

**THE ENDANGERED SPECIES ACT AND CURRENT PROBLEMS  
CONCERNING THE ADMINISTRATION OF LIVESTOCK GRAZING  
ON NATIONAL FORESTS IN THE SOUTHWEST**

**October 26, 2001**

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The purpose of this paper is to highlight significant problems occurring in the administration of livestock grazing on National Forests in the Southwestern Region of the National Forest System (Arizona and New Mexico). There are approximately 1,300 individual grazing allotments within the 11 National Forests that comprise this region. These grazing allotments cover a land base of nearly 19 million acres, and approximately 1,600 persons hold permits and leases that authorize the use of these lands for livestock grazing.

The ability to graze livestock on public lands in the Southwest is vitally important to the region's ranching industry. Although Arizona contains a total of approximately 73 million acres of land, only 18 percent of that land is in private ownership. More than 11 million acres of land within Arizona are administered by the Forest Service, which comprise 15 percent of all land within the state. Moreover, the substantial portion of Arizona's best rangeland is located within National Forests in central and eastern Arizona, where temperatures are cooler and precipitation levels are greater.

Ranching has been and remains an integral part of the custom and culture of rural Arizona counties such as Apache, Greenlee, Navajo, Gila, Yavapai, Graham and Cochise Counties. It contributes to the stable economic base of communities in rural areas. In addition, county governments receive revenues from various grazing fees and associated taxes. Because of the extremely small percentage of privately-owned land in most rural counties in the

Southwest, revenues from grazing on National Forests and other public lands is an important source of revenue for essential governmental functions.

Since the mid-1990s, the Forest Service has imposed increasingly severe restrictions on livestock grazing, in the form of reductions in stocking levels, exclusion of livestock from portions of allotments, limits on the amount of forage that can be consumed by livestock, and changes in the period of use. These restrictions threaten the viability of many ranching operations. This administrative change is being driven by the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, et seq., which is administered by the Fish and Wildlife Service (“FWS”). In some cases, restrictions on grazing are necessary to comply with the requirements imposed under ESA Sections 7 and 9. In many cases, however, Forest Service employees are improperly interpreting and applying the ESA to justify their actions.

Some Forest Service employees appear to be genuinely confused about the ESA and its application to the administration of livestock grazing and other land uses. Other Forest Service employees are simply using the ESA as an excuse to reduce stocking levels or to dictate management prescriptions without regard to the impact on permittees. In addition, there appears to be a general overreaction to threats of litigation from groups categorically opposed to grazing on federal land and a desire to placate these groups, which has simply lead to more lawsuits being filed.

In any case, the ESA is being misinterpreted and misused in the Southwestern Region, as the examples below will demonstrate. These abuses can be eliminated without the need for Congressional action or the amendment of any rule or regulation: The Forest Service simply

needs to incorporate ESA compliance into its existing decision-making processes in the manner intended by Congress.

## **THE REGULATORY FRAMEWORK.**

### **A. Overview of the Section 7 Consultation Process**

Section 7 of the ESA, 16 U.S.C. § 1536, requires federal agencies to ensure that their actions will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat designated for an endangered or threatened species. The “no jeopardy” requirement applies only to federal agencies, i.e., the Forest Service, and not to activities by non-federal entities. The process by which federal agencies satisfy their obligation to avoid jeopardy under Section 7 is referred to as consultation.

A federal agency that is proposing an action must initially determine if the proposed action “may affect” listed species or critical habitat. Consequently, the initial question is whether there are any listed species or critical habitat located in the area likely to be impacted by the action.<sup>1</sup> The federal agency may either request that the FWS provide a list of listed species and critical habitat in the project area or provide notification of the listed species and critical habitat believed to be in the project area to the FWS. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(c). The FWS must respond, in either case, within 30 days, based on the best scientific and commercial data available. 50 C.F.R. § 402.12(d). ***If no listed species or critical habitat***

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<sup>1</sup> It should be emphasized that the requirements discussed below apply only to habitat that has been designated as critical under Section 4 of the ESA. See 16 U.S.C. §§ 1532(5)(A) (definition of “critical habitat”) and 1533(b)(2) (basis for designating critical habitat). The ESA does not protect “suitable” or “potential” habitat.

