

**Authority:** The authority for this action is the Endangered Species Act of 1973 as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 19, 2005.

**Marshall P. Jones, Jr.,**

*Acting Director, Fish and Wildlife Service.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

**RIN 1018-AU22; 1018-A148**

#### **Endangered and Threatened Wildlife and Plants; Proposed Rule To Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-Owl From the Federal List of Endangered and Threatened Wildlife; Proposal To Withdraw the Proposed Rule To Designate Critical Habitat**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), under the authority of the Endangered Species Act of 1973 (Act), as amended, propose to remove the Arizona distinct population segment (DPS) of the cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) (pygmy-owl) from the Federal List of Endangered and Threatened Wildlife and accordingly to eliminate its designated critical habitat. The Arizona DPS of the pygmy-owl was listed as endangered on March 10, 1997 (62 FR 10730), and critical habitat was designated on July 12, 1999 (64 FR 37419). On January 9, 2001, a coalition of plaintiffs filed a lawsuit with the District Court of Arizona challenging the validity of our listing of the pygmy-owl as a DPS and the designation of its critical habitat. After the District Court of Arizona remanded the designation of critical habitat (*National Association of Home Builders et al. v. Norton*, Civ.-00-0903-PHX-SRB), we proposed a new critical habitat designation on November 27, 2002 (67 FR 7102). Ultimately, as a result of this lawsuit, the United States Court of Appeals for the Ninth Circuit issued an opinion on August 19, 2003, stating that “the FWS acted arbitrarily and capriciously in designating the Arizona pygmy-owl population as a DPS under the *DPS Policy*” (*National Association of Home Builders v. Norton*, 340 F. 3d 835, 852 (9th Cir. 2003)). In light of the Ninth Circuit’s opinion, we have reassessed the application of the DPS significance

criteria to the Arizona pygmy-owl. Based on our assessment, we do not believe that the available information and science satisfy the criteria to indicate that pygmy-owls in Arizona are an entity that qualifies for listing under the Act. Accordingly, we propose to remove the Arizona population of pygmy-owls from the list in 50 CFR 17.11, remove the critical habitat designation for this population at 50 CFR 17.95, and withdraw our November 27, 2002, proposed rule to designate new critical habitat.

**DATES:** We will accept comments until October 3, 2005. Public hearing requests must be received by September 19, 2005.

**ADDRESSES:** Comments and materials concerning the proposed delisting of the Arizona DPS of the pygmy-owl should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021-4951. Written comments may also be sent by facsimile to 602/242-2513. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Steve Spangle, Field Supervisor (*see ADDRESSES*) (telephone 602/242-0210; facsimile 602/242-2513).

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Comments Solicited**

We intend that any final action resulting from this proposal will be based on the best available information. We have gathered and evaluated new information related to the pygmy-owl that has become available since the 1997 listing and are seeking any other pygmy-owl information. We will continue to support surveys of pygmy-owls in Mexico to further elucidate the status of the species in Mexico, and to identify threats to the population.

We are soliciting comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We are particularly interested in comments concerning:

- (1) Biological, genetic, and/or morphological data related to the taxonomic classification of the pygmy-owl throughout its current range;
- (2) The location and characteristics of any additional populations not considered in previous work that might have bearing on the current population status;

(3) Additional information related to current versus historical range, current distribution, genetic diversity, and population sizes of the Arizona pygmy-owl population and its contribution to the taxon as a whole;

(4) Status of the pygmy-owl in Mexico, particularly threats to populations or habitat; and

(5) Information related to discreteness, significance, and conservation status of any potential pygmy-owl DPS.

We will take into consideration the comments and any additional information received, and such communications may lead to a final determination that differs from this proposal.

