes, it makes sense to impose a high level of certainty that such takes are actually occurring. Id. "It makes no sense," however, to impose such high standards "in (1) assessing the impacts from incidental takes occurring over the life of the action, and (2) establishing appropriate terms and conditions to insulate an action agency and permitees from liability for any such takes." Id.
81. ACGA, supra note 2, at 1241. Under section 7(b)(4), the Secretary "shall" issue an ITS if she concludes that the proposed agency action and the anticipated incidental take is not likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat, or if the agency offers reasonable and prudent alternatives which
instructed the agency to issue an ITS even if no take would occur as a result of the permitted activity. Although the agency seemed to back away from that proposition, also arguing that it should be permitted to issue an ITS whenever a taking is “likely” or “possible,” the court found both positions untenable. According to the Ninth Circuit, FWS’s interpretation would permit the agency to “engage in widespread land regulation even where no Section 9 liability could be imposed.” The court declined to allow FWS such latitude.

In analyzing whether FWS had acted arbitrarily and capriciously in issuing the ITSs, the court essentially stepped into the agency’s shoes to determine whether, given the existing record, FWS rationally could have determined that an incidental take would occur. As the requirements the court imposes for establishing a valid ITS are not at all clear upon the face of the opinion, it is necessary to examine the court’s analysis in some detail.

B. What Are the Requirements for a Valid ITS?

The court set forth what amount to three basic conditions for the issuance of a valid ITS. First, absent extraordinary circumstances, the species in question must be shown to exist on the actual lands under review. The existence of the species on adjacent lands, and even in adjacent areas of the same watercourse (if those adjacent areas are not on the land under review), is not sufficient. Second, not only must the species exist on the land in question, but the species must be directly and immediately susceptible to actual injury or death as a result of the proposed activity at the time the ITS is issued. Habitat modification alone will avoid such consequences. 16 U.S.C. § 1536(b)(4) (2003). See also, Cheever, Road to Recovery, supra note 35, at 22. However, the statute also provides that, before an ITS may be issued, the Secretary must have concluded that “the taking of an endangered species or a threatened species incidental to the agency action will not” result in jeopardy or destruction of critical habitat. 16 U.S.C. § 1536(b)(4)(B) (emphasis added). That is, an incidental taking is an implied condition precedent to the issuance of an ITS.

The court declined to allow FWS such latitude. In analyzing whether FWS had acted arbitrarily and capriciously in issuing the ITSs, the court essentially stepped into the agency’s shoes to determine whether, given the existing record, FWS rationally could have determined that an incidental take would occur. As the requirements the court imposes for establishing a valid ITS are not at all clear upon the face of the opinion, it is necessary to examine the court’s analysis in some detail.

B. What Are the Requirements for a Valid ITS?

The court set forth what amount to three basic conditions for the issuance of a valid ITS. First, absent extraordinary circumstances, the species in question must be shown to exist on the actual lands under review. The existence of the species on adjacent lands, and even in adjacent areas of the same watercourse (if those adjacent areas are not on the land under review), is not sufficient. Second, not only must the species exist on the land in question, but the species must be directly and immediately susceptible to actual injury or death as a result of the proposed activity at the time the ITS is issued. Habitat modification alone

will avoid such consequences. 16 U.S.C. § 1536(b)(4) (2003). See also, Cheever, Road to Recovery, supra note 35, at 22. However, the statute also provides that, before an ITS may be issued, the Secretary must have concluded that “the taking of an endangered species or a threatened species incidental to the agency action will not” result in jeopardy or destruction of critical habitat. 16 U.S.C. § 1536(b)(4)(B) (emphasis added). That is, an incidental taking is an implied condition precedent to the issuance of an ITS.

82. ACGA, supra note 2, at 1242 (FWS handbook provided that “when no take is anticipated” the agency should state in the ITS that “The Service does not anticipate the proposed action will incidentally take any [species].”).
83. Id. at 1237.
84. Id. at 1240.
85. Id.
86. Id. at 1243 (Pursuant to Section 706 of the APA, 5 U.S.C. § 706, the court “must review de novo the actions of [FWS] under the arbitrary and capricious standard,” which requires the court to “determine whether the [ITSs] are founded on a rational connection between the facts found and the choices made by [FWS] and whether it has committed a clear error of judgment.”) (citing Motor Vehicle Mfr. Ass'n v. State Farm Mutual Auto., 463 U.S. 29, 43 (1983); see Pyramid Lake Paiute Tribe of Indians v. U. S. Dep't of the Navy, 898 F.2d 1410, 1414 (9th Cir. 1990)).
may not be sufficient. Third, where the ITS validly demonstrates incidental take, its terms and conditions must provide a clear, *directly quantifiable* standard for determining when the authorized level of take has been exceeded.

