

June 4, 2010

Mexican spotted owl habitat protected by federal court

By HOWARD FISCHER
Capitol Media Services

PHOENIX – A federal appeals court has upheld the decision to designate 8.6 million acres in the Southwest – including nearly 4 million acres in Arizona – as critical habitat for the Mexican spotted owl.

The 9th Circuit Court of Appeals on Friday rejected arguments by the Arizona Cattle Growers Association that the U.S. Fish and Wildlife Service improperly designated some areas where no owls are found as “occupied.” The judges said nothing in the law requires that a species be continuously present in an area to have it designated as occupied.

Separately, the judges rejected arguments by the cattle growers that the federal agency did not properly consider economic impacts of the listing.

The decision is a victory for the Tucson-based Center for Biological Diversity which had pushed the Fish and Wildlife Service for the habitat designation in the first place and intervened to defend it when the cattle growers sued.

C.B. “Doc” Lane, spokesman for the cattle growers, said the ruling won’t have any immediate impact on the activities of his

organization’s members.

But he said it sets a bad precedent. Lane said it essentially gives federal officials carte blanche to designate any area they want as critical habitat when they lack scientific evidence to outline a more specific area.

Critical habitat doesn’t affect activities of private landowners. But it does require federal agencies to consult with Fish and Wildlife Service to

ensure anything they do, including issuing permits for activities on federal lands, do not destroy the habitat. Lane said that this ruling, in easing what it takes to make such a designation, can only lead to less and less economic activity in a state like Arizona with so much federal land.

Friday’s ruling is the latest development in a fight that goes back to 1993 when the Mexican spotted owl was first listed endangered.



Mexican spotted owls. (Robin Silver)

Pushed by the Center for Biological Diversity to designate critical habitat, Fish and Wildlife first designated 4.6 million acres. When that was struck down, the agency first proposed 13.5 million acres but eventually pared that back to the original 4.6 million acres.

In an often-blistering 2003 ruling, U.S. District Judge David Bury called arguments by the agency about what is critical habitat are “nonsensical.” He also said the agencies’ interpretation of the words in federal laws is “unsupported by the English language.”

That resulted in the new designation of 8.6 million acres in 2004 which was challenged by the cattle growers.

Their attorney argued that broad an expanse is unjustified.

Norman James said the designation

is linked to areas the owl “occupied.” That term, he said, is unambiguous and must be interpreted to mean where the species resides.

But appellate Judge Betty Fletcher, writing for the unanimous three-judge panel, said it’s not that clear cut.

She said that, in its most narrow sense, an owl “resides” only in its nest. At the other end of the spectrum, Fletcher said, an owl can reside anywhere in its

home range which, in the case of this owl, can be as wide as 3,831 acres.

And then, she said, there is the question of how often an area within the home range is used.

“The Fish and Wildlife Service has authority to designate as ‘occupied’ areas that the owl uses with sufficient regularity that it is likely to be present during any reasonable span of time,” Fletcher wrote.

The judge acknowledged there are times that data are inconclusive or a habitat is used only on a sporadic basis. But she said allowing the federal agency to designate areas where the owl is likely to be found promotes the conservation goals of the Endangered Species Act.

And Fletcher said the intent of Congress in approving the law was to direct agencies to exercise caution and to give the benefit of the doubt to protecting the endangered species.