#### **Background**

The cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) (pygmy-owl) is in the order Strigiformes and the family Strigidae. It is a small bird, approximately 17 centimeters (cm) (6.75 inches (in)) long. Males average 62 grams (g) (2.2 ounces (oz)), and females average 75 g (2.6 oz). The pygmy-owl is reddish brown overall, with a cream-colored belly streaked with reddish brown. Color may vary, with some individuals being more grayish brown. The crown is lightly streaked, and a pair of black/dark brown spots outlined in white occur on the nape suggesting “eyes.” This species lacks ear tufts, and the eyes are yellow. The tail is relatively long for an owl and is colored reddish brown with darker brown bars (Proudfoot and Johnson 2000). The pygmy-owl is primarily diurnal (active during daylight) with crepuscular (active at dawn and dusk) tendencies. They can be heard making a long, monotonous series of short, repetitive notes, mostly during the breeding season (Proudfoot and Johnson 2000).

The pygmy-owl is one of four subspecies of the ferruginous pygmy-owl. It 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. Only the Arizona population of the pygmy-owl is listed as an endangered species (62 FR 10730; March 10, 1997).

Historically, pygmy-owls were recorded in association with riparian woodlands in central and southern Arizona (Bendire 1892; Gilman 1909; Johnson *et al.* 1987). Plants present in these riparian communities included cottonwood (*Populus fremontii*), willow (*Salix* spp.), ash (*Fraxinus velutina*), and hackberry (*Celtis* spp.). However, recent records have documented that pygmy-

owls are found in a variety of vegetation communities such as riparian woodlands, mesquite (*Prosopis velutina* and *P. glandulosa*) bosques (Spanish for woodlands), Sonoran desertscrub, semidesert grassland, and Sonoran savanna grassland communities (Monson and Phillips 1981; Johnson and Haight 1985; Proudfoot and Johnson 2000) (see Brown 1994 for a description of these vegetation communities). While native and nonnative plant species composition differs among these communities, there are certain unifying characteristics such as (1) the presence of vegetation in fairly dense thickets or woodlands, (2) the presence of trees, saguaros (*Carnegiea giganteus*), or organ pipe cactus (*Stenocereus thurberi*) large enough to support cavities for nesting, and (3) elevations below 1,200 meters (m) (4,000 feet (ft)) (Swarth 1914; Karalus and Eckert 1974; Monson and Phillips 1981; Johnsgard 1988; Enriquez-Rocha *et al.* 1993; Proudfoot and Johnson 2000). Large trees provide canopy cover and cavities used for nesting, while the density of mid- and lower-story vegetation provides foraging habitat and protection from predators and contributes to the occurrence of prey items (Wilcox *et al.* 2000).

#### Previous Federal Action

On May 26, 1992, a coalition of environmental organizations (Galvin *et al.* 1992) petitioned us to list the entire cactus ferruginous pygmy-owl subspecies as endangered under the Act. We published a finding that the petition presented substantial scientific or commercial information indicating that listing of the pygmy-owl may be warranted and commenced a status review of the subspecies (58 FR 13045; March 9, 1993). As a result of information collected and evaluated during the status review, including information collected during a public comment period, we proposed to list the pygmy-owl as endangered with critical habitat in Arizona and threatened in Texas (59 FR 63975; December 12, 1994). After a review of all comments received in response to the proposed rule, we published a final rule listing the pygmy-owl as endangered in Arizona (62 FR 10730; March 10, 1997). In that final rule, we determined that listing in Texas was not warranted and that critical habitat designation for the Arizona population was not prudent.

On October 31, 1997, the Southwest Center for Biological Diversity filed a lawsuit in Federal District Court in Arizona against the Secretary of the Department of the Interior for failure to designate critical habitat for the pygmy-owl and a plant, *Lilaeopsis*

*schaffneriana* var. *recurva* (Huachuca water umbel) (*Southwest Center for Biological Diversity v. Babbitt*, CIV 97–704 TUC ACM). On October 7, 1998, the District Court issued an order that, along with subsequent clarification from the Court, required proposal of critical habitat by December 25, 1998, followed by a final determination 6 months later.