1. **Existence of the Species on the Land under Review**

Although the court acknowledged that “habitat modification resulting in actual killing or injury may constitute a taking,” it rejected FWS’s issuance of ITSs absent the documented existence of the species on the allotment. 87 In several cases, while FWS could not document listed species within the boundaries of the allotment in question, the agency did show listed species present in areas close to the allotments. 88 In the case of the East Eagle Allotment, for instance, the loach minnow had been found only one mile downstream from the allotment in 1997 (the same year the ITS was issued), yet the court was unwilling to accept the biologists’ conclusion that cattle activity in the stream would result in a take, either directly or indirectly. 89

It is unclear to what extent evidence of the species’ existence must predate the ITS. In the only ITS upheld by the court—the Cow Flat Allotment—the loach minnow had been found instream on the allotment in each year from 1994 through 1996. The ITS was issued in 1997, meaning that there was a lag time of a year or so between documentation and ITS—a lag which the court presumably deemed permissible. Whether the court would approve of a lag of any more than a year is uncertain. 90

---

87. *ACGA*, *supra* note 2, at 1244. The court carves out an exception for migratory species, however. *Id.* at 1242. Presumably, this exception is justified due to the recognition that such species are unlikely to be consistently found in habitat areas, and that modification of essential habitat may actually kill or injure them even if they are not present at the time their habitat is destroyed.

88. The Gila topminnow had been found in a spring on the Red Creek Allotment one thousand feet from a spring on the Sears Club/Chalk Mountain Allotment, and the FWS had concluded that, although the springs were not directly connected, “upstream fish movement could be possible during some flows.” *Id.* at 1246. Although the loach minnow had not been documented as existing in the portion of Eagle Creek within the East Eagle Allotment, it had been found “in Eagle Creek approximately three miles downstream from the allotment, and in Middle Prong Creek, approximately one mile downstream.” *Id.* at 1247. Loach minnow had been found in the San Francisco River, which is “adjacent to, but not actually part of,” the Wildbunch Allotment. *Id.*

89. *Id.* at 1247.

90. Certainly the fact that FWS’s biologists have determined that an animal historically present in an area will return in the future is given little credibility. Indeed, FWS’s conclusions concerning the pygmy-owl were quite accurate: as the court acknowledged, “subsequent surveys [indicating presence of the owl on the allotment] show that ‘the Service correctly anticipated that the owl was present in the areas at issue’” even though “no pygmy-owls were detected during 1997 surveys . . . .” *Id.* at 1245.
2. Direct and Immediate Susceptibility to Injury or Death from Proposed Activity

Species on the land in question must be directly and immediately susceptible to actual injury or death from the proposed activity at the time the ITS is issued. For instance, in *ACGA II*, the Sonora Chub was present on the Montana Allotment, but only in an area from which livestock were excluded. Despite the fact that cattle could access the chub’s habitat by crossing the Mexican-American border, and despite the possibility that the chub could disperse into cattle-accessible areas during periods of high instream flows, the Ninth Circuit was unwilling to uphold FWS’s ITS. The court found that there was “little factual support” for the proposition that such take would occur, and specifically held that mere “potential” for harm was insufficient to sustain an ITS.⁹¹

Indeed, while the court acknowledged the validity of indirect injury,⁹² in no case did it sustain an ITS on this basis. The only ITS upheld by the court was that for the Cow Flat allotment, in which FWS had shown that cattle were able to access and physically injure the listed species directly at the time the ITS was issued.⁹³ The court held that, because of the “specificity of the [FWS]’s data, as well as the articulated causal connection between the activity and the ‘actual killing or injury’ of a protected species,” FWS had “articulated a rational connection between harm to the species” and grazing.⁹⁴

In contrast, in the case of the Montana Allotment ITS, FWS showed that cattle excluded from the chub’s habitat still had access to the stream channel immediately upstream of that habitat. Yet this was not sufficient to sustain an incidental take finding because “there is no information about how far upstream the enclosure is nor is there site specific data that connects grazing in the enclosure and sedimentation.”⁹⁵ Thus, FWS biologists: (1) demonstrated access to upstream habitat; (2) concluded that direct take could result “during periods of high instream flow and fish dispersal”;⁹⁶ (3) concluded that indirect take could result through alteration of “the suitability of the habitat to support Sonora chub”;⁹⁷ and (4) reported that the Montana Allotment is part of the last known chub

