

## Pygmy owl to be removed from endangered list

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August 3, 2005 - The U.S. Fish and Wildlife Service proposed a ruling this week to remove the cactus ferruginous pygmy owl from the federal list of threatened and endangered species and to withdraw its proposal to designate critical habitat in Arizona. The proposal comes nearly two years after the 9th Circuit Court of Appeals ruled that the service failed to properly justify the small owl's listing in the first place.

While a final ruling remains to be seen, the controversial proposal already is receiving mixed responses from both ends of the spectrum, from environmentalists who said they were "appalled" to homebuilders who support the ruling. Removal of the owl's endangered status may make it easier for some developers to build in the Northwest, especially in Marana on the east side of Interstate 10, where forests of cacti are considered prime habitat for the owl.

"With the listing of the pygmy owl and everything that's happening in terms of land development, it's interesting that now all of a sudden there is a recommendation to delist," said Marana Town Manager Mike

Reuwsaat, reacting to the news earlier this week. "I expect there'll be a whole slew of comments both ways on the proposed delisting of the pygmy owl. It's a pretty big step considering where everything's been for so long."

The proposed ruling marks the first step to remove the endangered status of Arizona's pygmy owl, whose protection has been a contentious issue among environmentalists and homebuilders since the day it was listed. The protected pygmy owl has served as somewhat of a poster child for environmental consciousness in Pima County, causing a tightening of development regulations that homebuilders say has been a burden to new development.

The service first listed the pygmy owl as endangered in 1997, followed later in 2002 by its proposed designation of 1.2 million acres in Arizona as critical habitat. Ruling on a 2001 lawsuit filed by homebuilders, the appellate court found that the agency had not justified its listing of the owl as significant when considered separately from a broader population that includes owls in Mexico.

Though scientists say there are hundreds of adult pygmy owls in

Mexico, only 20 were found in Arizona this year and scientists have failed to convince officials in Washington that the owl's presence in Arizona is significant to ensuring survival of the entire subspecies.

Reuwsaat said that, however the decision goes, it's nothing personal for Marana, which continues to work on developing its habitat conservation plan that includes preserving open space for the pygmy owl. Marana's conservation plan includes a 25-year horizon that takes into account several endangered and threatened species, including the burrowing owl, the Tucson shovel-nosed and ground snakes, the lesser long-nosed bat and the pale Townsend's big-eared bat.

An early draft of the town's plan identified three male pygmy owls living east of I-10, where Marana has been especially conscientious about making sure development remains sensitive to the environment. Reuwsaat said he was unsure whether delisting the owl would significantly change the market in that area, considering the success of developments already happening there.

In communities such as Dove Mountain, Saguaro Ranch, Sky Ranch and Tortolita Vistas, the

town has limited development to disturbing no more than 40 percent of the land, allowing key biological corridors to remain intact for significant biological species.

"I think, initially, people weren't sure that the market would bear the kind of development that is now successful east of I-10. There was a lot of concern by the development community that certain portions of that property were not available for development," Reuwsaat said. "Most of the development east of I-10 has begun to be developed or is developing at a lower intensity, and a good part of that is a result of some of the requirements of having the pygmy owl listed. Now, what I think you see east of I-10 is that the market is there and it supports a different type of development, economically, whether the pygmy owl is listed or not."

Reuwsaat said he expects no change to Marana's plan to expand the Tortolita Preserve - a 2,400-acre desert park near Dove Mountain - to 18,000 acres.

"One of the town's goals is to provide a balance between building and the environment, and the preserve provides one example of that while allowing other parts of Marana to develop for human consumption," he said. "It stands on its own."

Homebuilders in Southern Arizona still complain that they must undergo timely consultation processes with FWS before moving forward with developments to make sure they aren't destroying lands deemed critical habitat for the pygmy owl.

Ed Taczanowsky, president of the Southern Arizona Homebuilders Association, said homebuilders would look forward to some relief from the federal consultation requirement that have caused delays to some projects.

"We agreed with the 9th Circuit Court of Appeals decision, so we think this is step in the right direction but we also know there's a yearlong process still involved," he said. "But regardless of what happens with the pygmy owl, whether it's listed or delisted, the environmentalists have still won because of the Sonoran Desert Conservation Plan and the passage of the open-space bonds."

