IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FOREST GUARDIANS, et al.,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE, et al.,

Defendants.

No. CV 00-612-TUC-RCC

ORDER

Pending before the Court is Plaintiffs' April 2, 2001 Motion for Summary Judgment and Defendants' July 16, 2001Cross Motion for Summary Judgment. On July 22, 2002, Magistrate Judge Glenda Edmonds filed a Report and Recommendation ("Recommendation") recommending that the Court deny Plaintiffs motion for summary judgment and grant Defendants motion for summary judgment. Both parties filed objections to the Recommendation and the Court heard oral argument on the parties' objections on October 3, 2002. After consideration of the parties' written and oral arguments, the Court will decline to adopt the Recommendation and will grant summary judgment in favor of Plaintiffs.

Factual and Procedural Background

In 1993, the Fish and Wildlife Service ("FWS") listed the Mexican spotted owl ("owl") as a threatened species pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §1531, et seq. In December 1995, FWS published a Recovery Plan for the owl describing the owl's decline and issuing recommendations promoting the owl's recovery. The Recovery plan stated that grazing threatens the owl's survival because it reduces the amount of available prey, promotes destructive fires, degrades vegetation in riparian areas, and slows the development of productive habitat.

Pursuant to the ESA, § 7, federal agencies have an affirmative duty to ensure that their activities do not adversely affect threatened species. 16 U.S.C. §1536(a)(2). If an agency determines that its actions may adversely affect a threatened species, the agency must initiate consultation with the FWS. 50 C.F.R. § 402.14. After consultation is completed, the FWS issues a biological opinion which summarizes its findings and determines whether the agency's proposed action is likely to jeopardize the threatened species. 16 U.S.C. § 1536(b). If, in the estimation of the FWS, the proposed action will jeopardize the threatened species or its habitat, "the opinion must specify any reasonable and prudent alternatives that would sufficiently mitigate the project's adverse effects." *Sierra Club v. Marsh*, 816 F.2d 1376, 1379 (9th Cir. 1987). If an agency obtains new information not previously considered by the FWS or if its actions are subsequently modified in a manner not considered by the biological opinion, the agency must reinitiate consultation with the FWS. 50 C.F.R. §§ 402.16 (b) and (c).

Livestock grazing on national forest land is authorized through permits, typically issued for a period of ten years. 36 C.F.R. § 222.3(c)(1). These permits must be consistent with the Forest Plan which establishes planning goals for individual units of the national forest system for 10-15 year periods. *See* 16 U.S.C. §1604. Prior to the issuance or renewal of permits, the Forest Service must conduct site-specific environmental analysis pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321. In some circumstances the Forest Service may issue an Allotment Management Plan which describes in greater detail how

grazing should be conducted. During the ten year term of the permit, the Forest Service issues Annual Operating Plans ("AOPs") which describe the standards in the forest plan, including forage utilization standards.

In response the FWS's Recovery Plan, the Forest service developed amendments in 1996 to their Forest Plans for the eleven national forests in the Southwest Region. The amendments require the Forest Service to monitor forage use by livestock and other animals in "key forage monitoring areas" and to ensure that forage use does not exceed forage utilization standards during the growing season.

Because the Forest Service intended to modify is forest management practices in the 1996 amendments, the Forest Service consulted with the FWS in July 1995 (before implementation of the amendments) to ensure that their new forest management practices would not adversely affect the owl. The FWS issued two biological opinions in 1996 in which it found that the Forest Service's amended forest plans would comply with the ESA and that the old Forest Service plans were not in compliance.

Plaintiffs filed this complaint in October 2000 alleging that the Forest Service violated the ESA by failing to implement the grazing standards in the 1996 Forest Plan amendments, as was anticipated in the biological opinions, and then failing to re-initiate consultation. Plaintiffs filed for summary judgment in April 2001. Defendants filed a response and cross motion for summary judgment in July 2001. Judge Edmonds issued her Report and Recommendation in July 2002.

Summary Judgment Standard

Summary judgment is proper where no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The initial burden rests on the moving party to point out the absence of any genuine issue of material fact, but the moving party need not support its motion with affidavits or other supporting materials. Fed.R.Civ.P. 56(a); *Celotex*, 477 U.S. at 323. Once satisfied, the burden shifts to the opponent to demonstrate through production of

probative (and admissible) evidence that an issue of fact remains to be tried. *Id.* at 323-24. The non-moving party may not rest on mere denials of the movant's pleadings, but must respond asserting specific facts showing a genuine issue exists precluding a grant of summary judgment. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324. The Court must accept the non-movant's evidence as true and view all inferences in the light most favorable to the non-movant. *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987).

