



Questions and Answers: Delisting the Cactus Ferruginous Pygmy Owl in Arizona

Q: Why was the Arizona population of the cactus ferruginous pygmy-owl listed as endangered?

A: The Arizona population was added to the Federal endangered species list in March 1997 as a distinct population segment. The owl's habitat has been modified in Arizona due to dams, water diversions, and urban expansion as well as curtailment of its habitat or range. Arizona surveys documented 41 adult pygmy-owls in 1999, 34 in 2000, 36 in 2001. Only 18 were detected in 2002; a decrease thought to be related to prolonged drought.

Q: What is a Distinct Population Segment?

A: Under the Endangered Species Act, a "species" is any subspecies of fish or wildlife or plants, and any distinct vertebrate population segment (DPS) and may be considered for protection. We use three elements to assess whether a population may be recognized as a DPS:

- 1) Discreteness of the population in relation to the remainder of the species to which it belongs;
- 2) The significance of the population segment to the species to which it belongs; and
- 3) The population segment's conservation status in relation to the Act's standards for listing.

Q: Why was the listing of the population of the cactus ferruginous pygmy-owl challenged?

A: On January 9, 2001, a coalition of plaintiffs lead by National Association of Home Builders, filed suit challenging the validity of the pygmy-owl as an endangered species under our DPS policy and the designation of its critical habitat. The plaintiffs argued that the DPS designation violated our policy because the Arizona pygmy-owl population was neither discrete nor significant. The court agreed with our argument that the population was discrete, but said we did not articulate why the discrete population was significant.

September 21, 2001, the Arizona District Court upheld listing of the Arizona population of the pygmy-owl and at the Service's request (due to admitted shortcomings of the 1999 economic analysis), remanded the critical habitat designation pending preparation of a new analysis of the economic effects of critical habitat. The court ordered the Service to submit a critical habitat proposal to the Federal Register by November 15, 2002, and issue a final determination by July 31, 2003.

On August 19, 2003, the Ninth Circuit Court of Appeals (responding to National Association of Homebuilders and Southern Arizona Home Builder Association's appeal) overruled Arizona District Court's upholding the listing of the Arizona distinct population segment and found the Service'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. The case was remanded to the Arizona District Court for remedy. On June 28, 2004, the Court remanded the decision to the Service for reconsideration consistent with the court's opinion.

Q: The Court questioned our rationale for determining the “significance” of the Arizona pygmy-owl DPS to the species to which it belongs. How did this factor into our decision?

A: The Service was asked by the court to reconsider its decision and initiated a review of the Arizona DPS in conjunction with the Ninth Circuit’s ruling, while considering our policies. We do not believe that we can meet the standard of evidence to indicate that the population is an entity that qualifies for listing under the Act.

We evaluated the significance of the Arizona DPS in light of our DPS policy and the Ninth Circuit’s ruling in this case. Currently available information on these factors -- in light of the standard of evidence required under the Ninth Circuit’s opinion – leads us to our conclusion that the pygmy-owls in Arizona does not qualify for listing under the Act.

Q: Did you use new information in your review?

A: In its remand, the Ninth Circuit allowed the Service to consider information relative to the significance of the Arizona Distinct Population Segment to the pygmy-owl western population. In doing so, the Service considered information that we received from 1997 (the time of listing) to the present. This included information received while preparing the proposed critical habitat designation and the draft recovery plan.

Q. Fish and Wildlife biologists prepared a white paper on the biology of the pygmy owl in December, 2003. Did you use this information when preparing the proposed decision to delist the bird?

A. The White Paper did not contain recommendations nor did it draw conclusions; rather it was a discussion of the current science as it relates to the significance of the cactus ferruginous pygmy owl as a distinct population segment. All elements in the White Paper are fully discussed in the proposal. The conclusions that we have drawn are open for public review and comment at this time.

Q: Isn’t delisting contrary to Assistant Secretary’s (December 2003) published statement that “the U.S. Fish and Wildlife Service has not reversed its 1997 biological finding that the Arizona population of the cactus ferruginous pygmy-owl is an endangered species and requires the protection of the Endangered Species Act?”