In September 1998, we appointed the Cactus Ferruginous Pygmy-owl Recovery Team (Recovery Team), comprised of biologists (pygmy-owl experts and raptor ecologists) and representatives from affected and interested parties (*i.e.*, Federal and State agencies, local governments, the Tohono O'odham Nation, and private groups). On January 9, 2003, we published a notice of availability in the **Federal Register** (68 FR 1189) opening the public comment period for the draft pygmy-owl recovery plan until April 9, 2003. On April 30, 2003 (68 FR 23158), we reopened the public comment period on the recovery plan until June 30, 2003.

On December 30, 1998, we proposed to designate critical habitat in Arizona for the pygmy-owl (63 FR 71820). On April 15, 1999, we released the draft economic analysis on proposed critical habitat and reopened the public comment period for 30 days (64 FR 18596). On July 12, 1999, we published our final critical habitat determination (64 FR 37419), essentially designating the same areas as were proposed.

On January 9, 2001, a coalition of plaintiffs filed a lawsuit with the District Court of Arizona challenging the validity of the Service's listing of the Arizona population of the pygmy-owl as an endangered species and the designation of its critical habitat. On September 21, 2001, the Court upheld the listing of the pygmy-owl in Arizona but, at our request, and without otherwise ruling on the critical habitat issues, remanded the designation of critical habitat for preparation of a new analysis of the economic and other effects of the designation (*National Association of Home Builders et al. v. Norton*, Civ. –00–0903–PHX–SRB). The Court also vacated the critical habitat designation during the remand. Subsequently, the Court ordered that we submit the critical habitat proposed rule to the **Federal Register** on or before November 15, 2002. On November 27, 2002, we published the proposed rule to designate critical habitat for the pygmy-owl (67 FR 7102) and opened a public comment period on the proposed rule and the draft economic analysis until February 25, 2003. We extended the comment period on February 25, 2003, until April 25, 2003 (68 FR 8730). We

then reopened the comment period on April 28, 2003, until June 27, 2003 (68 FR 22353). Due to a lack of funding, work on the final rule designating critical habitat for the pygmy-owl was suspended in April 2003.

The plaintiffs appealed the District Court's ruling on the listing of the pygmy-owl as a distinct population segment. On August 19, 2003, the Ninth Circuit Court of Appeals upheld the Service's determination that the Arizona pygmy-owl population was discrete, but found that the Service did not articulate a rational basis for finding that the Arizona pygmy-owl population was significant to the taxon, as discussed in further detail below (*National Association of Home Builders v. Norton*, 340 F. 3d. at 852). The judgment of the District Court was reversed, and the case was remanded to the District Court for further proceedings consistent with the Ninth Circuit's opinion.

The Ninth Circuit's opinion and the Service's lack of funding to complete work on the final critical habitat designation prompted us to file a declaration with the District Court of Arizona requesting to stay or modify the Court-ordered critical habitat completion deadline of September 29, 2003. On September 29, 2003, the Court granted a stay pending further order of the Court.

On October 1, 2003, the interveners-appellees petitioned for a rehearing from the Ninth Circuit. That request was denied. On November 12, 2003, the plaintiffs filed a motion with the District Court seeking removal of the listing based on the Ninth Circuit's ruling. On December 10, 2003, the Service filed a response agreeing that removal of the listing was appropriate. The motion also indicated that the Service was undertaking an internal review of the current status of the pygmy-owl in the United States and Mexico and was engaged in ongoing surveys of the species. The interveners in the case opposed the plaintiffs' motion and disputed the contention that the listing rule should be removed.

On June 25, 2004, the District Court for the District of Arizona (CV 00–0903 PHX–SRB) remanded the listing rule to the Service for reconsideration consistent with the Ninth Circuit's ruling and ordered that the pygmy-owl listing should remain in place for the duration of the Service's deliberations. On January 31, 2005, pursuant to the District Court's order, we filed a status report with the District Court regarding our reconsideration of the listing rule for the pygmy-owl. This proposed rule to delist the Arizona DPS of the pygmy-owl is the result of our evaluation of

whether the DPS is a listable entity under the Act.