*are present in the project area, nothing further is required: the action may proceed without violating Section 7.* See Final ESA Section 7 Consultation Handbook 3-3 (Fish and Wildlife Service March 1998) (flow chart of informal consultation process; copy attached). See also Terry Rabot, “The Federal Role in Habitat Protection,” Endangered Species Bulletin 10-11 (Fish and Wildlife Service Nov./Dec. 1999).<sup>2</sup>

However, if listed species or critical habitat are present, then the federal agency proposing the action will perform an analysis to determine whether the action “may affect” the listed species or critical habitat. A biological assessment is required only if the proposed action constitutes a “major construction activity.” A “major construction activity” is defined as “a construction project (or other undertaking having similar physical impacts) which is a major federal action significantly affecting the quality of the human environment” under NEPA. 50 C.F.R. § 402.02. If the proposed action is not a “major construction activity,” the federal agency may perform a less formal evaluation of the proposed action’s impacts. In either case, if the federal agency determines that any listed species and critical habitat that are present in the project area will not be affected by the proposed action, then the proposed action may proceed. 50 C.F.R. § 402.12(k); Final ESA Section 7 Consultation Handbook, supra; Rabot, supra. The federal agency is required to consult with FWS only if listed species or critical habitat are actually present and may be affected by the proposed action.

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<sup>2</sup> Mr. Rabot is a biologist with the Division of Endangered Species, Branch of Consultation and HCPs, in the FWS Arlington, Virginia headquarters office. His article describing the consultation process is available on the FWS’s website at <http://endangered.fws.gov.bulinfo.html>.

If the federal agency proposing the action believes that the action, while having some effects on listed species or critical habitat, is not likely to adversely affect the listed species or critical habitat, the federal agency may request that FWS concur with its evaluation. If FWS concurs, no additional consultation is required. This process is known as informal consultation. See 50 C.F.R. §§ 402.12(j) & (k), 402.12, and 402.14(b)(1). See also Final ESA Section 7 Consultation Handbook, supra. As shown in the attached flow chart, informal consultation is a streamlined process that normally proceeds very quickly.

However, if the federal agency proposing the action believes that the action is likely to adversely affect listed species or critical habitat, or if FWS does not concur with the federal agency's determination that the impacts on listed species or critical habitat will not be adverse, formal consultation is required. 50 C.F.R. §§ 402.12(k) and 402.14(a). During formal consultation, a more thorough evaluation of the proposed action is undertaken, and at the conclusion of consultation, the FWS provides a biological opinion regarding the impacts of the proposed action. 16 U.S.C. § 1536(3)(A); 50 C.F.R. § 402.14(g) & (h). The biological opinion will state whether FWS believes the proposed action is likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. 50 C.F.R. § 402.14(h)(3). If a "jeopardy" biological opinion is issued, FWS will include reasonable and prudent alternatives (to the extent available) to the proposed action that are necessary to avoid jeopardy to the species. 16 U.S.C. § 1536(3)(A); 50 C.F.R. § 402.14(h)(3).

The "jeopardy" standard is a high threshold. The proposed action must jeopardize both the survival and the recovery of the listed species. See 50 C.F.R. § 402.02 (definition of "jeopardize the continued existence of"). The standard for finding destruction or adverse

modification of critical habitat likewise requires a determination that impacts to the habitat will threaten both the survival and the recovery of the species. See 50 C.F.R. § 402.02 (definition of “destruction or adverse modification”). Adverse effects, including deaths of members of a species, will not necessarily result in a jeopardy determination. Similarly, the fact that an action may destroy future habitat of a species will not, by itself, support a jeopardy determination. As previously noted, suitable and potential habitat do not receive protection under the ESA.

**B. The Rights of an “Applicant”**

Normally, consultation occurs between a federal agency (here, the Forest Service) that is proposing an action and FWS. However, when the proposed action involves a federal contract or permit, such as a grazing permit held by a rancher, the rancher has the right to participate in the consultation process as an applicant. The term “applicant” is defined as “any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.” 50 C.F.R. § 402.02. Thus, all ranchers holding a permit or lease authorizing livestock to be grazed on National Forest land are applicants for the purposes of Section 7 and FWS’s regulations governing consultation. FWS’s regulations grant applicants several important rights in connection with the consultation process.

