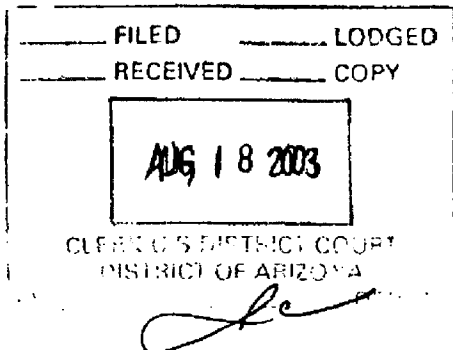


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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEFENDERS OF WILDLIFE, et.al.,) No. CIV 02-195-TUC-CKJ
Plaintiffs,)
vs.) **ORDER**
LT. GENERAL ROBERT B. FLOWERS,)
et.al.,)
Defendants.)

Pending before the Court are cross-motions for summary judgment regarding Claim 6 of Plaintiffs' Second Amended Complaint in which Plaintiffs allege that the United States Army Corps of Engineers has violated its duties under Section 7(a)(1) of the Endangered Species Act.¹ As set forth in greater detail below, Plaintiffs' Motion for Summary Judgment (Doc. # 121) with respect to Claim 6 only is DENIED, and the Government's Motion for Summary Judgment (Doc. # 133) with respect to Claim 6 only is GRANTED.

¹ The Court is well aware of the fact that Plaintiffs and Defendants filed motions for summary judgment relating to all remaining claims set forth in Plaintiffs' Second Amended Complaint—namely Claims 3, 4, 5, 6, and 8. As each of these claims is fairly distinct and in an effort to render expeditious decisions on the parties' motions, the Court intends to issue a separate ruling as to each claim and/or project.

188

1 **Discussion**

2 In Claim 6 of their Second Amended Complaint, Plaintiffs Defenders of Wildlife and
3 Center for Biological Diversity (hereinafter "Defenders") allege that the United States Army
4 Corps of Engineers (hereinafter "the Corps") has violated section 7(a)(1) of the Endangered
5 Species Act (hereinafter "ESA") and the Administrative Procedure Act (hereinafter "APA")
6 in failing to utilize its authorities under the Clean Water Act to carry-out programs for the
7 conservation of the cactus ferruginous pgmy-owl (hereinafter the "CFPO" or "owl").²

8 The relevant provision of Section 7(a)(1) provides as follows:

9 All other Federal agencies shall, in consultation with and with the assistance of the
10 Secretary, utilize their authorities in furtherance of the purposes of this chapter by
11 carrying out programs for the conservation of the endangered species and
12 threatened species listed pursuant to section 1533 of this title.

13 16 U.S.C. § 1536(a)(1). Furthermore, conservation is defined as "the use of all methods and
14 procedures which are necessary to bring any endangered species or threatened species to the
15 point at which the measures provided pursuant to this chapter are no longer necessary." 16
16 U.S.C. § 1532(3). In interpreting the Corps' duties under Section 7(a)(1), this Court's
17 analysis is guided by *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the*
18 *Navy*, 898 F.2d 1410 (9th Cir. 1990) and *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir.
1998).

19 In *Pyramid Lake*, the United States Court of Appeals for the Ninth Circuit held that
20 section 7(a)(1) sets forth that agencies have "affirmative obligations to conserve," and that
21 conservation "means to use and the use of all methods and procedures which are necessary
22 to bring an endangered species or threatened species to the point at which the measures
23 provided pursuant to the Act are no longer necessary." *Pyramid Lake*, 898 F.2d at 1416-17
24 (quotations and citations omitted). *See also id.* at 1417. However, the agency "is to be

25
26 ² The Second Amended Complaint also lists the United States Environmental
27 Protection Agency (hereinafter "EPA") as a defendant on this claim, yet Defenders dropped
28 the EPA as a defendant on this claim as memorialized in this Court's April 25, 2003 Order
(Doc. # 130).

1 afforded some discretion in ascertaining how best to fulfill the mandate to conserve under
2 section 7(a)(1)." *Id.* at 1418. Particularly important to the Ninth Circuit was the fact that any
3 conservation recommendation by the USFWS is purely advisory under 50 C.F.R. § 402.14(j)
4 ("The Service may provide with the biological opinion a statement containing discretionary
5 conservation recommendations. Conservation recommendations are advisory and are not
6 intended to carry any binding legal force."). *See id.* at 1418 n. 18.

7 In *Sierra Club*, the United States Court of Appeals for the Fifth Circuit reaffirmed that
8 federal agencies have an affirmative duty to consult with the USFWS and to conserve listed
9 species. *See Sierra Club*, 156 F.3d at 616. However, it also noted that the "duty to consult
10 and duty to conserve is tempered by the actual authorities of each agency." *Id.* at 616 n. 5.
11 Ultimately, the agency has the discretion to make a final substantive decision of how to
12 implement its section 7(a)(1) duties in light of its program authorities and its exercise of its
13 discretion will not be overturned if "it has considered the relevant factors, and followed the
14 required procedures." *Id.* at 617-18. If the agency fails to undertake any consultation with
15 the USFWS regarding conservation measures, then it has impermissibly "read out of
16 existence" a substantive requirement of section 7(a)(1). *Id.* at 618.