---

⁹¹ *Id.* at 1246.
⁹² “Harming a species may be indirect, in that the harm may be caused by habitat modification, but habitat modification does not constitute harm unless it ‘actually kills or injures wildlife.’” *Id.* at 1238.
⁹³ Direct effects included possible crushing of loach minnow eggs, reduction in food availability, and actual trampling of the fish. *Id.* at 1248.
⁹⁴ *Id.* at 1248-49.
⁹⁵ *Id.* at 1246.
⁹⁶ *Id.*
⁹⁷ *Id.*
habitat in the United States. But, for the Ninth Circuit, because the chub was not immediately susceptible to direct injury at the time the ITS was issued, the "evidence that a take would occur as a result of livestock grazing" was insufficient.

Further, situations involving only potential, unproven injury, whether direct or indirect, are not sufficient. "Possible," "prospective," "speculative," or "likely" death or injury will not sustain an ITS. These strictures on findings of indirect injury through habitat modification suggest that indirect injury may never amount to a taking. The court was singularly unwilling to accept FWS's determination that sedimentation, removal of vegetative cover, or destruction of riparian habitat could result in takings of listed species not documented on the allotments in question, or not directly physically accessible by cattle.

3. Compliance Terms and Conditions of an ITS Must Provide a Clear, Directly Quantifiable Standard

Ideally, the amount of take authorized by an ITS should be specifically quantifiable. The Ninth Circuit, however, has upheld take limits based upon "a combination of numbers and estimates," and Congress has "anticipated situations in which impact could not be contemplated in terms of a precise number." However, in the absence of a specific number, FWS "must establish that no numerical value could

98. Appellants-Cross-Appellees' Opening Brief at 56, Ariz. Cattle Growers Ass'n v. United States Fish & Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001 ) (Nos. 99-16102, -16103, 00-15322, -16611) (Sonora chub "exists only in the Coronado National Forest" in which the Montana Allotment is situated).

99. ACGA, supra note 2, at 1246. The sticking point for the court seems to be the fact that, in most circumstances at issue in the cases, cow and fish would not meet in physical confrontation; while trampling receives the court's evidentiary approval without much ado, siltification, disturbance of habitat, and changes in water temperature are treated with suspicion. Perhaps due to the constant emphasis that an animal must be "actually killed or injured," the judges envisioned something more dramatic than injury or death resulting from disturbances in the "breeding, feeding, or sheltering" specifically contemplated by the federal regulations. See supra note 5, and accompanying text.

100. ACGA, supra note 2, at 1237 (court rejects FWS's contention that "Section 7 should encompass those situations in which harm to a listed species was 'possible' or 'likely'"); id. at 1244 (in rejecting ITS for razorback sucker, the court also rejects FWS's contention that "it should be able to issue an [ITS] based upon prospective harm."); id. ("Although habitat modification resulting in actual killing or injury may constitute a taking, [FWS] has presented only speculative evidence").

101. Although the court asserts that FWS has only a "low bar" to meet in proving indirect takings through habitat modification, id. at 1244, the court's consistent rejection of FWS's determinations suggests the opposite.

102. Id. at 1249.

103. Id. at 1249-50 (citing H.R. REP. NO. 97-567, at 27 (1982)).
be practically obtained." According to the Ninth Circuit, FWS could use ecological conditions as a "surrogate" for defining the amount or extent of authorized take "where data or information exists which links such changes to the take of the listed species." For instance, the court notes that FWS could use "the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts." In other words, if ecological conditions are used as a proxy for a take, those conditions must in some way be quantified and directly linked to impacts on the species.

In the case of the protected fish at issue here, FWS presumably could implement a system of water quality analysis that would indicate when water conditions had deteriorated to such an extent that fish would be injured. Or, in the case of the pygmy owl, FWS could track the loss of trees known to provide cover for the owls, or the loss of food supply on the allotment. Yet given the court's unwillingness to recognize indirect takes, it is unclear how anything other than a direct body count can establish a clear threshold for determining when authorized take levels are exceeded. Again, FWS's failure seems to be an evidentiary one. While from the biologists' perspective, habitat destruction and modification does injure protected species, without a demonstration of a direct take, FWS will be hard pressed to convince a court that injury is even probable, let alone demonstrate how authorized levels of injury will be exceeded.