First, the Forest Service is required to provide the applicant with the opportunity to submit information for consideration during the consultation. 50 C.F.R. § 402.14(d). Thus, the rancher may prepare studies, reports or other scientific and commercial data and provide that information to FWS for consideration during the consultation process. Notably, FWS is required to “[r]eview all relevant information provided by the Federal agency or otherwise available,” which includes information submitted by the ranchers. 50 C.F.R. § 402.14(g)(1). In addition, if

any on-site inspection of the rancher's allotment occurs, the rancher has the right to be present during the inspection along with representatives of the Forest Service and FWS. Id.

Second, FWS is required to discuss its evaluation of the information it has received or obtained, as well as the basis for its finding in the biological opinion and the availability of reasonable and prudent alternatives, with both the Forest Service and the rancher. 50 C.F.R. § 402.14(g)(5). Moreover, the regulations instruct FWS to "utilize the expertise of the Federal agency *and any applicant* in identifying these alternatives." Id. (emphasis supplied). Thus, the rancher should be involved in all meetings and discussions relating to FWS's evaluation of the data provided or developed during the consultation and in the identification of any reasonable and prudent alternatives to the proposed action.

FWS is also required to make the draft biological opinion available to the federal agency. The applicant is entitled to a copy of the draft opinion. 50 C.F.R. § 402.14(g)(5). The applicant may then provide comments on the draft biological opinion to the agencies.

The rancher's applicant status also determines the time period within which the consultation must be completed. Under Section 7(b) of the ESA, the statutory time limit for consultation is 90 days or such time as is mutually agreed to between the federal agency and FWS. 16 U.S.C. § 1536(b)(1)(A). However, when a permit or license applicant is involved, the ability of the agencies to mutually extend the consultation period is limited. 16 U.S.C. § 1536(b)(1)(B). The agencies may extend the 90-day consultation period without the consent of the applicant by an additional 60 days, but only if FWS, prior to the close of the 90-day period, provides the applicant a written statement setting forth (i) the reasons why a longer consultation period is required; (ii) the information that is required to complete the consultation; and (iii) the

estimated date on which the consultation will be completed. 16 U.S.C. § 1536(b)(1)(B)(i); 50 C.F.R. § 402.14(e). In any case, a consultation involving an applicant cannot be extended beyond 150 days unless the applicant expressly consents to an additional time extension. Id.

Unfortunately, in practice, ranchers are rarely afforded the right to participate in the consultation process. Typically, the rancher's only involvement is review of the draft biological opinion, by which time it is often too late to have any meaningful input. Moreover, as discussed below, the Forest Service and FWS have begun to use the informal consultation process, depicted in the attached flow chart, to negotiate standards and requirements designed to eliminate all impacts. The rancher is excluded from this process.

**C. Section 9 “Take” Prohibition**

Section 9(a)(1) of the ESA, 16 U.S.C. § 1538(a)(1), makes it unlawful for any person to “take” any endangered or threatened species. The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” with respect to listed species. 16 U.S.C. § 1532(19). In contrast to Section 7, the Section 9 prohibition against the taking of listed species applies to all persons, and is not limited to federal actions.

FWS has promulgated regulations that define the terms “harm” and “harass” contained in the definition of “take.” The definition of the term “harm” has generated the most controversy because it is the only term in the definition of “take” that refers to the modification of habitat:

*Harm* in the definition of “take” in the [ESA] means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.<sup>3</sup>

In Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 U.S. 687 (1995), the Supreme Court affirmed FWS’s definition of the term “harm” in response to a facial challenge to the regulation. Notably, in the court’s various opinions, all of the justices agreed that the regulation defining “harm” requires a showing of *actual* death or injury to members of a listed species as a result of habitat modification, and that habitat modification alone does not violate Section 9. The majority opinion noted that “every term in the regulation’s definition of ‘harm’ is subservient to the term ‘an act which actually kills or injures wildlife.’” 515 U.S. at 700 n.13. Justice O’Connor, in her concurring opinion, stated that the harm regulation “applies [only] where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals protected under the Endangered Species Act.” Id. at 713. Thus, “that a protected animal could have eaten the leaves of a fallen tree or could, perhaps, have fruitfully multiplied in its branches is not sufficient under the regulation.” Id. at 711.

