

Issues & Answers

NATURAL RESOURCES & ENVIRONMENTAL ALERT

Pygmy-Owl Doesn't Qualify as Endangered Species

National Association of Home Builders v. Norton
Ninth Circuit Court of Appeals, No. 02-15212 (Aug. 19, 2003)

In a significant victory for Arizona's home building and real estate industry, the Ninth Circuit Court of Appeals has held that the U.S. Fish and Wildlife Service's decision to list the Arizona population of the cactus ferruginous pygmy-owl as endangered under the Endangered Species Act (ESA) was unlawful. The National Association of Home Builders, the Southern Arizona Home Builders Association, and the Home Builders Association of Central Arizona brought the appeal. The law firm of Fennemore Craig represents them.

The Ninth Circuit's opinion, which is currently available on the court's website at <http://www.ca9.uscourts.gov/ca9/newopinions.nsf> effectively declares that the pygmy-owl population in southern Arizona is not a "species," that is, an entity that is eligible for listing under the ESA. The case has been remanded to U. S. District Judge Susan R. Bolton for further proceeding consistent with the opinion. Judge Bolton previously affirmed the listing of the Arizona pygmy-owl population, but set aside the

designation of critical habitat on the basis that the Fish and Wildlife Service failed to adequately evaluate the economic and other impacts of the designation. A new rule designating critical habitat was to be issued by September 29, 2003. The Home Builders believe this new ruling moots the designation of critical habitat, as well as the development of a recovery plan for the pygmy-owl, which was proposed by the Fish and Wildlife Service in early 2003.

The issue presented to the Ninth Circuit was whether the Fish and Wildlife Service properly applied its Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy) in listing the Arizona pygmy-owl population as an endangered species under the ESA. Normally, only species or subspecies of plants and animals qualify for listing. Under limited circumstances, however, a distinct population segment of animals or "DPS" may be treated as a species and be eligible for listing. The DPS Policy, jointly issued by the Fish and Wildlife Service and the

National Marine Fisheries Service in 1996, establishes the criteria to be used in determining when a population of animals constitutes a DPS. Under this policy, a population of animals may be listed if that population is both "discrete" (i.e., separated from other populations of the same animal) and "significant" (i.e., important) to the species as a whole.

Writing for a unanimous three-judge panel, Circuit Judge A. Wallace Tashima held that the Fish and Wildlife Service acted arbitrarily and capriciously in designating the Arizona pygmy-owl population as a DPS. The Home Builders argued that the Fish and Wildlife Service impermissibly ignored the status of the species in Mexico, where the owl is common, in making its DPS determination, thus failing to consider the Arizona population's significance to the pygmy-owl species as a whole. The court agreed with the Home Builders, holding that the agency erroneously focused on the significance of the species in the United States, while ignoring the larger Mexican population, whose range extends over 1,000 miles into west-central Mexico. ■

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