### Distinct Vertebrate Population Segment

We must consider a species for listing under the Act if available information indicates that such an action might be warranted. "Species" is defined by the Act as including any species or subspecies of fish and wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). We, along with the National Marine Fisheries Service (National Oceanic and Atmospheric Administration—Fisheries), developed the Policy Regarding the Recognition of Distinct Vertebrate Population Segments (DPS Policy) (61 FR 4722) to help us in determining what constitutes a DPS. Under this policy, we use three criteria to assess whether a population under consideration for listing 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.

A population segment may be considered discrete if it satisfies either one of the following conditions: (1) Marked separation from other populations of the same taxon (a group of organisms that form a unit of classification, *e.g.*, a family, genus, species, subspecies) resulting from physical, physiological, ecological, or behavioral factors, including genetic discontinuity; or (2) populations delimited by international boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of 4(a)(1)(D) of the Act.

If a population is considered discrete under one or more of the above conditions, its biological and ecological significance is assessed. Measures of significance may include, but are not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon; (2) evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon; (3) evidence that the discrete population segment represents the only surviving natural occurrence of the taxon that may be more abundant elsewhere as an introduced population outside its historical range; and (4) evidence the discrete population segment differs markedly from other

populations of the taxon in its genetic characteristics.

If a population segment is discrete and significant, its evaluation for endangered or threatened status will be based on the Act's definitions of those terms and a review of the factors enumerated in section 4(a). Endangered means the species is in danger of extinction throughout all or a significant portion of its range. Threatened means the species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

### Delisting Analysis: Proposed Application of the Significance Criteria to the Pygmy-Owl in Arizona

In the discussion below we provide our preliminary analysis of the significance of the Arizona DPS in light of our DPS policy and the Ninth Circuit's ruling in this case. In doing so we considered information known at the time of the listing of the pygmy-owl, as well as information obtained subsequently. This is consistent with the June 25, 2004, ruling by the District Court remanding the rule back to the Service for reconsideration, which held that once a rule has been declared arbitrary and capricious and it is remanded to the agency for further consideration, the agency may use all information available at the time of reconsideration. Prior to making a final determination we will consider any new information obtained during the public comment period and make any necessary revisions.

(1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon.

Approximately three quarters of the distribution of the pygmy-owl occurs within tropical and subtropical plant communities. This includes pygmy-owls of southern Texas south through the Mexican States of Tamaulipas and Nuevo Leon, which occupy mesquite forest, riparian forest, thorn forest, tropical deciduous forest, heavy riparian forest, and areas more tropical in nature, including cypress groves (Cartron *et al.* 2000b; Proudfoot and Johnson 2000; Leopold 1950). It also includes areas in southern Sonora, Sinaloa, and Nayarit where pygmy-owls occur within the tropical Sinaloa thornscrub and Sinaloa deciduous forest community types and associated riparian communities (Leopold 1950; Brown 1994; Phillips and Comus 2000).

Approximately one quarter of the distribution of pygmy-owls falls within desert plant communities. This includes pygmy-owls in Arizona south through western Mexico into the State of Sonora.

In Arizona, the pygmy-owl is found within Sonoran Desert scrub or semidesert grassland biotic communities and associated riparian and xeroriparian (dry washes) communities (Cartron *et al.* 2000b; Proudfoot and Johnson 2000). In northern Sonora, Mexico, the ecological setting in which the pygmy-owl is found exhibits similar ecological conditions to the range of the Arizona pygmy-owl with regard to vegetation, climate, soils, etc. (Leopold 1950; Brown 1994; Phillips and Comus 2000; <http://mexicochannel.net/maps>).