In short, the term “harm” may apply to activities that modify habitat only if the activity (1) significantly modifies or degrades habitat and (2) *actually kills or injures members of a listed species*. Modification of habitat that may be suitable for a listed species, even habitat designated as “critical” under Section 4 of the ESA, is insufficient to establish a taking. The

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<sup>3</sup> The definition of the term “harass,” which is also found in 50 C.F.R. § 17.3, does not include the “concept of environmental damage,” such as the modification of habitat. See 40 Fed. Reg. 44412, 44413 (Sept. 26, 1975). Instead, two elements must be shown: (1) the likelihood of injury to wildlife, and (2) some degree of fault, either an intent to harass or negligence. See 46 Fed. Reg. 29490, 29491 (June 2, 1981).

habitat modification must proximately cause death or injury to individual members of a listed species to violate Section 9.

The Arizona Cattle Growers' Association ("ACGA") has recently been involved in two lawsuits regarding the scope and application of Section 9 to livestock grazing. In the first lawsuit, Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service, 63 F.Supp.2d 1034 (D. Ariz. 1998), the ACGA challenged the lawfulness of certain incidental take statements ("ITSs") that were issued by FWS in a programmatic biological opinion concerning livestock grazing on land administered by the BLM in southeastern Arizona. The ITSs contained in the biological opinion restricted livestock grazing on a number of allotments in order to protect habitat for several listed species, including the cactus ferruginous pygmy-owl and the razorback sucker. The ACGA contended that FWS had acted illegally and in excess of its authority in determining that grazing would take members of those species and by imposing restrictions on livestock grazing by means of the ITSs to protect habitat.

In an order filed December 10, 1998, U.S. District Judge David Alan Ezra ruled in favor of the ACGA and declared that the ITSs for the pygmy-owl and razorback sucker were arbitrary, capricious and unlawful. The court rejected FWS's argument that the modification of habitat, including habitat designated as critical for the razorback sucker, was sufficient to establish a taking and support the issuance of the ITSs:

[FWS's] argument is inadequate to demonstrate the requisite harm to constitute a taking. The language of the regulation states that "harm" includes habitat modification or degradation only if it results in actual injury or death to wildlife. The Supreme Court recently reiterated the importance of actual death or injury in the definition of "harm" [in Sweet Home]. . . . [T]he Supreme Court concluded that the modification or degradation of habitat can constitute "harm," and by extension, a "take," but only if there is

evidence that the habitat modification will result in actual injury or death to wildlife. If Defendants are unable to provide evidence indicating that the listed species even exist on the allotments at issue, they certainly cannot show that the habitat modification they speak of will “actually kil[l] or injur[e] wildlife.”

63 F.Supp.2d at 1042.

FWS issued another biological opinion in February 1999 pertaining to livestock grazing on 22 allotments administered by the Forest Service within National Forests in Arizona and New Mexico. Despite Judge Ezra’s ruling, FWS concluded that grazing would take members of listed species in violation of Section 9 and issued ITSs imposing restrictions on livestock grazing under the guise of preventing take even though, in a number of instances, members of a listed species were not present. In April 1999, the ACGA filed a lawsuit challenging six of the ITSs. Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife Service, CIV 99-0673-PHX-RCB (D. Ariz.).

