

**The Pygmy-Owl and Its Impact on Land Uses
In Southern Arizona – An Example of Why the
Endangered Species Act Should Be Amended**

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Thank you for the opportunity to participate in this roundtable discussion on Endangered Species Act reform. It has been more than 15 years since Congress has enacted any significant amendments to the ESA, and the key provisions of the ESA have been in effect for over 20 years. In my view as an attorney who represents public and private land and resource users, the time has come for Congress to take a hard look at how the ESA is being used and, increasingly, abused by federal agencies and so-called environmental organizations to prevent legitimate land uses. As one commentator recently stated:

The ESA is not the single most important federal environmental statute, but – whether one applauds or deplors this turn of events – the law is now a primary obstacle to land development and related activities in America.

George Cameron Coggins, *A Premature Evaluation of American Endangered Species Law, in Endangered Species Act: Law, Policy, and Perspective*, 1, 1 (Donald C. Baur and Wm. Robert Irvin eds. 2002).

In my presentation, I will focus on two aspects of the ESA that, based on my experience,

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are especially problematic: First, the process by which species are “listed,” i.e., designated for protection under the ESA, and, second, the Section 7 consultation process, which has evolved into a federal zoning program. To illustrate some of the problems in these areas, I will focus on the cactus ferruginous pygmy-owl, which is found in southern Arizona, including portions of the Tucson metropolitan area.

1. The Pygmy-Owl’s Listing and Subsequent Litigation

The species ferruginous pygmy-owl is found throughout tropical and subtropical North and South America.² The cactus ferruginous pygmy-owl is one of at least four subspecies of ferruginous pygmy-owl. Its range is extensive, extending from southern Arizona, south through western Mexico to the States of Colima and Michoacan, and from southern Texas south through eastern Mexico to the States of Tamaulipas and Nuevo Leon. The cactus ferruginous pygmy-owl (hereinafter, “pygmy-owl”) is considered common in the majority of its range in Mexico. The Arizona and Texas populations are found at the northern fringe of the pygmy-owl’s range.

According to the Fish and Wildlife Service (“FWS”), the pygmy-owl was once common in Arizona. Claims of the bird’s abundance in Arizona, however, are based on anecdotal information from naturalists’ observations in the late nineteenth and early twentieth centuries, before Arizona became a state. Other naturalists, including one collector of over 4,000 birds in Arizona, surveying during the period the pygmy-owl was purportedly common, never reported observing a pygmy-owl, raising questions about the pygmy-owl’s historic status in Arizona. Some biologists believe the lack of confirmed sightings is attributable to natural fluctuations that are common at the extremes of a species’ range. In any case, since 1920, pygmy-owls have rarely been sighted in Arizona.

² The following background is based on various sources, including published FWS rulemaking materials and published and unpublished articles, studies and comments.

In May 1992, five environmental organizations submitted a petition requesting that the pygmy-owl be listed as an endangered species. After receiving multiple 60-day notices of intent to sue over its failure to act, FWS finally published a proposed rule listing the Arizona and Texas populations of the pygmy-owl in December 1994. *Proposed Rule to List the Cactus Ferruginous Pygmy-Owl as Endangered with Critical Habitat in Arizona and Threatened in Texas*, 59 Fed. Reg. 63,975 (Dec. 12, 1994). At that time, FWS believed that the pygmy-owl was dependant on riparian habitat because most historic sightings of pygmy-owls occurred near rivers and other wet riparian areas in southern and central Arizona. *Id.* at 63,977 and 63,983. Consequently, in December 1994, FWS proposed critical habitat in Arizona consisting entirely of riparian areas along lower elevation rivers and streams, including portions of the Salt and Verde Rivers, portions of the San Pedro River, portions of the upper and middle Gila River, and the Santa Cruz River and several tributaries near Tucson. *Id.* at 63,989 (map).³

FWS received over 120 written comments in response to the proposed listing rule, the majority of which criticized the proposal, including comments from other agencies within the Department of the Interior, the Governor of Arizona, the Arizona State Land Department and the Arizona Game and Fish Department. Nevertheless, a rule listing the Arizona pygmy-owl population (but not the Texas population) as an endangered species was ultimately published in March 1997, without critical habitat. *See Determination of Endangered Status for the Cactus Ferruginous Pygmy-Owl in Arizona*, 62 Fed. Reg. 10,730 (March 10, 1997) (“Listing Rule”).

