

ENDANGERED SPECIES & WETLANDS REPORT

September 2001
Vol. 6, No. 12

Politics, regulation and law on ESA, wetlands and takings

Pygmy-owl critical habitat set aside, listing upheld

Critical habitat for the cactus ferruginous pygmy-owl has been thrown out by a federal judge in Arizona, who said “broader reconsideration” of the CH designation is necessary in order to fully consider economic impacts (*National Ass’n of Home Builders v. Norton*, 00-903-PHX-SRB, D. Ariz.).

U.S. District Judge Susan Bolton said the plaintiffs, who also include the Southern Arizona Home Builders Association and the Home Builders Association of Central Arizona, “have presented evidence which suggests that [FWS] did not fully evaluate the ‘economic and other impacts’ ” of the 731,000-acre CH designation in four counties in Arizona.

Bolton upheld the listing of the bird, however, rejecting the plaintiffs’ arguments that the owl population in Mexico should have been considered in the decision to list.

The judge did not confine herself to the economic analysis issue. In her 10-page order, she said that because “systematic pygmy-owl surveys had not yet been done over all the potential habitat in Arizona, [FWS] determined critical habitat by designating areas where the pygmy-owls have been sighted, areas that they thought would be consistent with the species [sic] known habitat, and all the land in between. Not only did they include areas actually occupied by the pygmy-owls, they also designated as ‘critical habitat’ types of areas where they thought the pygmy-owls could live.”

FWS and developers disagreed about whether the decision will significantly reduce the need for formal consultation on private lands in Arizona.

“Given that there are few pygmy-owls in southern Arizona, and a number of those are found on federal land, I expect the order to eliminate the need for formal consultation for most activities on private land, virtually all of which is unoccupied,” said plaintiffs’ attorney Norm James of Fennemore & Craig in Phoenix.

FWS disagreed. “Consultation will continue on private land,” said FWS spokesman Jeff Humphrey, in Phoenix. “There’s occupied and suitable habitat on private land, and development that may adversely affect owls through the loss of suitable habitat will still have to be evaluated by federal permitting agencies” such as EPA and the Army Corps of Engineers.

But James said that most Tucson-area developers “have been conducting annual surveys for pygmy-owls during the past several years using the Fish and Wildlife Service’s protocol, and should be able to establish that their properties have not been used by owls for any essential purpose, such as nesting. It is unlikely that development activities would support a ‘jeopardy’ determination under these circumstances.”

Earlier this year, FWS asked the judge to stay the litigation and allow it to complete a new economic analysis, while keeping the listing and CH designation in effect (*ESWR* June,

p. 12). The Tenth Circuit Court of Appeals—which does not cover Arizona—had set aside the Southwestern willow flycatcher CH designation after ruling that the service’s economic analysis for that designation was inadequate (*New Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, 00-2050; *ESWR* May, p. 1).

Bolton’s ruling “creates a dilemma for the service with respect to other critical habitat designations that are currently being challenged in court,” said Tom Jackson of Kelley Drye & Warren in Washington. In the case, the service “admitted that the [CH] designation for the pygmy-owl was based on a flawed analysis, and the designations in other cases suffer from that same flaw. Sooner or later, I think the service will be asked pointedly by other judges around the country why other designations shouldn’t also be vacated. The ruling also represents another in a growing line of cases holding that the service is using the wrong fundamental standard in designating critical habitat because it is not restricting designations to habitat that is necessary to avoid short-term jeopardy to species but is instead designating habitat that the Service believes is necessary for long-term recovery.”

Owl still protected through listing

Bolton said that even without a CH designation, “the present listing of the species as endangered will still provide some protection against destruction of the pygmy-owls’ habitat.” The latest count found 47 birds in southern Arizona.

But James said Bolton “did not address the heart of the Home Builders’ arguments, which focused on the service’s 1996 Distinct Population Segment policy.” The builders contended that under the policy, FWS was supposed to determine the “significance” of a population “by reference to the taxon as a whole, which necessarily would require consideration of the status of the pygmy-owl in Mexico.”

“There was no dispute that the service ignored the status of the Mexico population and relied on the international border to distinguish between owls in Mexico and owls in southern Arizona,” James said. “Given that virtually all of the owl’s range is found in Mexico (Arizona lies at the extreme northern fringe of the range and comprises a very small part of the total range of the owl) and the owl is regarded as common in Mexico, we believed the treatment of the Arizona population as a distinct population segment was inconsistent with the service’s policy, as well as Congress’ mandate that the ability to list populations should be used sparingly and only when supported by the biological evidence.”