In an order filed December 14, 1999, Senior U.S. District Judge Robert C. Broomfield again ruled that an ITS is appropriate only when a take has occurred or is reasonably certain to occur, rejecting the FWS’s argument that the term “take” (and by implication, “harm” and “harass”) has a different meaning in the context of consultation under Section 7 as when used in the context of Section 9. Moreover, with the exception of one allotment, the court held that FWS did not have a rational basis for determining that the take of members of listed species may occur and for issuing ITSs and imposing restrictions on grazing activities. In each case, either members of a listed species were not found within the allotment, or were found in locations from

which cattle had already been excluded. Under these circumstances, the court held that FWS had again acted in an arbitrary and unlawful manner in issuing the ITSs.<sup>4</sup>

## **CURRENT PROBLEMS AND ABUSES**

### **A. Improper “Effects” Determinations Are Leading to Unnecessary Consultations**

As explained above, formal consultation is required under Section 7 only when a proposed federal action may *adversely* affect a listed species or the primary constituent elements of critical habitat that has been designated for a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.12(a) & (k), 402.13(a) and 402.14(a). Put simply, if no members of a listed species are present within or in the vicinity of a grazing allotment and if no critical habitat is found within the allotment, consultation is neither required nor necessary. The Forest Service either does not understand these basic criteria or is choosing to ignore them in order to eliminate grazing and placate organizations philosophically opposed to natural resource use and development. Forest Service biologists routinely make “may affect/likely to adversely affect” determinations, thereby triggering formal consultation, when there is no evidence that livestock grazing is actually affecting a listed species or a listed species’ critical habitat.

A recent example of this sort of erroneous “effects” determination is found in a biological assessment issued by the Tonto National Forest in 1999.<sup>5</sup> “Biological Assessment of the Effects

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<sup>4</sup> FWS appealed both decisions. These appeals have been consolidated and were argued before the Ninth Circuit Court of Appeals in March 2001.

<sup>5</sup> The Tonto National Forest is located in central Arizona, northeast of Phoenix. It contains more than 2 million acres of land.

of Ongoing Grazing Management on 25 Allotments” (March 31, 1999) (“Tonto BA”). In this document, the Forest Service analyzed the effects of livestock grazing on 25 allotments within the Tonto National Forest on 18 species of wildlife, fish and plants. The Forest Service determined that livestock grazing under current management practices was likely to adversely affect virtually every one of the 18 listed species, even though many of the species are not found within the particular allotments and, in some cases, are not present within the Tonto National Forest.

For example, the Forest Service determined that ongoing livestock grazing on 24 of the 25 grazing allotments is likely to adversely affect two listed species of bat, the lesser long-nosed bat and the Mexican long-nosed bat. The lesser long-nosed bat is a nectar, pollen and fruit-eating bat that annually migrates from Mexico to southern Arizona and southwestern New Mexico, arriving in April and departing in September. However, there is no evidence that this species of bat has ever migrated as far north as the Tonto National Forest. Similarly, the Mexican long-nosed bat occurs from southwestern Texas, southwestern New Mexico and through much of Mexico to Guatemala. The primary roosting site for this bat is a cave in Big Bend National Park in Texas. However, this species of bat has never been observed in Arizona. Despite the fact that neither species has been observed within the Tonto National Forest, the Forest Service’s biologists concluded that grazing would adversely affect these species because “suitable” foraging habitat could be present on the allotments and this habitat could be affected by grazing.

Another example from the Tonto BA relates to the cactus ferruginous pygmy-owl, a subspecies of ferruginous pygmy-owl whose northernmost range extends into southern Arizona.

Once again, no pygmy-owls have been observed on or near the Tonto National Forest for some 30 years. In 1971, pygmy-owls were seen within the extreme southwestern portion of the National Forest (but not on or near the allotments subject to the biological assessment). Moreover, no critical habitat has been designated within any of the grazing allotments, and there is no evidence that grazing adversely impacts the pygmy-owl, which is considered a habitat “generalist” and is currently found in xeroriparian and desertscrub vegetation types. Nevertheless, Forest Service biologists determined that livestock grazing on 15 of the allotments is likely to adversely affect the pygmy-owl.

Similar determinations were made with respect to several different species of fish. For example, ongoing grazing on one of the allotments was determined by Forest Service biologists to be likely to adversely affect the bonytail chub, which has never been found within any waters within the Tonto National Forest and is currently found in the upper Colorado River basin and in Lake Mohave on the Colorado River north of Laughlin, Nevada – some 300 miles from the Tonto National Forest.