Report and Recommendation

Jurisdiction

In its cross motion for summary judgment, Defendants argue that this Court lacks subject matter jurisdiction under the Administrative Procedure Act ("APA") because Plaintiffs failed to identify a "final agency action" as required by the APA. Defendants further assert that Plaintiffs' claims are barred by the doctrine of res judicata. The Magistrate found that Plaintiffs adequately identified a final agency action for purposes of the APA, namely that the "Forest Service violated its statutory duty pursuant to 16 U.S.C. § 1536(a)(2) and 50 C.F.R. §§ 402.16(b) and (c) when it failed to reinitiate consultation with the FWS after failing to immediately implement the grazing program described in the 1996 Forest Plan amendments." (Recommendation at 7.) Further, Judge Edmonds concluded that Plaintiffs are not barred by res judicata because the presence of additional plaintiffs in this case who did not participate in prior adjudications precludes the application of res judicata. (*Id.* at 9.) Neither party raised objections to these findings.

Endangered Species Act

Plaintiffs claim the Court should grant summary judgment in their favor because Defendant Forest Service failed to implement the grazing standards contained in the 1996 amendments upon which the FWS relied when it issued its biological opinion. Plaintiffs claim that this failure to implement the grazing standards in the 1996 amendments requires the Forest Service to reinitiate formal consultation pursuant to 16 U.S.C. § 1536(a)(2) and 50 C.F.R. §§ 402.16(b) and (c). The Forest Service readily admits that it has not immediately

implemented the grazing standards in the 1996 Forest Plan amendments. Rather, the Forest Service argues that it never intended to implement the new grazing standards immediately but instead planned to implement them as the old grazing permits expired and new permits were issued subsequent to site specific National Environmental Policy Act ("NEPA") analysis. At issue then, is whether the FWS believed the Forest Service intended to enact its grazing standards immediately or gradually with the renewal of the old permits at the time that the FWS issued its biological opinions.

The Recommendation examines the text of the 1996 Forest Plan amendments, the Forest Service's Record of Decision, the Environmental Impact Statements, and other documents issued by the Forest Service and FWS to determine that "the new grazing standards were to be implemented immediately and not gradually as the old grazing permits came due for renewal." (Recommendation at 17.) Further, the Magistrate concluded that the "immediate implementation of the new standards was a point upon which the FWS could have relied when it issued its two biological opinions." (*Id.*) The Recommendation notes that in *Ariz. Cattle Growers Ass'n ("ACGA") v. Cartwright*, 29 F.Supp.2d 1100 (D.Ariz. 1998), a case in which ACGA challenged the new grazing standards in the 1996 Forest Plan amendments, the Forest Service itself indicated it believed through its consultations with the FWS, that it was committed to implementation of the new grazing standards in the AOP's prior to the issuance of new grazing permits.

Administrative Procedure Act

The Administrative Procedure Act (APA) allows for judicial review of actions by federal agencies. 5 U.S.C. §§ 701 et seq. The APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. An agency's decision may only be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). Plaintiffs claim that the Forest Service violated 50 C.F.R. §§ 402.1(b) and (c) which requires reinitiating formal consultation where a federal agency

obtains new information that its actions may affect a listed species or critical habitat in a manner or to an extent not previously considered, or if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat. The Recommendation notes, however, that the Ninth Circuit has held "not every modification of or uncertainty in a complex and lengthy project requires the action agency to stop and reinitiate consultation." *Id.* at 1388.

The Magistrate found the fact that the Forest Service's implementation of the 1996 grazing amendments at a slower rate than the FWS anticipated when it issued the biological opinions does not violate the ESA and 50 C.F.R. §§ 402.16. This is because "the new grazing standards are not so important to the recovery of the Mexican spotted owl that the delay in their implementation triggers the duty to reinitiate consultations." (Recommendation at 21.) Specifically, the Recommendation states that: 1) there is no evidence FWS considered timely implementation of the new grazing limits to be vital to the owl's recovery, 2) the Forest Plan amendments did not emphasize grazing limitations, and finally, 3) the FWS itself has not ordered the Forest Service to reinitiate consultations. (Id. at 21-23.) Because the immediate implementation of the new grazing standards is not vital to the owl's recovery, the Recommendation concludes that "the Forest Service's failure to reinitiate consultation is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Id. at 23.) Accordingly, the Magistrate found that Plaintiffs are not entitled to relief under the APA and recommended denying Plaintiffs' motion for summary judgment and granting Defendants cross motion for summary judgment.