Sonoran Desert conservationists have, in fact, won some victories in the years since the pygmy owl was listed, as Pima County officials have tightened zoning restrictions and development standards. The Sonoran Desert Conservation Plan led to the approval of a \$174 million open-space bond proposal in May 2004 to help buy land for the pygmy owl and 53 other vulnerable species.

Carolyn Campbell, executive director of the Coalition for Sonoran Desert Protection, said she has been preparing for the decision announced this week for a long time but was hoping that FWS officials would have a change of heart.

She said rumors had surfaced that the Bush Administration and FWS officials in Washington were "watering at the mouth" to delist the owl.

"To me it's just really disturbing that

the administration would make a political decision like this. The original lawsuit on the critical habitat issue and the listing itself was brought on by the homebuilders, and they've got a lot of sway with the administration," she said. "They seem to think the sky is falling because we have an endangered bird that's listed as an endangered species that's getting in the way of the bulldozer."

Campbell said conservation groups throughout Pima County have been working with local government officials to develop visionary habitat conservation plans, and federal funding often accompanies such plans when they involve federally protected species. Now, she's worried some of that support may be lost if the owl loses its status.

"The impetus for the habitat conservation planning going on in Pima County, partly, was the listing of the pygmy owl," she said. "Now it's gone way past the owl and we have a pretty comprehensive approach."

Campbell has been working on Pima County's habitat conservation plan since 1998 in an effort to ensure long-term survival of the full spectrum of plants and animals indigenous to the county. She's also working with Marana and Tucson on their habitat conservation plans that are still in the early stages.

David Hogan, urban wildlands director for the Center for Biological Diversity, said the proposed ruling to delist the owl is an "appalling" attempt to subvert the will of the community to protect wildlife and the desert.

The Tucson-based group was responsible for originally getting the owl listed eight years ago.

"One of the most disturbing things about the proposal is that it continues the Bush Administration's trend to crush science in favor of its own agenda," he said. "In this case, agency bureaucrats overruled their own biologists who recommended keeping the owl protected. It's very clear what the Tucson field office of the Fish and Wildlife Service wanted to do and that was to continue Endangered Species Act protection. It's clear this proposal is a gesture of love to the building industry."

During a press teleconference this week, Larry Bell, acting deputy director of the FWS Southwest Region in Albuquerque, responded to allegations that Washington was going against the will of its own scientists in the Tucson office who some say recommended the owl be kept on the list.

Bell said the final decision to move forward with the proposed rule came from U.S. Department of the Interior officials in Washington, which based its decisions on recommendations and information forwarded by regional offices.

"I don't know if that recommendation came forward, but assuming that it did, that was submitted as a recommendation to be considered with the additional information and taken in light of the ruling of the court, and that's what led us to the proposed rule," he said. "It's important to remember that it is a pro-

posed rule that gives us the opportunity to receive additional information."

Bell said FWS will publish the proposed rule to delist the owl in the Federal Register on Aug. 3. The service will solicit additional information on the significance of the Arizona pygmy owl for 60 days following the publication. The owl will remain under protection of the Endangered Species Act until a final rule is adopted. By statute, FWS must adopt a final ruling within one year of the publication of the proposed rule.

"In a general sense, I think that there will be mixed emotions relative to the proposal, and we certainly anticipate that," Bell said. "We're hoping as a result of that to get the absolute best information coming forward that we can." Specifically, Bell said, the service is asking for additional information on the following topics: Information concerning the biological, genetic and morphological data related to classification of the pygmy owl; The location of characteristics of any additional populations not previously identified in other work; Additional information related to current versus historical range, current distribution, genetic diversity and population size; The status of the pygmy owl in Mexico, particularly threads to populations or habitats; Information related to discreteness, significance and conservation status of any potential distinct population; Plotted on a map, pygmy owl population patterns resemble two fingers in the shape of the letter V coming up the eastern side of Mexico into Texas

and coming up the western side into Arizona. While those two fingers are genetically distinct, populations in Arizona have been determined to be linked to those in Mexico.

