

[Back to Home](#)

## **Ninth Circuit Requires Service to Quantify Take of Listed Species it Authorizes or Demonstrate Why Quantification is Impracticable**

*by Sue Meyer*

In an opinion that raises the bar for issuance of incidental take statements (ITS) issued under Section 7 of the federal Endangered Species Act (ESA) (16 U.S.C. § 1536), the Ninth Circuit Court of Appeals invalidated an ITS for failing to specify conditions under which reinitiation of consultation would be triggered. *Oregon Natural Resources Council v. Allen*, No. 05-35830 (9th Cir. Feb. 16, 2007).

Furthermore, although the court did not go so far as to *require* the U.S. Fish and Wildlife Service (Service) to specify numeric limits on individual members of listed fish and wildlife species killed or harmed (“taken”) in all ITSs, it did express a strong preference for such numeric limits, rebuking the Service for issuing an ITS “without explaining why such a limit is impracticable to obtain and employ.”

As a result, project proponents seeking incidental take authorization through Section 7 are likely to encounter ITSs with stricter standards. At the same time, project proponents will need to exercise vigilance to ensure that the Service does not issue an ITS that opens the litigation door for project opponents.

The Ninth Circuit’s ruling, that ITSs must contain measurable guidelines to determine when incidental take authorized pursuant to the ITS would be exceeded, thus triggering the requirement for reinitiation of consultation, itself is not without precedent in the Ninth Circuit. *See, e.g., Arizona Cattlegrowers’ Association v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir 2001). However, the court wove into its opinion a new requirement for numeric limits in ITSs absent an explanation as to why such limits “cannot be practically obtained.” Although the Ninth Circuit cites extensively to the legislative history of the ESA and the 1978 and 1982 amendments, this is the first time the Ninth Circuit has articulated such a standard.

The practical implications of this new standard are several: As an initial matter, the Service is likely to react to the court’s ruling by attempting to impose numeric limits of individuals for which take is authorized on far more ITSs. Where it is impractical to set numeric limits on individuals taken, the Service will seek to impose numeric limits on habitat impacts. Although such numeric limits are now commonplace in ITSs, it is foreseeable that the Service will reduce reinitiation thresholds, erring on the side of caution in light of the court’s ruling. The result will be ITSs with decreased habitat disturbance limitations (*i.e.*, smaller projects) and an increase in number of reinitiations.

Finally, the new standard -- ITSs with numeric limits if the Service is unable justify excluding them -- offers a new litigation target for individuals and groups seeking to shut down projects, and yet more potential for lengthy delays under the Section 7 process.

Project proponents should work carefully with the Service in the development and drafting of biological opinions and incidental take statements so as to avoid the new potential pitfalls associated with Section 7 consultation.

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