C. Implications of the Court's New Standards

Even though the court assumes the role of biologist through its de novo review of FWS's actions in these cases, it imposes a rather counter-biological view of ecosystem operation. The court said it would uphold an ITS should FWS demonstrate a rational connection between habitat degradation and actual injury to a listed species. Yet the court consistently rejected FWS's scientifically rational conclusions that the deleterious effects of cattle grazing on fragile riparian corridors adjacent

104. Id. at 1250.
105. Id.
106. Id. (emphasis added).
107. Id. ("for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads" could be used, but only "if a sufficient causal link" is established between these changes and "the take of the listed species."). This, of course, begs the question of what evidence is sufficient to establish such a "causal link," for it is these very types of changes that FWS found could result in incidental takes in the first place. And, of course, it was these very types of changes that the court rejected as insufficient for establishing such takes.
108. See supra note 80.
109. See infra notes 110-111, and accompanying text.
to demonstrated endangered species habitat would injure those species. Given the fact that livestock grazing has contributed to annihilation of the natural habitat of the species in this case, it hardly seems logical to call FWS's conclusions about those same activities irrational.

Ecologically-if not legally-speaking, it is hardly controversial that adverse modification and destruction of the known habitat of a species constitutes "actual injury." Habitat destruction is the leading cause of a species becoming endangered in the first place. The ESA declares as much in its first paragraph: "The Congress finds and declares that... various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation..."

The Ninth Circuit made clear, however, that the proper vehicle for habitat conservation is the critical habitat listing procedure under ESA.
Section 4,114 not the ITS provisions of Section 7.115 There are no similar provisions that protect undesignated habitat of listed species, despite abundant evidence that the destruction of any habitat of a listed species is injurious to such species.116 The ESA provides a broad mandate to “halt and reverse the trend toward species extinction, whatever the cost.”117 FWS, in attempting to implement this mandate, reads the incidental take provisions as requiring the issuance of an ITS any time it was likely that destruction of habitat would injure listed species. By enforcing strict, yet unspoken standards of proof and causation, the Ninth Circuit substantially frustrated this goal.

The Ninth Circuit correctly asserts that FWS should be held to a rational evidentiary standard in implementing its mandates under the ESA. Yet, the ITSs as described by the court do not exactly leap off the page as paragons of irrationality. Under what standard is it “irrational” to conclude that cattle grazing and trailing only one mile upstream from documented endangered species habitat could result in indirect injury—indeed, even direct injury—to that species? Under what standard is it “irrational” that, in foraging for food, cattle will cross national boundary lines and reach endangered species habitat from which they are otherwise excluded? And in what sense is it “irrational” to conclude that cattle grazing, long documented as a leading cause of biodiversity loss and massive destruction of Western riparian habitat,118 will “actually kill or injure” listed species nearby?

It is troubling that the court, in assuming the role of biological analyst, failed to specify how a “rational connection” between habitat

114. Id. § 1533(a)(3); see also § 1532(5)(A) (2002) (definition of “critical habitat”); supra, note 6. With certain limited exceptions, the Secretary must designate critical habitat “concurrently” with listing of a species. 16 U.S.C. § 1533(b)(6)(C). However, the designation process “requires a complex environmental and economic analysis” and FWS and NMFS do not have a great track record in completing such designations. Cheever, Road to Recovery, supra note 34, at 57. For an in-depth analysis of the meaning of critical habitat and the standards used to designate and protect it, see James Salzman, Evolution and Application of Critical Habitat Under the Endangered Species Act, 14 HARV. ENVTL. L. REV. 311 (1990); Katherine S. Yagerman, Protecting Critical Habitat Under the Federal Endangered Species Act, 20 ENVTL. L. 811 (1990).

115. ACGA, supra note 2, at 1244 (“Absent this [critical habitat designation] procedure, however, there is no evidence that Congress intended to allow [FWS] to regulate any parcel of land that is merely capable of supporting a protected species.”)

116. The ESA applies, of course, only to species that have been driven to the verge of extinction. Unfortunately, as many commentators have noted, the ESA “does not make it illegal to exploit a ‘healthy’ species population beyond that species’ ability to sustain exploitation or to destroy or degrade the habitat of a healthy species until that destruction drives the species to the verge of extinction.” Cheever, Introduction to Takings, supra note 17, at 118.


118. See supra note 110; see also WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST (George Wuerthner & Mollie Matteson, eds., 2002).
destruction and a take may be demonstrated. While it seems clear that the take regulation should be "limited by ordinary principles of proximate causation" and foreseeability, the United States Supreme Court has also made clear that indirect harm through habitat modification can constitute a take.

