



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

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**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: What does ‘delisting’ mean?**

**A:** Delisting is the process the government undertakes to remove (delist) a species from the Federal list of threatened and endangered species. When a species is protected under the Endangered Species Act (ESA), it is added to the list of threatened or endangered species. Hence removing the species is termed ‘delisting.’

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

**A:** The cactus ferruginous 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 taxon was listed as endangered.

**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, northwest Tucson, south-central Pinal County and the Tohono O’odham Nation lands.

**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, resulting in the curtailment of its habitat or range. Arizona surveys documented 41 adult pygmy-owls in 1999, 34 in 2000, 36 in 2001. Since 2002, the annual number of documented adult pygmy-owls has been around 20, with five or fewer nests located each of those years.

**Q: What is a Distinct Population Segment?**

**A:** Under the ESA, a “species” includes any subspecies of fish or wildlife or plants, and any distinct vertebrate population segment (DPS) and may be considered for protection. Per our established Distinct Vertebrate Population Segment Policy, 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 ESA’s standards for listing.

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

**A:** On January 9, 2001, National Association of Home Builders, et al, 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 Arizona pygmy-owl DPS designation violated our policy because the Arizona pygmy-owl population was neither discrete nor significant.

On September 21, 2001, the Arizona District Court upheld the endangered status 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. The final determination of critical habitat has been put on hold pending a resolution of the listing portion of the lawsuit.

On August 19, 2003, the Ninth Circuit Court of Appeals (responding to National Association of Home Builders and Southern Arizona Home Builders Association’s appeal) overruled Arizona District Court’s ruling that upheld the listing of the Arizona distinct population segment. The Appeals Court 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.

Upon reconsideration, we find that the pygmy-owl does not qualify as a listable entity under our DPS policy, and that delisting is appropriate.

**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 we initiated a review of the Arizona DPS in conjunction with the Ninth Circuit’s ruling, while considering our policies.

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-owl in Arizona does not qualify for listing under the ESA.

**Q: Did you use new information in your review?**

**A:** Yes. The Arizona District Court indicated in its remand that the Service could consider all information relative to the significance of the Arizona Distinct Population Segment to the pygmy-

owl. Therefore, we considered information that we received during the public comment period, as well as information 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.

The final rule contains a full discussion of the scientific review undertaken. See Comments and Responses section.

**Q. Service biologists prepared a white paper on the biology of the pygmy owl in December 2003. Did you use this information the final rule?**

**A.** The White Paper was a discussion of the current science as it relates to the significance of the cactus ferruginous pygmy owl as a distinct population segment. We fully considered the White Paper in preparing the final rule.

**Q. Did you base your decision on science or policy?**

**A.** We based our decision on science, policy and legal considerations.

The Court questioned our rationale for determining the “significance” of the Arizona pygmy-owl DPS to the pygmy-owl species. Thus the court set the parameters for our review.

We considered the most current science to evaluate the significance of the Arizona population of pygmy-owls to the rest of the taxon. Specifically we looked at whether or not the Arizona pygmy-owl population occurs in an unusual or unique ecological setting, is markedly genetically different, and whether the loss of the Arizona population would cause a significant gap in the entire taxon. In each case, we found that the science did not support the Arizona population as being significant.

Congress cautioned us to use designation of a DPS sparingly. Keeping with Congress’ guidance, our policy is narrow by design.

**Q: With the delisting of the Arizona population of the pygmy-owl, will it be unprotected?**

**A:** The pygmy-owl will continue to receive protection pursuant to the Migratory Bird Treaty Act. This law prohibits the taking (killing, pursuit or harassment) of the pygmy-owl or the possession of its parts (feathers, eggs, etc.) It does not address habitat. Arizona State law provides no specific protections for the pygmy-owl.

**Q: What will be the Federal responsibilities for the pygmy-owl now that it is delisted?**

**A:** A final rule delisting the Arizona DPS of the pygmy-owl means the requirements under section 7 of the ESA would no longer apply. Federal agencies 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 are also relieved of their responsibilities under section 7(a)(1) of the ESA to use their authorities to further the conservation of the pygmy-owl. Additionally, we will not finalize the designation of critical habitat nor will we complete a final recovery plan.

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

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

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

The Town of Marana and City of Tucson are each drafting theirs. 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 yerbabuenae*), 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 Turk's head cactus (*Echinocactus horizonthalonius* var. *nicholli*), Huachuca water umbel (*Lilaeopsis schaffneriana recurva*), the Chiricahua leopard frog (*Rana chiricahuensis*) and the Gila chub (*Gila intermedia*). In addition, the plan will include the yellow-billed cuckoo (*Coccyzus americanus* spp. *occidentalis*) which is a candidate for listing. The plan will also address up to 44 other unlisted but vulnerable species.

**Q: What will happen to the Habitat Conservation Plan or the lands that have been conserved for the cactus ferruginous pygmy-owl?**

Permits issued pursuant to the development of a habitat conservation plan will no longer be in effect. Once a species is removed from ESA protection, non-federal entities no longer need a permit to take those species while engaged in otherwise lawful activities. Since the owl will continue to receive protection under the Migratory Bird Treaty Act any conservation measures that happen under an HCP provide valuable protection for the owl, its nests and its eggs

What happens to lands preserved pursuant to a habitat conservation plan depends upon the landowner and how the land was protected. There will likely be some cases where land preserved pursuant to a Section 10 permit under the ESA will no longer have to be preserved. In other cases, some plans resulted in conservation agreements held by a third party, and the easement that is part of such agreement may have its own stipulations which affect the lands in question. Each situation will require a case-by-case assessment.

**Q: What will happen to lands that have been conserved for the cactus ferruginous pygmy-owl using other methods?**

If land has been conserved pursuant to a section 10 permit that includes other species, then the status of those conserved lands may not change. In addition to land conserved for the pygmy-owl pursuant to habitat conservation plans, approximately 5,000 acres have been conserved through other agreements negotiated between non-federal and federal entities, such as the Army Corps of Engineers and the Service. Requests to remove conservation measures agreed to in these agreements, habitat conservation plans and federal consultations will be determined on a case-by-case basis.

Determining any continued responsibility for pygmy-owl conservation measures and habitat set-asides depends upon a number of factors including a landowner or developer's commitment to preserving open space, whether a conservation easement is in place and its unique stipulations and any restrictions that have been placed on the land for zoning and taxing purposes.

While ESA protection no longer will apply to pygmy-owls, the extent to which other factors affect lands previously preserved on their behalf will need to be assessed by the landowner. It is important to remember that regardless of the loss of ESA protection for owl it is still protected under the Migratory Bird Treaty Act.