

# ENDANGERED SPECIES & WETLANDS REPORT

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## FWS MUST REVISIT DECISION TO WITHDRAW PROPOSED RULE FOR LIZARD

A federal judge has reinstated a proposed rule to list the flat-tailed horned lizard as threatened, which the Fish and Wildlife Service had withdrawn in early 2003 (Tucson Herpetological Society v. Norton, 04-75 PHX NVW, D. Ariz.).

U.S. District Judge Neil V. Wake, an appointee of President George W. Bush, said FWS had not complied with a Ninth Circuit order to evaluate the significance of lost habitat for the reptile, whose U.S. habitat is in the Sonoran Desert of Arizona and California (Defenders of Wildlife v. Norton, 258 F.3d 1136, 9th Cir. 2001).

"[T]he Secretary [of the Interior] acknowledged that the lizard currently exists in an area much smaller than its historical range, but she failed to assess whether the historical habitat was a significant portion of the range," Wake said.

"[T]he Secretary's decision to withdraw the proposed rule does not square with the Ninth Circuit's mandate. The Secretary failed to consider whether the lizard's lost historical habitat was a significant portion of the range," Wake said.

Conservation groups that brought the suit called Wake's decision an "important victory," but the judge also included some language that will be welcomed by the Interior Department.

Wake said it was reasonable for FWS to take into account a multi-party conservation agreement addressing the lizard.

"Considering the ambiguity in the statutory structure and the lack of binding case law, the court cannot say that the Secretary violated the ESA by considering the Conservation Agreement's voluntary efforts," Wake said. "A portion of the statute does instruct her to consider the listing factors along with 'those efforts, if any, being made by any state . . . to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices.' 16 U.S.C. § 1533(b)(1)(B)."

"[T]he Secretary did not violate the ESA when she relied on the potential mitigating effects of the Conservation Agreement in justifying the withdrawal of the proposed rule," Wake said.

"The Secretary acknowledged that the 'stated objectives' of the Conservation Agreement 'have not yet been fully achieved,'" Wake said, quoting the withdrawal notice. But, he added, "she also outlined those actions that have been implemented. . . . Based on those actions that had been taken, the Secretary had a rational basis for concluding that the Conservation Agreement was effective at mitigating certain threats."

Taylor Edwards, President of the Tucson Herpetological Society, said that despite the existence of the voluntary conservation agreement, lizards "continue to lose valuable habitat and populations are still declining."

In addition to the herpetological society, plaintiffs include the Center for Biological Diversity, Sierra Club, the Horned Lizard Conservation Society and Defenders of Wildlife.

The judge scheduled a telephone status conference for Sept. 2 to determine "the Secretary's responsibilities in accordance with the terms of this order and set a timetable for her to take such actions."

<http://www.eswr.com/705/fthlwakeop.pdf> Wake's opinion

<http://www.eswr.com/705/fthlop92001.pdf> 9th Circuit's decision

<http://www.biologicaldiversity.org/swcbd/press/lizard8-30-05.html> CBD press release

<http://www.eswr.com/frr/f010303.htm> Withdrawal of proposed rule