³ By the time FWS finally designated critical habitat for the Arizona pygmy-owl population, however, the species was regarded as a habitat generalist, requiring only relatively dense, lowland desert vegetation containing larger trees and cactus. *Designation of Critical Habitat for the Cactus Ferruginous Pygmy-Owl*, 64 Fed. Reg. at 37,421-37,422 (July 12, 1999). Southern Arizona contains a substantial amount of land containing these types of features, including several million acres of land within a major Indian reservation, a neighboring national park and a federal wildlife refuge

The linchpin of FWS's decision to list the pygmy-owl was its determination that the Arizona population constitutes a "distinct population segment" and therefore is eligible for listing as a "species." In the preamble to the Listing Rule, FWS explained that the pygmy-owl is believed to be one of four subspecies of ferruginous pygmy-owl, and that there may be two distinct populations of this subspecies, a western population found in southern Arizona and western Mexico and an eastern population found in southern Texas and northeastern Mexico. FWS, accordingly, determined that the eastern and western populations constitute distinct population segments and satisfy the definition of a "species" under the ESA. *Listing Rule*, 62 Fed. Reg. at 10,731. With little explanation, however, FWS went on to subdivide the western pygmy-owl population at the international border into Arizona and western Mexico populations, thereby creating a distinct population segment consisting solely of pygmy-owls in Arizona. *Id.* at 10,731 and 10,737.

Thus, a pygmy-owl in northern Sonora is not endangered. If that owl flies into Arizona, it is protected. If the same owl flies back to Sonora, it becomes, again, an ordinary pygmy-owl.

Faced with this anomalous situation, the National Association of Home Builders, the Southern Arizona Home Builders Association, and the Home Builders Association of Central Arizona filed suit challenging both the rule listing the Arizona pygmy-owl population and the 1999 critical habitat designation for the owl, which covered more than 730,000 acres of land and included some 136,000 acres of private land. In September 2001, the district court set aside the critical habitat designation on the basis that the analysis of economic impacts, required under Section 4(b)(2) of the ESA, was inadequate. The district court, however, affirmed the listing, concluding that it was not necessary for FWS to consider pygmy-owls in Mexico. The Home Builders appealed that decision to the Ninth Circuit Court of Appeals.

The central issue on appeal was whether FWS violated its *Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act*, 61 Fed. Reg. 4,722 (Feb. 7, 1996) (“DPS Policy”), in listing the Arizona pygmy-owl population as an endangered species. Normally, only species or subspecies of plants and animals qualify for listing. See 16 U.S.C. § 1532(16) (definition of “species”). In certain limited circumstances, however, a distinct population segment of vertebrate fish or wildlife may be treated as a species and be eligible for listing. Under the DPS Policy, a population of animals may be listed only if that population is both “discrete” (i.e., separated from other populations of the same species) and “significant” (i.e., important to the welfare of the species as a whole).

In August 2003, the Ninth Circuit held that FWS acted arbitrarily and capriciously in treating the Arizona pygmy-owl population as a distinct population segment. *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835 (9th Cir. 2003). Put simply, the court agreed that FWS erroneously focused on the significance of the species in the United States, while ignoring the larger, contiguous Mexican population, thus failing to follow the DPS Policy’s requirements. The Ninth Circuit’s opinion effectively declares that the pygmy-owl population in southern Arizona is not a “species,” i.e., not an entity that is eligible for listing under the ESA.

Despite this holding, the pygmy-owl remains listed today. On remand, Home Builders moved for entry of final judgment vacating the Listing Rule. The district court, however, concluded that it was not required to vacate the Listing Rule and, after evaluating a series of “equitable concerns,” decided the Listing Rule should be left in place. FWS was ordered to provide a status report on its “reconsideration” of both the Listing Rule and the rule designating critical habitat by January 31, 2005. The Home Builders attempted to appeal this order to the Ninth Circuit. However, the new appeal was dismissed on jurisdictional grounds, based on the

lack of a final judgment. Consequently, the Arizona pygmy-owl population continues to be listed as an endangered species, even though the Ninth Circuit held this population does not qualify as a “species” in August 2003.