In northern Sonora, Mexico, millions of acres of Sonoran Desert and thornscrub are being converted to buffelgrass (*Pennisetum ciliaris*). This direct loss of habitat from the conversion to buffelgrass also results in an indirect loss of habitat because of invasion of buffelgrass into adjacent areas and increased fire frequency and intensity in buffelgrass savannas (Burquez-Montijo *et al.* 2002). Little is known about the direct effects of fire on pygmy-owl behavior or distribution. We have no research information at our disposal that follows the behavior of and impacts to owls before, during and following natural fire events. Flesch (2003) concluded that the conversion of native vegetation to buffelgrass savannas constitutes a serious threat to pygmy-owls by eliminating or suppressing regeneration of large columnar cacti in northern and central Sonora, especially in areas where saguaros are already uncommon (Flesch 2003). Buffelgrass areas have significantly lower species diversity and reduced structural complexity than the native desert scrub (Van Devender and Dimmit 2000). Pygmy-owls were found in or adjacent to buffelgrass clearings that formed a mosaic of artificial savannah and native vegetation (Flesch 2003). The conversion of native vegetation to buffelgrass and the associated direct and indirect effects on habitat are an ongoing threat to pygmy-owls in Mexico (Flesch 2003). Survey data indicate that pygmy-owls are patchily distributed in Sonora, Mexico (Flesch 2003). This conversion of native vegetation to buffelgrass may be serving to create an ecological setting that is very different than that occupied by Arizona pygmy-owls.

Johnson *et al.* (2003) examined previous population and site locations for owls between 1872 and 1971. They found that, historically, the owl used riparian zones along streams and later transitioned to the more xeric habitat of cacti. They believed a direct correlation exists between the timeframe of the 1920s, when numerous water projects

were constructed resulting in reduced stream flows, and a downward trend in population numbers as compared to 1880–1920. Thus, their work argues against a clear indication that more current events resulted in population reductions, or that there has been a precipitous decline since the changes that occurred just after the turn of the century.

(2) Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon.

In the listing rule (March 10, 1997; 62 FR 10730), we found that the gap in the range of the taxon through loss of the Arizona pygmy-owls would be significant because it would: (a) Decrease the genetic variability of the taxon; (b) reduce the current range of the taxon; (c) reduce the historical range of the taxon; and (d) extirpate the western pygmy-owls from the United States.

With regard to genetic variability, factor (a) above, in our listing rule we were able to determine genetic distinctness between western and eastern pygmy-owls; however, we did not have evidence of genetic differences between pygmy-owls in Arizona and northwestern Mexico. Proudfoot and Slack (2001) present the most current and extensive work on the genetics of the pygmy-owl. They found that there were distinct differences between pygmy-owls in Arizona and Texas. Their work also showed genetic differences between pygmy-owls in eastern and western Mexico. However, we have no evidence of a marked genetic difference between the Arizona pygmy-owls and those in the rest of the western range. Glenn Proudfoot, Texas A&M University, will shortly complete some additional pygmy-owl genetic analysis using a different methodology (S. Richardson, pers. comm., 2005). These analyses are expected to be available very soon and may be relevant to our final decision. We will review this information when it becomes available.

Given the genetic and geographic separation between the eastern and western pygmy-owls and the habitat differences within the western population of desert and subtropical/tropical plant communities, Arizona pygmy-owls at the northern periphery of the western range represent a potential source of genetic diversity within the range of the taxon. Recent pygmy-owl genetic work, done by Proudfoot at Texas A&M, presents evidence that genetic divergence occurs in both Arizona and Sonora, Mexico. A distinct genetic clade exists in northwest Tucson and genetic separation exists between

Sonora and Sinaloa indicating that separate groups of pygmy-owls, including Arizona, contribute to the overall genetic diversity of this subspecies (Proudfoot and Slack 2001, Proudfoot 2005). Genetic divergence tends to occur at the periphery of a species' range (Lesica and Allendorf 1995). The peripheral nature of the Arizona pygmy-owls may increase the potential for the population to diverge from populations in Sonora and Sinaloa, Mexico. Because peripheral populations may be isolated to some extent from core populations, peripheral populations may become genetically distinct because of genetic drift (random gene frequency changes in a small population due to chance alone) and divergent natural selection (the natural process by which organisms leave differentially more or fewer descendants than other individuals because they possess certain inherited advantages or disadvantages) (Lesica and Allendorf 1995). However, we have no evidence to suggest a marked genetic difference between the Arizona pygmy-owls and the rest of the western pygmy-owls.