Objections

Plaintiffs

Plaintiffs object to the Recommendation because they argue that the Recommendation applied the wrong legal standard to their ESA § 7 consultation claim. Plaintiffs assert that they need not rely on the APA's general judicial review provision in this case because the ESA, unlike other statutes, contains its own citizen-suit provision. *Citing* 16 U.S.C. §

1540(g)(1)(A) and *Bennet v. Spear*, 520 U.S. 154, 173 (1997). Plaintiffs argue that the Recommendation erred in determining the Forest Service did not violate the ESA because grazing is not vital to the owl's recovery. Rather, Plaintiffs assert that the ESA requires only that the change in agency action *may effect* a listed species in a manner not previously considered. Under this lower standard, Plaintiffs argue, it is not relevant whether grazing is a vital part of the recovery plan for the owl, rather the Court should ask whether grazing *may effect* the owl's recovery. The bar is so low, "any possible effect, whether beneficial, benign, adverse, or of an undetermined character triggers the formal consultation requirement." 5 Fed. Reg. 19,949 (June 3, 1986). By determining that the Forest Service's immediate implementation of the 1996 amendments was not vital to the owl's recovery, Plaintiffs argue that the Recommendation short circuited the consultation process and effectively usurped the FWS's role as an expert agency by not allowing the FWS to determine the effect of delayed implementation on the owl.

Plaintiffs further contend that the relative importance of the effects of grazing as compared with the effects of other activities is irrelevant to the determination of whether the Forest Service is required to re-initiate consultation. Where the influence of an agency action is uncertain or the data inexact, Plaintiffs argue, consultation is required.

Plaintiffs also take issue with the Recommendation's finding that the Forest Service is implementing the grazing amendments at a slower rate than assumed in the FWS's biological opinion. Plaintiffs assert that, to the contrary, the Forest Service will never implement the heart of the grazing amendments, the forage utilization guidelines, because use of the guidelines was enjoined by Judge Broomfield in a 2000 district court case. The question therefore, Plaintiffs argue, is not whether a slower rate of implementation may effect the owl but rather whether never implementing the forage utilization guidelines, in addition to delaying monitoring requirements, could have any effect on the owl. Plaintiffs conclude it will.

Plaintiffs also offer evidence to support the contention that had the Recommendation applied the "may effect" standard, the Recommendation would have had to conclude that the Forest Service must re-initiate consultation. Finally, Plaintiff claims that deferring to FWS's

failure to request reconsultation is inappropriate because the FWS almost certainly had no idea that the Forest Service was not faithfully implementing the 1996 amendments and because it is the federal agency, not the FWS which has the duty to initiate consultation.

Defendants

Defendants believe that the record in this case demonstrates the Forest Service is implementing the grazing utilization guidelines in the manner and at the rate intended when the Forest Service first initiated consultation. Specifically, the FWS understood the Forest Service would implement the guidelines on an allotment by allotment basis, after National Environmental Policy Act ("NEPA") analysis for each allotment.

Defendants claim first that the action being implemented currently is the action that was proposed to the FWS during consultation on the 1996 Plan Amendments. Defendants assert that during the consultation process, the FWS was aware that the Forest Service would be implementing the plan amendments through site-specific planning (the NEPA framework) over the course of five to ten years. Defendants cite the revised Environmental Impact Statement, which discusses the need for a transition period before full implementation of the amendments was achieved, and also look to the Forest Service's Record of Decision which states that the amendments will be applied through project level decisions and site-specific environmental analysis. The Forest Service argues that neither of these documents indicates the Forest Service intended to implement the amendment standards before project level decisions were made, as would be necessary if the Forest Service immediately implemented the new standards.

Defendants also claim the Magistrate erred in concluding that the Annual Operating Plans ("AOPs") fit within the category of "new permits, new contracts and other new instruments" which must conform with the 1996 amendments. Defendants argue that site specific, project-level, decisions are made through allotment management plans which must be consistent with the amendments and are developed after NEPA analysis. The AOPs are distinct from allotment management plans in that they offer yearly guidance to the permittee based on range and resource conditions for a particular year. The AOPs, according to Defendants, are not "new" instruments, but rather are only issued to set parameters for already

existing permits. Defendants claim it is the grazing permit, not the AOP which must be amended to comply with the Forest Plan and amendments. Because the Forest Service is implementing the amendments as anticipated by the FWS in the consultation process, Defendants claim, re-initiation of consultation is not required.

Discussion

Implementation of the 1996 Amendments

After independently reviewing the documents submitted as evidence in this case, the Court finds no error in the Magistrate's conclusion that the Forest Service and FWS assumed during consultation that the 1996 amendments would be immediately implemented. The Forest Service has consistently stated that the general forage utilization standards outlined in the Record of Decision were to be implemented before site specific NEPA analysis. *See, e.g.*, Region Wide Forest Plan Amendment Project Record (AR), document 93, p. 162; (Pl.'s Reply, pp. 3-5); (Pl.'s Mot., Ex. D p. 94.); AR, Doc. 110, Vol. 1, Tab Apache-Sitgreaves.

Also persuasive is the Forest Service's response to public comments on when the amendments would be applied to grazing allotments:

> The direction in the amendment will take effect immediately upon approval of the amendments. However, because of the small area affected by any type of treatments under any alternative and the way and speed at which natural processes occur; any noticeable differences on-the-ground would be very light in the short run. The point is that the direction will be applied now but the effects will not be discernable immediately.