As this discussion suggests, a prime area of ESA reform concerns the reevaluation the criteria used to determine when an animal should be listed and be subject to the ESA’s protections. The ESA protects “endangered species” and “threatened species.” The definition of “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). Clearly, Arizona pygmy-owls do not qualify as a “species” and, therefore, should not have been listed – a federal court of appeals has said so.

More generally, population segments or other groups of animals should not be treated as species and be eligible for listing absent extraordinary circumstances and only when clearly supported by scientific data. Unfortunately, it has become increasingly common for populations of animals to be treated as species and listed. From 1978 through 2000, approximately 60 DPSs have been listed. However, 39 of those DPSs were listed *after* 1995. Kate Geoffroy and Thomas Doyle, “Listing Distinct Population Segments of Endangered Species: Has It Gone Too Far?” *Natural Resources & Environment* (ABA Section of Environment, energy, and Resources Fall 2001). While I have not counted the number of DPSs listed after 2000, my periodic review of the FWS website suggests that this trend has continued and may be accelerating. See <http://endangered.fws.gov/federalregister/index.htm>.

2. The Impact of Listing: Federal Land Use Regulation

Once a species is placed on the list of endangered or threatened species – regardless of whether that “species” is a “subspecies” or a population of animals – the real problems begin for

public and private resource users. And based on my experience with the ESA, the biggest problem concerns the Section 7 consultation process. Put simply, Section 7 consultation has evolved into a federal land use regulation program, under which FWS field employees dictate the manner in which private projects are allowed to proceed.

Section 7(a)(2) of the ESA imposes both substantive and procedural requirements on federal agencies, requiring each agency to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species” which has been designated as critical. 16 U.S.C. § 1536(a)(2). The definition of the term “action” in the joint regulations on interagency consultation is broad, and includes federal contracts, permits, easements and other types of approvals. 50 C.F.R. § 402.02 (definition of “action”). However, in all cases, the action must be a *federal* action, and not a private or state action. As discussed below, this requirement is frequently ignored.

In addition, the requirements of Section 7(a)(2) apply only to habitat that has been formally designated as critical under Section 4 of the ESA. As the Ninth Circuit Court of Appeals has explained, the ESA does not protect “suitable” or “potential” habitat:

The ESA provides for the designation of critical habitat outside the geographic area currently occupied by the species when ‘such areas are essential for the conservation of the species.’ 16 U.S.C. § 1532(5)(A)(ii). Absent this procedure, however, *there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species.*

Ariz. Cattle Growers Ass’n v. U. S. Fish and Wildlife, 273 F.3d 1229, 1244 (9th Cir. 2001) (emphasis supplied).

To ensure that Section 7(a)(2)’s substantive “no jeopardy” mandate is satisfied, a federal agency proposing an action (an “action agency”) “consults” with FWS. A federal agency must

initially determine if its proposed action “may affect” listed species or critical habitat. Consequently, the initial question is whether any listed species or critical habitat is present in the “action area,” i.e., the area directly and indirectly affected by activities authorized under the Permit. 50 C.F.R. § 402.02 (definition of “action area”). The federal agency may either request that FWS provide a list of listed species and critical habitat in the area or provide notice to FWS of the listed species and critical habitat believed to be in the area. 50 C.F.R. § 402.12(c). FWS must respond, in either case, within 30 days, based on the best scientific and commercial data available. 50 C.F.R. § 402.12(d).

If no listed species or critical habitat are present, nothing further is required: The federal action may proceed without violating Section 7(a)(2). As stated by Congress:

[Section 7] mandates all federal agencies, in consultation with the Secretary, to ensure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of an endangered species or result in the destruction or adverse modification of its critical habitat.