With regard to factor (b), a reduction in current range, the Ninth Circuit looked to other DPS rules and findings published by the Service. The Court stated that the Service had previously found two ways in which the loss of a discrete population could reduce the current range of its taxon. First, the Court concluded that a gap could be significant if the loss of the population would amount to a "substantial reduction" of the taxon's range. The Court noted the final listing rule for the pygmy-owl stated that the Arizona population represented only a small percentage of the total current range of western pygmy-owls, and the Service did not find that the loss of this "small percentage" would substantially curtail the current range. Second, "the loss of a discrete population that is numerous and constitutes a large percentage of the total number of taxon members could be considered a significant curtailment of a taxon's current range" (340 F.3d. at 845). The Court noted the Service did not find that the "20 to 40 individuals [in the Arizona population] would significantly curtail the western pygmy-owls' current range, which consists mostly of the more-numerous northwestern Mexico pygmy-owl population" (340 F.3d. at 845). In this case, the range of the taxon (*Glaucidium brasilianum cactorum*), includes both the western pygmy-owl population occurring from lowland central Arizona south through western Mexico to the States of Colima and Michoacan, and

the eastern pygmy-owl population from southern Texas south through the Mexican States of Tamaulipas and Nuevo Leon. Taking into account our DPS policy, as well as the analysis of the Ninth Circuit, we conclude that the loss of the Arizona population would not result in a significant gap in the range of the taxon due to a reduction in the current range of the subspecies. Because this Arizona population occupies only a small percentage of the range of the subspecies, its loss would not amount to a substantial reduction of the range of the subspecies.

With regard to factor (c) above, we found in our original listing rule that the gap would be significant because the loss of the Arizona pygmy-owls would reduce the historical range of the taxon. We determined this because the Arizona population is at the periphery of the western pygmy-owl's historical range, and that this peripheral population was always a stable portion of that range. The Ninth Circuit found that alone does not make Arizona a major geographical area in the western pygmy-owl's historic range. The Ninth Circuit found that, while Arizona pygmy-owls might possibly be significant to its taxon's historic range, the Service did not articulate a reasoned basis in the listing rule as to why that is so. The historic ranges of the Arizona population and of the whole subspecies are not precisely known. Based upon the best information available, the historic range in Arizona was considerably larger than the population's current range in Arizona. However, even the historic range in Arizona was only a small percentage of the historic range of the entire subspecies. We have no other information suggesting that the historic range of the Arizona population represents "a major geographical area" such that, given the ruling of the Ninth Circuit, the loss of the Arizona population would result in a significant gap in the range of the taxon.

We do believe that protection and management of some peripheral populations may be important to the survival and evolution of certain species. Population members most distant from the species' core regularly demonstrate adaptations not often seen in core populations. This in and of itself, however, does not satisfy the question of significance. Maintaining genetic diversity within the western population and the taxon as a whole may be important in the face of land use changes, primarily impacts from a conversion of native vegetation to agricultural crops and buffelgrass pastures for livestock grazing in Mexico (Burquez and Yrizar 1997). Land use

changes in Mexico may cause the reduction of the core pygmy-owl population in Mexico, and as such there might be an increased reliance on peripheral populations to maintain genetic adaptation and diversity. Peripheral populations often persist when core populations are extirpated (Channell and Lomolino 2000a, 2000b; Lomolino and Channell 1995). In the face of changing environmental conditions, what constitutes a peripheral population today could be the center of the species' range in the future (Nielsen *et al.* 2001). Peripheral populations survive more frequently than do core populations when species undergo dramatic reductions in their range (greater than 75 percent) (Channell and Lomolino 2000a). However, we do not have sufficient information to assess the likelihood of the Arizona peripheral population contributing to the long-term survival of the species. Additionally, as noted above, we do not have evidence to support a marked genetic difference between Arizona pygmy-owls and pygmy-owls in western Mexico.