By rejecting the biologists' careful determinations of the harmful effects of cattle grazing on listed species as arbitrary and capricious, the court has invited broader challenge to FWS's scientific authority—not only in issuing ITSs, but in performing biological assessments, designating critical habitat, and fulfilling any other of its myriad duties under the ESA. And by fashioning a theory of ecosystem operation based on the arbitrary boundary lines of grazing allotments, the Ninth Circuit robbed the indirect injury provision of much, if not all, meaning.

CONCLUSION

The Ninth Circuit in ACGA held that FWS may only issue an ITS when there is a "rational connection" between the facts of the case and

---

119. Babbitt v. Sweet Home Chapter of Cmty's. for a Great Or., 515 U.S. 687, 709 (1995) (O'Connor, J. concurring); see also, Desiderio, supra note 23, at 801 (FWS should "bear the burden to prove that land uses in geographical areas outside critical habitat will proximately cause actual injury.");

120. Sweet Home, 515 U.S. at 702 ("Secretary's interpretation of 'harm' to include indirectly injuring endangered animals through habitat modification permissibly interprets 'harm'"); id. at 704 ("Congress intended "take" to apply broadly to cover indirect as well as purposeful actions.")

121. FWS and NMFS perform scientific functions. Decisions to list species as endangered or threatened, to designate critical habitat, and to issue incidental take statements are all based on careful data collection, analysis and predictive modeling. By overriding such scientific decisions in one context, the court signals its willingness to question these agencies' authority and professional capabilities in others. Such a willingness will not be lost on those who wish to challenge FWS and NMFS decisions in other arenas. See, e.g., R. Clark Morrison & Alicia Guerra, Proving the Negative: Fish and Wildlife Service Suffers Setback in Federal Court (Morrison and Foerster, LLP), Dec. 26, 2001, available at http://www.mofo.com/news/bulletin.cfm?MCatID=7574&concentrationID=&ID=627&Type=7 ("the case should impose some discipline on the USFWS, which often restricts the development of public and private projects based on limited evidence of the need for those restrictions."); Hard Evidence Required Before Regulating Endangered Species on Private Lands, (Bingham McCutchen, LLP), Feb. 25, 2002, available at http://www.bingham.com/Bingham/webadmin/documents/radIBESC.pdf ("Arizona Cattle Growers sends a tough message to [FWS] with regard to its authority to impose conditions and limitations on land use... 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 [FWS] regarding take and incidental take permits." Also counseling clients "not to simply accept the [FWS]'s presumption that it can impose its ESA authority."); Two Recent Decisions Scrutinize the Role of Science in Endangered Species Act Decisions (Latham & Watkins, LLP, Environmental Dept.), Apr. 4, 2002, available at http://www.lw.com/resource/Publications/ClientAlerts/default.asp?yid=&pid=233&search=Arizona%20Cattle%20Growers ("The Ninth Circuit decision in Arizona Cattle Growers may help to discipline the science behind FWS biological opinions by reaffirming the requirement that scientific evidence must support any FWS Section 7 determination that a take of a listed species will occur.").
the agency's conclusions that incidental takes will occur. The court also emphasized that habitat modification alone, without a showing of actual death or injury to endangered species, is not a "take." Further, the court held that the meaning of "take" is the same for ESA Sections 7 and 9. Finally, the ACGA court set three new limits on the issuance of an ITS. First, except perhaps in extraordinary circumstances involving migratory species, listed species must be documented as existing on the land in question at the time of the ITS. Second, species must be directly and immediately susceptible to injury or death from the proposed action. Third, the terms and conditions specified in an ITS must present a clear, directly quantifiable standard for determining when authorized take levels will be exceeded.

In asserting these new standards, and in rejecting FWS's findings as arbitrary and capricious, the court came close to eliminating the "indirect injury" provision of Section 9 of the ESA, upheld by the Supreme Court in *Sweet Home*. And by rejecting FWS's scientific determinations that habitat modification harms listed species, the court denigrated FWS's authority to carry out its protective duties under the ESA. This is good news for cattle ranchers and other federal land users motivated to avoid the strictures of environmental protections. However, it is not such good news for agencies like FWS charged with conserving listed species and regulating activities on federal lands.

The very reason a species is listed as endangered is because it has become, through habitat destruction and other forms of human intervention, *rare*. The rarer the species, the harder it is to find an individual member in a given tract of habitat. And, of course, the more habitat that is destroyed, the closer the species will be driven to extinction—rendering it even less likely that evidence of the species will be discovered in those few areas left to sustain it. Further destruction of such habitat "harms" these species, "injures" these species, and "significantly impairs essential behavioral patterns, including breeding, feeding or sheltering," of these species. The only "irrational" approach to the Secretary's definition of "take" is to deny this.