The assessment of the potential threat of the agency action is performed by the Secretary in a biological opinion. *This process begins when the agency is advised by the Fish and Wildlife Service or the National Marine Fisheries Service that an endangered species resides in the area of the intended project. When a species is in the project area, the agency responsible for the action or the applicant for a federal permit or license performs a biological assessment to determine if the species is present and submits it to the Secretary. Based on this and other information, the Secretary issues a biological opinion as to whether or not a project would be likely to jeopardize a species or adversely modify its critical habitat.*

H.R. Rep. No. 567, 97th Cong., 2nd Sess., 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2810 (emphasis supplied).

In other words, a federal agency is required to determine whether the action “may affect” the relevant listed species or critical habitat only if listed species or critical habitat are present. If

members of a listed species are believed to occupy the area, or if the area has been designated as critical habitat, and the Federal agency determines that they will not be affected by the proposed action (known as a “no effect” determination), then the proposed action may proceed without consultation.

As federal regulatory programs have expanded, an increasing number of private land uses require some sort of federal permit or approval or have some other federal nexus. For example, many private construction activities currently require a permit under the Clean Water Act. An obvious example is a permit for the discharge of dredged or fill material into the navigable waters of the United States, issued by the Army Corps of Engineers under Section 404 of the Clean Water Act. 33 U.S.C. § 1344. In many cases, a landowner needs a Section 404 permit to build a road or install utility lines across desert washes on his property. The “federal action” is the issuance of the permit and the activities it authorizes – the construction of the road crossing within the Corps’ jurisdictional waters.

While it may seem obvious that the federal action is the issuance of the permit, FWS often treats *the entire project* as a “federal action” for consultation purposes, even if there is no federal involvement in or control over the balance of the project. This effectively “federalizes” the private project for the purposes of Section 7 consultation, and allows FWS to control local land uses. In many cases, this occurs regardless of whether members of a listed species or designated critical habitat are found in the area.

Let me provide an example. In late 2000, a real estate developer applied for an individual Section 404 permit in connection with developing the Entrada del Oro project, located in northern Pinal County approximately 10 miles southeast of Apache Junction, Arizona. Entrada del Oro is a master-planned community containing approximately 440 acres, consisting of

single-family residences, parks, a school site and open space. At build-out, the project will contain approximately 1,100 single-family homes. The permit would allow the construction of road and utility line crossings, impacting less than 1 acre of desert washes.

No pygmy-owls have ever been observed on or near the Entrada del Oro property. At the time the application was filed, however, the property was located within pygmy-owl critical habitat. As a result of the presence of critical habitat, the Army Corps of Engineers initially determined that the action may affect, but is not likely to adversely affect, the pygmy-owl. In January 2001, the Corps contacted FWS and requested FWS's concurrence in that finding.

FWS would not accept the Corps' determination, and instead requested additional information from the Corps. In April 2001, the Corps provided additional scientific information to FWS and explained the developer had agreed to project modifications that would preserve large wash corridors (where suitable habitat was purportedly found) as well as upland linkage corridors. FWS still refused to concur with the Corps' determination. In May 2001, the Corps gave in and requested the initiation of formal Section 7 consultation.

After several meetings with the Corps and the developer, FWS again requested additional information on the project rather than consulting on the federal permit. In August 2001, the developer submitted a draft biological assessment to the agencies, which concluded that the project may affect, but is not likely to adversely affect, the pygmy-owl and its designated critical habitat. However, FWS still would not initiate consultation.

In September 2001, the district court in *Nat'l Ass'n of Home Builders* set aside the designation of critical habitat for the pygmy-owl. 2001 WL 1876349 (D. Ariz. Sept. 21, 2001). The Corps reevaluated its position, which was based principally on impacts to pygmy-owl critical habitat, and decided to withdraw its Section 7 consultation request. After notifying FWS

of its decision, the Corps issued its permit, authorizing the developer to impact a total of 0.78 acres of jurisdictional waters for road and utility line crossings. FWS strongly objected to the Corps' position. In letters to the Corps, the Director of the FWS Arizona Ecological Services Office argued consultation was necessary because the property contains habitat that may be suitable for pygmy-owls. The Corps declined FWS's request for consultation and stood by its "no effect" determination.