Another example is the desert pupfish, a tiny fish that was once widespread in southern Arizona, southeastern California, northern Baja California and Sonora. Pupfish are apparently limited to low desert habitats unless water temperatures are moderated by thermal discharges. No natural populations of desert pupfish occur within the Tonto National Forest, and there is no evidence that pupfish were historically found in central Arizona. Nevertheless, ongoing livestock grazing on eight allotments was determined to be likely to adversely affect the pupfish because potential pupfish habitat could be present or, in some cases, the allotments are within the “elevational range” of the species.

A number of additional examples from the Tonto BA could be provided. In each case, a determination was made by the Forest Service that ongoing livestock grazing would be likely to adversely affect a listed species, notwithstanding the fact that the species is not found within the allotment or, if found within the allotment, there is no scientific data suggesting that grazing's impacts are adverse. The Forest Service has apparently forgotten that a biological assessment is simply a vehicle to determine whether species are present in the area of the proposed action and, if so, whether the proposed action will adversely affect those species. As explained by the FWS:

The purpose of a "biological assessment," as stated in [50 C.F.R.] § 402.12(a), is to evaluate the potential effects of the action on listed or proposed species or designated or proposed critical habitat and determine whether any such species and habitat are likely to be adversely affected by the action. Biological assessments are designed to assist Federal agencies in "determining whether section 7(a)(2) consultation should be initiated ***by identifying endangered or threatened species that may be present in the area affected by their proposed project*** and by identifying the impacts of those projects on such species."

Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926, 19945 (1986), quoting H.R. Rep. No. 697, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 14 (1979) (emphasis supplied). While perhaps more extreme than most Forest Service biological assessments, the Tonto BA nevertheless illustrates the type of analysis that is being used by the agency to determine if consultation is required.

Another, related problem is the Forest Service's recent use of informal "guidance criteria" to make effects determinations that trigger formal consultation. These guidance criteria are apparently developed by means of closed-door negotiating sessions between Forest Service and FWS biologists and are ultimately issued as some sort of informal guidance document.

There is no public participation in the development of these guidance criteria, and ranchers and other affected members of the public are excluded from the process.

Under these guidance criteria, the Forest Service is not required to find that members of a listed species or critical habitat are actually present on a grazing allotment prior to initiating consultation. Instead, the criteria typically focus on the presence of suitable habitat or, in some cases, the possible development of habitat that could be suitable for a listed species in the future. For example, a “may affect” finding is required under the guidance criteria whenever the “environmental baseline” for a listed species is determined to be more than moderately to slightly degraded. Similarly, if a fishery biologist finds that listed species’ “habitat” – an undefined term – may be present on an allotment, a “may affect” finding is mandated without regard to whether members of the species or its critical habitat are actually present.

The use of these informal criteria is regarded as mandatory by Forest Service line officers in the Southwestern region. For example, in connection with a recent administrative appeal by an Arizona Cattle Growers’ Association member, Johnson Cattle Company, the district ranger explained in his responsive statement:

Determination of effects must be based upon grazing guidance criteria for the Southwest Region of the Forest Service. These criteria are designed for use by qualified F. S. fish and wildlife biologists and botanists to prepare and document the site-specific preliminary assessments for each grazing allotment necessary for consultation under Section 7 of the ESA.

In that case, the district ranger determined ongoing livestock grazing would adversely affect the spikedace, a small, listed species of minnow, on the basis of such criteria as soil conditions, lack of site inspections by fish biologists, and the presence of potential habitat, even though there was

no evidence that spikédace had ever existed within the allotment and the nearest spikédace was some 50 miles away.

In short, the Forest Service, at least in the Southwestern Region, has apparently discarded the criteria specified in the FWS's regulations and that agency's consultation handbook, and has developed its own set of criteria for determining when consultation is necessary. These criteria go well beyond what the ESA actually requires. As explained by the district ranger in connection with the Johnson Cattle Company appeal:

Although the ESA only requires formal consultation when there are impacts to members of a species or critical habitat, the [Forest Service] has established grazing guidance criteria that go far beyond the ESA in that "may affect, likely to adverse[ly] affect" calls are frequently called for, even in the absence of a species or suitable [*sic*] habitat.