A: No. The December 2003 statement by Assistant Secretary Manson also says that the court ruled that the 1997 listing of the pygmy-owl was “arbitrary and capricious” as a matter of law, not biology. Asking the court to vacate the rule was the legally appropriate response. In looking at the current situation on remand to determine if the Arizona pygmy-owl population is significant, it remains a legal matter and not one that can be determined solely by biology. We presented our information on the significance to the court. The court disagreed, thereby creating a legal standard that led to our decision to propose de-listing.

Q: Where is the whole cactus ferruginous pygmy-owl “taxon” found?

A: The pygmy-owl is one of four subspecies of the ferruginous pygmy-owl. The cactus ferruginous pygmy-owl subspecies occurs from lowland central Arizona south through western Mexico to the States of Colima and Michoacan, and from southern Texas south through the Mexican States of Tamaulipas and Nuevo Leon. The entire subspecies constitutes a “taxon.” Only the Arizona population of the pygmy-owl is presently listed as an endangered species.

Q: Where are cactus ferruginous pygmy-owls found in Arizona?

A: Historically occurring throughout much of south and central Arizona and in what is now the Phoenix area, pygmy-owls are now found at Organ Pipe Cactus National Monument, the Altar Valley, and northwest Tucson and south-central Pinal County. Pygmy-owls also occur on the Tohono O'odham Nation, but we have no specific information on their numbers or distribution there.

Q: If the Arizona population of the pygmy-owl is delisted, will it be unprotected?

A: The pygmy-owl would continue to receive protection under the Migratory Bird Treaty Act. This act would prohibit the taking (killing, pursuit or harassment) of the pygmy-owl or the possession of its parts (feathers, eggs, etc. Arizona State law provides no specific protections for the pygmy-owl.

Q: What will be the federal responsibilities for the pygmy-owl if this proposal is finalized?

A: A final rule delisting the Arizona DPS of the pygmy-owl would mean the requirements under section 7 of the Act would no longer apply. Federal agencies would no longer need to consult with us on their actions that may affect the pygmy-owl and insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of the pygmy-owl. Federal agencies would also be relieved of their responsibilities under section 7(a)(1) of the Act to use their authorities to further the conservation of the pygmy-owl. Additionally, we would not finalize the designation of critical habitat nor would we complete a final recovery plan.

Permitted scientific take as a result of surveys and research will likely continue to be regulated by the State of Arizona, Arizona Game and Fish Department and would be considered in the context of potential effects to population stability.

Q: What is the cactus ferruginous pygmy-owl?

A: The cactus ferruginous pygmy-owl is a small, reddish-brown bird with a cream-colored belly streaked with reddish-brown and a long tail. Pygmy-owls average 2.2 ounces and are approximately 6.75 inches long. The eyes are yellow, the crown is lightly streaked, and there are no ear tufts. Paired black spots on the back of the head may resemble eyes. Their diet includes lizards, birds, insects, and small mammals.

Q: Are there any habitat conservation plans that address the pygmy-owl?

Two have been finalized. The Lazy K Bar Ranch was completed in 1998 and has no expiration date. The Sky Ranch HCP is a single species (owl) plan finalized in January of 2004 and has a five-year timeframe.

The draft Pima County Multi-Species Conservation Plan (Pima Co MSCP) is the largest plan and will include the Lesser long-nosed bat (*Leptonycteris curasoae yerbabuena*), southwestern willow flycatcher (*Empidonax traillii extimus*), cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*), desert pupfish (*Cyprinodon macularius*), Pima pineapple cactus (*Coryphantha scheeri* var. *robustispina*), Nichols Turks head cactus (*Echinocactus horizontalis* var. *nicholli*), Huachuaca water umbel (*Lilaeopsis schaffneriana recurva*), and the Chiricahua leopard frog (*Rana chiricahuensis*). In addition, the plan will include Gila chub (*Gila intermedia*), a species proposed for listing, and the Acuna cactus (*Echinomastus erectocentrus* var. *acunensis*) and yellow-billed cuckoo (*Coccyzus americanus* spp. *occidentalis*), both of which are candidates for listing. The plan will also address up to 44 other unlisted but vulnerable species.

The Town of Marana and City of Tucson are working on their HCPs under non-traditional Section 6 grants for HCP planning.