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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION OF HOME BUILDERS; et al.,

Plaintiffs - Appellees,

v.

GALE A. NORTON; et al.,

Defendants - Appellees,

DEFENDERS OF WILDLIFE; et al.,

Defendant-intervenors -

Appellants,

and

FRIENDS OF THE OWLS; et al.,

Defendant-intervenors.

No. 07-15854

D.C. No. CV-00-00903-SRB

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona

Susan R. Bolton, District Judge, Presiding

Argued and Submitted October 21, 2008

San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: BYBEE and BEA, Circuit Judges, and PRO, ** District Judge.

This appeal represents the fourth time litigation involving the cactus ferruginous pygmy owl (“pygmy owl”) has reached this court. The Defenders of Wildlife (“DOW”) appeals the district court’s grant of summary judgment to the U.S. Fish and Wildlife Service (“Fish & Wildlife”) on DOW’s petition for review of Fish & Wildlife’s determination removing the Arizona population of the pygmy owl from the endangered species list. We affirm.

Fish & Wildlife did not act arbitrarily and capriciously by comparing the Arizona population of the pygmy owl to pygmy owls in northwestern Mexico to determine whether the Arizona population occupied an “unusual or unique” habitat or whether the Arizona population “differs markedly” from other populations. *See Final Rule to Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl From the Federal List of Endangered and Threatened Wildlife*, 71 Fed. Reg. 19,452 (April 14, 2006). If the larger Sonoran desert population, or the still larger western population, of pygmy owls inhabits an “unusual or unique” habitat or “differs markedly” from other populations of the pygmy owl, Fish & Wildlife could consider such fact on a petition to list one of those other populations. *See Policy Regarding the Recognition of Distinct*

** The Honorable Philip M. Pro, United States District Court for the District of Nevada, sitting by designation.

Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996) (the “DPS Policy”). No such petition was before Fish & Wildlife in this case.

Nor is the “significance” requirement of the DPS Policy, as applied to the Arizona population of the pygmy owl, an impermissible construction of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“the Act”). The “significance” criteria permits Fish & Wildlife to consider only a population’s biological and ecological importance to the taxon as a whole, and does not permit Fish & Wildlife to consider a population’s importance to the United States. *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 849 (9th Cir. 2003). The DPS Policy is entitled to *Chevron* deference. *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1142–43 (9th Cir. 2007). =

The Act neither defines “distinct population segment” nor specifies any criteria Fish & Wildlife must use in defining the term. *Id.* at 1141. While 16 U.S.C. § 1533(a) addresses Congress’s purpose in protecting certain “species,” it does not address the proper definition of that term.

Although DOW points to language in § 1533(a) referring specifically to the United States, none of this language relates to the definition of a “distinct population segment.” We also note that Fish & Wildlife’s approach is consistent with § 1533(b)(1)(A), which requires Fish & Wildlife to consider only “the best

scientific and commercial data available” and “those efforts, if any, being made by any State *or foreign nation* . . . to protect such species” (emphasis added).

The legislative history surrounding the ESA and its 1978 Amendments is even more inconclusive than the statutory text on the question raised by this case. We are thus unable to conclude that the DPS Policy, as applied to the Arizona population of the pygmy owl, constitutes an unreasonable interpretation of the ESA.

We also reject DOW’s contention that Fish & Wildlife’s past practice sheds light on the proper definition of “distinct population segment.” Under the DPS Policy, a domestic population of a species, although more abundant elsewhere in the world, may be listed as endangered or threatened when the domestic population is important to the species as a whole or where the domestic population constitutes a “significant portion” of the species’s range. *See* 16 U.S.C. § 1532(20). Of the listing decisions cited by DOW as evidence that Fish & Wildlife’s delisting of the Arizona population of the pygmy owl is inconsistent with its historical practice, only two postdate the 1978 Amendments to the ESA and both of those decisions were made before Fish & Wildlife promulgated the DPS Policy. Moreover, even if Fish & Wildlife made listing decisions inconsistent with the DPS Policy after the enactment of the 1978 Amendments, Fish & Wildlife’s formal rule interpreting the

Act is still entitled to deference. *See Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991).

Because the Act is open to multiple interpretations, we must “respect [the] legitimate policy choices” made by the political branches. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

AFFIRMED.