The Forest Service needs to carefully re-examine what is actually required under Section 7 and to base its determinations on the language of the statute and its implementing regulations. As the foregoing examples demonstrate, the criteria currently being employed bear little resemblance to the law's requirements, and unnecessarily generate the need for consultation on numerous allotments. This in turn ties up agency personnel and resources, and creates controversy that could be avoided, including lawsuits by so-called environmental groups.

**B. Use of the Informal Consultation Process to Negotiate the "Action" with FWS**

Another, closely-related problem is the improper use of the informal consultation process to "negotiate" the proposed action with FWS biologists and without the participation of the grazing permittee. As discussed above, Section 7 does not require formal consultation and the preparation of a biological opinion by FWS unless the proposed action is likely to adversely

affect a listed species or critical habitat. In other words, even assuming that members of a listed species or critical habitat are present, formal consultation is not required unless the effects of the proposed action are likely to be adverse. The informal consultation process, as shown in the attached flowchart from the FWS Consultation Handbook, is intended to provide a quick and simple way of obtaining the concurrence of the FWS so that formal consultation can be avoided.

Unfortunately, this process is being abused. All too often, informal consultation now consists of extended, closed-door negotiations between agency biologists. The point of these negotiations appears to be the elimination of any effects, regardless of whether those effects are adverse or innocuous. When this negotiating process is coupled with the inappropriate “effects” determinations discussed in the preceding section, the result is a new action that severely restricts the rancher’s rights under his grazing permit.

For example, in the Johnson Cattle Company appeal discussed above, the Forest Service and FWS conducted a series of meetings over a period of many months, from which the permittee was excluded (in fact, the permittee was not even aware that these meetings were taking place). Ultimately, the district ranger issued a decision unilaterally imposing new forage utilization standards, which were established during negotiations between agency biologists. The purpose of these new forage utilization standards was to protect “potential habitat” for the southwestern willow flycatcher. Once again, flycatchers were not present on the allotment, nor was any critical habitat designated within the allotment. Moreover, the allotment did not contain any habitat currently suitable for flycatchers. Instead, forage use by the permittee’s livestock was severely restricted in order to promote the possible future development of habitat.

This use of the informal consultation process to negotiate modifications to a rancher's grazing permit is improper in several different respects. Obviously, there is no statutory authority and no Forest Service regulation that allows forage utilization standards or other management prescriptions to be established by means of closed-door negotiations between agency biologists. In fact, this process is inconsistent with the requirements set forth in the Federal Land Policy and Management Act of 1976, as amended by the Public Range Lands Improvement Act of 1978, 43 U.S.C. §§ 1701-1785. The Public Range Lands Improvement Act amended various provisions of the Federal Land Policy and Management Act to provide that permit holders must be directly involved in the allotment management planning process. To ensure that a close and cooperative relationship would exist between federal land managers and permit holders, Congress amended 43 U.S.C. § 1752 to require that allotment management plans be developed "in careful and considered consultation, cooperation and coordination with the lessees, permittees and landowners involved." See H.R. Rep. No. 1122, 95<sup>th</sup> Cong. 2d Sess., at 25 (1978).

Putting aside the Forest Service's obligations to permittees under these statutes, the use of the informal consultation process to conduct closed-door negotiating sessions is inconsistent with the ESA itself. Under Section 7, FWS cannot dictate a federal agency's proposed action. Consultation occurs in regard to the effects of a proposed action or, in the case of an existing grazing permit, an existing action, and not on the action itself. The FWS itself has explained:

In no way does the Service [FWS] intend to use the consultation procedures of section 7 to establish substantive policy for Federal agencies. ***The Service performs strictly an advisory function under section 7*** by consulting with other Federal agencies to identify and help resolve conflicts between listed species and their critical habitat and proposed actions. As part of its role, the

Service issues biological opinions to assist the Federal agencies in conforming their proposed actions to the requirements of section 7. However, *the Federal agency makes the ultimate decision* as to whether its proposed action will satisfy the requirements of section 7(a)(2). The Service recognizes that the Federal agency has the primary responsibility for implementing section 7's substantive command . . . .