With regard to (d) above, we determined that a gap would be significant because it would deprive the United States of its portion of the western pygmy-owl's range. The Ninth Circuit Court rejected this argument as a misconstruction of this criterion. The Court found that in designating a DPS under the DPS policy, we must find that a discrete population is significant to the taxon as a whole, not to the United States. Therefore, we have determined, based on the information available to the Service, that loss of the Arizona population would not result in a significant gap in the range of the subspecies on the basis of the significance of the Arizona population to the subspecies' status as a whole.

(3) Evidence that the discrete population segment represents the only surviving natural occurrence of the taxon that may be more abundant elsewhere as an introduced population outside its historical range.

This criterion does not apply to the Arizona population of the pygmy-owl.

(4) Evidence the discrete population segment differs markedly from other populations of the taxon in its genetic characteristics.

As discussed above, we do not have evidence to support that there is a marked genetic difference between pygmy-owls in Arizona and the rest of the western population of pygmy-owls.

On the basis of the discussion above, we believe that the Arizona population of the pygmy-owl does not meet the definition of a DPS in accordance with

our 1996 DPS policy. As such, we are proposing to remove the Arizona DPS of the cactus ferruginous pygmy-owl from the Federal List of Endangered and Threatened Wildlife on the basis that the original classification data was in error. Accordingly, we are also proposing to remove the designation of critical habitat at 50 CFR 17.95(b) for the Arizona DPS of the pygmy-owl, and we are proposing to withdraw our proposed rule of November 27, 2002 (67 FR 71032) to set forth new critical habitat for this population.

#### Effects of the Proposed Rule

If the Arizona DPS of the pygmy-owl is delisted, the requirements under section 7 of the Act would no longer apply. Federal agencies would be relieved of the need to consult with us on their actions that may affect the pygmy-owl and to 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 proposed on November 2, 2002 (67 FR 71032) nor would we complete a final recovery plan.

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

#### Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our proposal is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding this proposal. We will consider all comments and information received during the 60-day comment period on this proposed rule as we prepare our final rulemaking.

#### Public Hearings

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be

received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor (*see ADDRESSES* section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

#### Clarity of the Rule

Executive Order 12866 requires each Federal agency to write regulations that are easy to understand. We invite your comments on how to make this proposal easier to understand including answers to questions such as the following: (1) Is the discussion in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposal? (2) Does the proposal contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposal (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce clarity? What else could we do to make the proposal easier to understand?

Send a copy of comments that concern how we could make this proposal easier to understand to Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also send comments by e-mail to [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

#### Required Determinations

##### Paperwork Reduction Act

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. Implementation of this proposal does not include any collections of information that require approval by OMB under the Paperwork Reduction Act.

##### National Environmental Policy Act (NEPA)

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

**References Cited**

A complete list of all references cited in this proposed rule is available upon request from the Arizona Ecological Services Field Office (see ADDRESSES section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we hereby propose to amend part 17, subchapter B of Chapter

I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

**§ 17.11 [Amended]**

2. Amend § 17.11(h) by removing the entry for “Pygmy-owl, cactus

ferruginous” under BIRDS from the List of Endangered and Threatened Wildlife.

**§ 17.95 [Amended]**

3. Amend § 17.95(b) by removing the entry for “Cactus Ferruginous Pygmy-owl (*Glaucidium brasilianum cactorum*).”

Dated: July 27, 2005.

**Marshall P. Jones, Jr.,**

*Acting Director, U.S. Fish and Wildlife Service.*

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