17 Several recent district court decisions are also helpful on this claim. United States
18 District Judge Wilken from the Northern District of California notes that "an agency has
19 broad discretion to carry out its obligations under section 7(a)(1) so long as its actions satisfy
20 the ESA's general prohibition against jeopardizing listed species." *San Francisco Baykeeper*
21 *v. United States Army Corps of Engineers*, 219 F.Supp.2d 1001, 1026 (N.D. Cal. 2002)
22 (holding that the Corps was entitled to rely on the consulting agency's no jeopardy finding
23 when carrying out its section 7(a)(1) duty to conserve). Likewise, United States District
24 Judge Robertson from the District of Columbia has ruled that agencies have "significant
25 discretion in shaping their conservation programs." *Defenders of Wildlife v. Norton*, 257
26 F.Supp.2d 53, 68 n.12 (D.D.C. March 31, 2003). *See also Oregon Na'tl Resources Council*
27 *Fund v. U.S. Army Corps of Engineers*, 2003 WL 117999, * 4 (D. Or. 2003) (Unpublished)

28

1 (noting that "an agency can defeat a § 7(a)(1) claim by showing that it has a program for
2 conservation of listed species and that the appropriate agency was consulted) *and Defenders*
3 *of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 135 (D.D.C. 2001).

4 The USFWS seemingly agrees with these decisions as is set forth below:

5 The Service will undertake programs for the conservation of listed species and will
6 consult with other Federal agencies attempting to do the same. The Service will
7 not, nor does it have the authority to, mandate how or when other Federal agencies
8 are to implement their responsibilities under section 7(a)(1), nor is the Service
9 authorized to issue a biological opinion under section 7(a)(1) of the Act. Section
10 7(a)(1) has a limited purpose under the Act: to authorize Federal agencies to factor
11 endangered species conservation into their planning processes, regardless of other
12 statutory directives Although there is no express legislative history directly
13 weighing and comparing the relative strengths of section 7(a)(1) with 7(a)(2), there
14 can be no doubt that Congress considered the jeopardy standard of section 7(a)(2)
15 as being the substantive cornerstone of section 7. . . . [T]he Service lacks authority
16 to issue biological opinions under that subsection [section 7(a)(1)], and the Act
17 does not mandate particular actions to be taken by Federal agencies to implement
18 7(a)(1).

19 51 Fed. Reg. 19926, 19934 (June 3, 1986).

20 In its filings, the Corps initially argues that Section 7(a)(1) "does not require that
21 particular programs be carried out or even that a program exist for each of the more than
22 1250 species that have been listed as threatened or endangered." There appears to be a split
23 amongst federal courts considering this issue. *Compare Sierra Club*, 156 F.3d at 616 ("[W]e
24 conclude that Congress intended to impose an affirmative duty on each federal agency to
25 conserve each of the species listed pursuant to § 1533. In order to achieve this objective, the
26 agencies must consult with FWS as to each of the listed species, not just undertake a
27 generalized consultation."); *with Northwest Environ. Advocates v. U.S. Environ. Prot.*
28 *Agency*, ___ F.Supp.2d ___, 2003 WL 21487274, *16 (D. Or. 2003) ("The statute does not
mention species-specific programs. Rather, the agency may reasonably interpret its § 7(a)(1)
obligations to extend no further than engaging in conservation programs that benefit
threatened species."); *and with Washington Toxics Coalition v. Environ. Prot. Agency*, C-01-
132C, p. 19 (W.D. Wash. 2002) (Unpublished) ("[S]ection 7(a)(1) does not require any
particular conservation program with respect to any particular species and does not apply to
each specific agency action."), attached as Exhibit 2 to Federal Defendants' Reply, Doc. #

1 158. However, the Court need not resolve this issue as there is evidence in the record that
2 the Corps has consulted with the USFWS with respect to how the Corps can use at least one
3 of its Clean Water Act authorities to conserve the CFPO.

4 Specifically, the undisputed record reveals that the Corps has completed formal
5 consultation with the USFWS regarding the effects of its Section 404 Clean Water Act
6 Nationwide Permit (NWP) program in Arizona on the CFPO. *See* COE 007247-51. As part
7 of that consultation, the Corps and the USFWS jointly developed guidelines to ensure that
8 the NWP program is not likely to adversely affect the CFPO. *See id.* The adopted guidelines
9 contain specific criteria that the Corps will apply in determining whether and to what degree
10 a proposed NWP project might affect the CFPO. *See id.* at 7250-51. Furthermore, the
11 guidelines provide that the Corps and the USFWS "will meet on an annual basis, or as
12 needed, to evaluate and discuss the continued effectiveness of these guidelines for protecting
13 Arizona's population of pygmy-owls and to update maps, if necessary. . . . If adaptive
14 measures to this agreement are necessary, they will be explored at that time." *Id.* at 7251.
15 As a result of these guidelines being adopted and implemented, the USFWS has stated its
16 belief that "these Guidelines will appreciably contribute to the conservation of the pygmy-
17 owl." *Id.* at 7247. Thus, considering the discretion that is to be given to agencies in carrying
18 out their Section 7(a)(1) duties, the Court finds that the Corps is entitled to summary
19 judgment in its favor as it has satisfied those duties with respect to the CFPO.

20
21 **Conclusion**

22 Accordingly, IT IS HEREBY ORDERED as follows:

- 23 1. Plaintiffs' Motion for Summary Judgment (Doc. # 121) with respect to Claim 6 only
24 is DENIED; and

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2. The Government's Motion for Summary Judgment (Doc. # 133) with respect to Claim 6 only is GRANTED.

DATED this 18th day of August, 2003.


CINDY K. JORGENSON
United States District Judge