Interagency Cooperation – Endangered Species Act of 1973, as amended; Final Rule, 51 Fed. Reg. 19926, 19928 (1986) (emphasis supplied).

Thus, any changes to the proposed action are the responsibility of the Forest Service. The Forest Service is not authorized to make changes to grazing allotments or modify allotment management plans through negotiations with local FWS biologists, a number of whom appear to regard grazing as an inappropriate use of public lands. Instead, grazing is managed through the statutory and regulatory framework established by Congress and implemented by the Forest Service through its regulations codified at 36 C.F.R. Part 222 governing livestock grazing. The rancher has the right to participate in that process.

If, during the informal consultation process, FWS refuses to concur with the Forest Service's determination that the effects of the action will not be adverse, then formal consultation should be immediately implemented. As explained above, a grazing permittee is granted "applicant" status and is entitled to participate in the formal consultation process. In the event FWS determines that the action is likely to jeopardize the continued existence of a listed species or adversely modify a listed species' critical habitat (again, not suitable or potential habitat), then FWS will suggest reasonable and prudent alternatives that modify the proposed action to the extent necessary to avoid jeopardy or adverse modification. See 50 C.F.R. §§ 402.02 (definition of "reasonable and prudent alternatives") and 402.14(h)(3). Any

reasonable and prudent alternatives must be developed in cooperation with the applicant, utilizing the applicant's expertise. 50 C.F.R. § 402.14(g)(5).

In short, under the process set forth in Section 7, as well as the FWS's regulations governing consultation, the rancher, as the applicant, plays a key role. Under the procedures currently being followed in the Southwestern Region, however, the grazing permittee is effectively eliminated from the process. The current consultation process consists of biologists from the Forest Service negotiating with biologists from the FWS to ensure that the action has no adverse effects. These adverse effects are not grounded in the ESA or its implementing regulations, and instead consist of informal guidance criteria or subjective calls made by agency biologists regarding the presence of potential habitat and similar conditions. Further, the apparent goal of this process is the elimination of all effects in order to avoid formal consultation. As explained, Section 7 does not prohibit federal actions that have adverse effects. Instead, Section 7 prohibits federal actions that jeopardize the continued existence of listed species.

## **CONCLUSION**

As the foregoing demonstrates, the Southwestern Region of the Forest Service has gotten off track. The problems discussed above reflect either confusion over what the ESA requires or the improper use of the ESA to justify agency decision-making. In either case, ranchers who are dependent on their ability to graze livestock on National Forest land are facing severe restrictions on their operations for no legitimate reason, threatening their livelihood.

Section 7 of the ESA prohibits federal actions that jeopardize the continued existence of listed species or destroy listed species' critical habitat. Section 9 of the ESA prohibits actions

that are reasonably certain to kill or injure members of a listed species. Neither Section 7 nor Section 9 authorizes or requires the Forest Service to modify a rancher's operations to eliminate impacts to suitable or potential habitat or to eliminate effects on listed species resulting from grazing, even when those effects are considered adverse. Moreover, the ESA does not alter or override existing laws, such as the Federal Land Policy and Management Act, nor does the ESA expand the scope of a federal agency's authority and allow the imposition of restrictions or requirements because they are considered by agency employees to be beneficial to listed species. E.g., American Forest and Paper Ass'n v. U.S. EPA, 137 F.3d 291, 298-299 (5<sup>th</sup> Cir. 1998) (EPA cannot invoke the ESA as a means of imposing requirements that are not authorized under the Clean Water Act); Platte River Whooping Crane Trust v. Fed. Energy Reg. Comm'n, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (the ESA "does not *expand* the powers conferred on an agency by its enabling act").

Fortunately, the problems discussed in this paper stem from the manner in which the agency is applying the ESA, and not from the ESA or its implementing regulations. Consequently, these problems are the result of internal policies and direction or, more likely, a simple lack of direction from the national office of the Forest Service. A narrower and more focused approach to consultation would not only eliminate the potential for these sorts of problems, but would also conserve agency resources (e.g., avoiding unnecessary consultations) and reduce the likelihood of administrative appeals and litigation.

Figure 3-1. Informal consultation process