Steve Chambers, a senior scientist with the FWS ecological services division in Albuquerque, said that when the owl was originally listed in 1997 the service used its authority to determine that the Arizona pygmy owl was a distinct population segment based on the conclusion that it was discreet, significant and endangered.

The only other criteria FWS must follow regarding listing the owl is the legislative history of the Endangered Species Act, which calls for the agency to use its authority to list distinct population segments sparingly.

"There's an argument to be made for almost any type of group of vertebrate animals out there that they might be visible under the Endangered Species Act," Chambers said. "That wasn't what Congress intended, and we have been directed by the legislative history to use this authority sparingly."

The decision to propose delisting the owl is a response to the 9th Circuit Court of Appeals opinion that declared the listing "arbitrary and capricious."

"The service's review of the Arizona distinct population segment, in light of our own regulations, alongside the 9th Circuit Court of Appeals ruling, does not feel (it meets) the standard of evidence to indicate that

the population is an entity that qualifies for listing under the act," Bell said.

"Along with this, the Fish and Wildlife Service is withdrawing its proposal to designate critical habitat for the pygmy owl."

Bell said 2004 administrative records submitted to the court lacked sufficient evidence to address the significance of the Arizona population of pygmy owls. Following that 2004 submission, FWS reviewed a "white paper" on the significance of the western population of the pygmy owl.

"The paper represents all that we know about the significance of the owl and makes a case for the entire Sonoran population, which extends to Mexico. Given the best information available, we do not believe the white paper to be compelling to adequately articulate the significant issue under the ruling of the court," he said.

"When you look at the white paper, it addresses what the owl is doing in both the United States and Mexico. It addresses them as a whole, and although it may talk about them as separate populations, it does not bring forward information as to why the Arizona population is so significant."

A brief history of the controversy surrounding the pygmy owl in Arizona:

The Arizona population of cactus ferruginous pygmy owls was listed as an endangered species on

March 10, 1997, under Fish and Wildlife Service's Distinct Vertebrate Population Segment Policy. The service listed only the owls in Arizona as endangered rather than including the entire subspecies of pygmy owls, which are located through Mexico's West Coast states and a portion of the eastern coast of Mexico and Texas.

On Jan. 9, 2001, a coalition of plaintiffs filed suit challenging the validity of the service's listing of the Arizona population of the pygmy-owl and the designation of critical habitat. On Sept. 21, 2001, the listing of the pygmy-owl in Arizona was upheld, but the critical habitat designation was set aside and sent back to the service to redo with a full economic analysis.

On Nov. 27, 2002, FWS published a proposal to designate 1.2 million acres of critical habitat. Work on proposed critical habitat has been suspended pending resolution of the current litigated dispute of the species' listing.

On Aug. 19, 2003, the 9th Circuit Court of Appeals, responding to a National Association of Home Builders appeal, overruled the District Court's upholding of listing the Arizona distinct population segment and found FWS's articulation of the "significance" of the Arizona population to be deficient under the service's Distinct Vertebrate Population Segment Policy.

The court did not find that the Arizona pygmy owl population was not significant, however, the opinion stated that the listing rule did not

articulate a rational basis for finding that the discrete population was significant to the whole subspecies, including the population in Mexico. On Oct. 11, 2003, the case was sent back to the Arizona District Court.

An open-ended June 25, 2004, District Court ruling stated that FWS must report to the court on the status of its reconsideration of the listing rule and the critical habitat designation by Jan. 31, 2005.

FWS officials had not made up their minds by that time, but many rumors surfaced that FWS was leaning toward delisting the owl. FWS submitted its current status report to the court on Aug. 1.

If the pygmy owl is delisted, FWS will not complete the proposed critical habitat designation or a recovery plan for the species but would continue to conduct surveys, according to a FWS press release. The owl still would receive protection under the Migratory Bird Treaty Act, which prohibits the taking, killing, pursuit or harassment of pygmy owls and the possession of their parts. However, the act doesn't forbid damage to habitat, which is a vital component of the conflict.

Written comments regarding the proposed rule can be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021, or by facsimile to (602) 242-2513. Electronic comments can be submitted to [http://cfpo\\_comments@fws.gov](http://cfpo_comments@fws.gov).