Defenders of Wildlife and the Center for Biological Diversity then brought suit, alleging that the Corps violated Section 7 by issuing the permit without completing consultation. Fortunately, the district court affirmed the Corps' position. The district court found that the Corps had considered the relevant factors in making its "no effect" determination, including the fact that pygmy-owls had not been found within the project site or its general area, there was no critical habitat designation, there was minimal suitable habitat on the project site, and the project would not present a barrier to movement of pygmy-owls should any actually migrate to northern Pinal County in the future. *Defenders of Wildlife v. Flowers*, 2003 WL 22145716 (D. Ariz. Aug. 18, 2003). Relying on the position taken by FWS, however, the environmental groups have appealed the decision to the Ninth Circuit Court of Appeals.

While in this example the landowner was able to avoid consulting, in many cases, the federal agency succumbs to FWS and the landowner is forced into consultation, during which FWS employees decide how the landowner's property may be used. In southern Arizona, FWS has routinely imposed conditions on private landowners during the consultation process to protect potential pygmy-owl habitat, based on the "nexus" provided by a federal permit. These conditions have included:

- The acquisition and preservation of off-site "conservation" land (typically three or

four times the area disturbed by the project), funded solely by the landowner.

- Land disturbance is limited to 30% or less within the development – thus, if the landowner owns 80 acres, he is allowed to actually disturb 24 acres, regardless of what the local government has authorized.
- The mandated open space within the development must be permanently maintained and access to those areas restricted in case a pygmy-owl does decide to fly across the property at some future time.
- Pesticides may not be used within the development.
- Exterior lighting and outdoor activities, such as organized events and outdoor cooking, may be restricted to preserve the attractiveness of the area for pygmy-owls.
- An education program for construction workers and/or residents in the development may be required.
- And my personal favorite: Cats, dogs and other pets must be kept on leashes if allowed outdoors.

These “conservation measures” have been included in various biological opinions issued by FWS during the past five years, which are available for review on the website of the Arizona Ecological Services Office, <http://arizonaes.fws.gov>. Notably, these requirements are not imposed as part of an incidental take statement to minimize the taking of species. The landowner’s property is not occupied by pygmy-owls, and there is no risk that a pygmy-owl would be killed or injured by the development. Instead, these requirements are imposed on the landowner by including them as conditions of the Clean Water Act permit. If the permit applicant refuses to accept these conditions, he is faced with the prospect of a “jeopardy”

determination or, at a minimum, project delays.

To address these regulatory abuses, the ESA should be amended to clarify scope of Section 7 consultation. First, as Congress has previously indicated, consultation should not be required when no members of a listed species or designated critical habitat are found in the project area. Consultation should not be triggered by impacts to areas deemed by FWS to contain suitable or potential habitat, which renders the designation of critical habitat meaningless, creates greater uncertainty and invites arbitrary and speculative regulation. Although critical habitat comes with its own set of problems, critical habitat must be formally designated through notice-and-comment rulemaking, taking into account the economic and other impacts of designating particular areas as critical to a listed species. *See* 16 U.S.C. § 1533(b). Moreover, critical habitat must be specifically described and its location can be readily verified. In contrast, there is no way to determine whether a particular parcel of land might be deemed suitable for a listed species by an overzealous field biologist.

Second, the consultation process must recognize the limits of federal regulatory authority over private land uses. The Army Corps of Engineers, in administering Section 404 of the Clean Water Act, has no power to dictate how real estate is developed. The agency, instead, regulates the discharge of pollutants into the navigable waters of the United States. The action triggering consultation is the issuance of a permit regulating such discharges, not the construction of homes in upland areas, outside of the Corps' jurisdiction. Section 7 consultation should focus on the impacts of the permitted action, not the amount of open space in a residential subdivision, for example. By clarifying the scope of consultation, Congress would ensure that Section 7 does what it was intended to do: Require federal agencies to ensure that their actions – not the actions of private landowners – do not jeopardize the continued existence of protected species.