AR 107, Tab EMP, answer 475-2.

Moreover, the Forest Service's statements in other litigation within this district on the same amendments suggest that the Forest Service believed the new standards were to be implemented shortly after adoption of the amendments. Specifically, the Forest Service stated, "it has always been Federal Defendants' position that the utilization table in the 1996 ROD could–and, in many circumstance (sic), should–be used in AOPs for existing permits on an interim basis if necessary to protect endangered species." *Ariz. Cattle Growers' Ass'n et al. v. Towns, et al.* CV 97-1868-PHX-RCB, Def. Mot. to Reconsider at 6. Defendant Forest

Service presents little, if any, evidence which suggests that utilization standards in the 1996 amendments were to be implemented only after site specific, NEPA analysis. Rather, the evidence clearly indicates that the general utilization standards were to be implemented on the allotments in the absence of (i.e. before) site specific analysis.

Reconsultation

"Judicial review of administrative decisions involving the ESA is governed by section 706 of the APA." 5 U.S.C. § 706; *Arizona Cattle Growers' Ass'n v. U. S. Fish and Wildlife, et al.*, 273 F.3d 1229, 1235 (9th Cir. 2001); *Pyramid Lake Paiute tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990); *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). "Under section 706, the reviewing court must determine that agency decisions are not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Arizona Cattle Growers*, 273 F.3d at 1236. A district court called upon to review an agency's decision must determine whether the agency's decision is based upon consideration of the relevant facts and does not betray clear errors in judgment. *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993). "Review under this standard is to be searching and careful, but remains narrow and a court is not to substitute its judgment for that of the agency." *Id.* "This is especially appropriate where... the challenged decision implicates substantial agency expertise." *Id.* Despite this deferential standard, a court should not automatically defer to the determination of an agency "without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

Under the ESA,

> Reinitiating of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
> (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or...

50 C.F.R. §§ 402.16(b) and (c).

On May 24, 2000, Judge Broomfield entered an order in *Ariz. Cattle Growers Ass'n v. Towns, supra*, enjoining the Forest Service from enforcing the utilization standards on p. 94 of the Record of Decision for Amendment of Forest Plans, dated June 5, 1996, through any AOP or alteration thereof. The result of this injunction is not only that the Forest Service is now implementing the utilization standards at a slower pace than originally intended at the time the amendments were adopted, but that the Forest service is prohibited from implementing the standards on an interim basis until site specific analysis is completed. Moreover, the Forest Service stated at oral argument that if NEPA analysis cannot be completed before a specific allotment is due for renewal, the grazing permit is renewed under the terms of the old permit. These facts indicate that not only is the Forest Service unable to implement the standards on an interim basis, as anticipated by the FWS at the time of consultation, but that in some cases the Forest Service has been unable to implement the standards even at the time of renewal of grazing permits, as it contends was anticipated during consultation, because it has not been able to complete NEPA analysis on all allotments where old grazing permits have expired.

While grazing may be only a small part of the overall recovery plan for the owl, the Court finds that failure to implement new grazing standards not only in the interim period between the adoption of the amendments and site specific analysis, as anticipated by the Biological Opinion, but also the failure to implement new standards even at the time of renewal of grazing permits, are actions by the Forest Service which may effect the owl and its habitat. The Forest Service's failure to reconsult is therefore contrary to the provisions of the ESA and not in accordance with law as required by the APA.

Because the Forest Service is not in compliance with the ESA, the Court will grant Plaintiffs' motion for summary judgment and deny Defendants' cross motion for summary judgment.

Remedy

The Court will require each party to file a short supplemental brief outlining its position on an appropriate remedy on or before Friday, October 25, 2002. The Court will hear oral argument on the remedy phase of this case on Friday, November 1, 2002 at 2:00 p.m.. The hearing will be allotted one hour.

IT IS THEREFORE ORDERED as follows:

1) the July 22, 2002 Report and Recommendation [Doc. 98] is **ADOPTED IN PART**; the Court adopts the Recommendation to the extent that it finds the Court has jurisdiction to hear this case and that the Forest Service has not implemented the 1996 grazing amendments as anticipated during consultation with the Fish and Wildlife Service;

2) Plaintiff's April 2, 2001 Motion for Summary Judgment [Doc. 14] is **GRANTED** pending oral argument on an appropriate remedy, to be heard on **Friday, November 1, 2002 at 2:00 p.m.** ;

3) Defendants' July 16, 2001 Cross Motion for Summary Judgment [Doc. 48] is **DENIED;**

4) Each party shall file a short supplemental brief on or before **Friday, October, 25, 2002** which states the party's position on an appropriate remedy.

DATED this 16th day of October, 2002.

Raner C. Collins
United States District Judge