



PACIFIC LEGAL FOUNDATION

February 8, 2013

Public Comments Processing
Attn: FWS-R1-ES-2012-0088
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

Filed Electronically

Re: Docket No. FWS-R1-ES-2012-0088
Endangered and Threatened Wildlife and Plants: Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat

IDENTIFICATION

Pacific Legal Foundation (PLF) appreciates the opportunity to comment on the proposed rule, *Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat*. 77 Fed. Reg. 73,770 (Dec. 11, 2012). Founded 40 years ago, PLF is the nation's oldest and most successful nonprofit legal organization litigating for limited government and individual liberty in courts across the country. PLF attorneys are experienced in issues arising under the Endangered Species Act (ESA).

COMMENTS

The U.S. Fish and Wildlife Service's decisions to list species of wildlife as endangered or threatened under the ESA must not be arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A). A decision is arbitrary or capricious if the Service "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). PLF respectfully suggests that the Service's decision to list four subspecies of the Mazama pocket gopher as threatened under the ESA is contrary to the evidence available to the Service, primarily because the Service misapprehended the effect of regulatory mechanisms currently in force.

The ESA establishes five statutory criteria to govern the Service's listing decisions. 16 U.S.C. § 1533(a)(1)(A)-(E). Among them is the requirement that the Service must consider whether a

species is in danger of extinction due to the “inadequacy of existing regulatory mechanisms.” 16 U.S.C. § 1533(a)(1)(D). If the Service finds that existing regulations adequately ensure that the species is not in danger of extinction, such a finding suggests that the Service should not list the species. *See Ctr. for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1294 (D.N.M. 2005).

In the case of the Mazama pocket gopher, the Service concludes that existing regulatory mechanisms that are designed to protect the gopher from extinction are inadequate. 77 Fed. Reg. at 73,786. The Service’s conclusion, however, runs counter to the evidence that the Service cites in the proposed rule. The Service identifies multiple regulatory provisions—at all levels of government—that currently prevent the destruction of pocket gopher habitat, and thereby protect the gopher from the most serious threats to the species’ survival. *Id.* at 73,782-86. But the Service’s decision to list the gopher inappropriately discounts the efficacy of those existing regulations. *Cf. Friends of Blackwater v. Salazar*, 691 F.3d 428, 436 (D.C. Cir. 2012) (holding that species may be delisted even in absence of existing regulatory mechanisms because Congress did not intend ESA to produce “absurd overabundance of regulation”). A brief review of those policies shows that the pocket gopher is heavily protected in Washington.

The Mazama pocket gopher is listed by the Washington Department of Fish and Wildlife (WDFW) as a threatened species under state law, and is therefore protected from “take.” 77 Fed. Reg. at 73,782-83; *see* Wash. Rev. Code § 77.15.120; Wash. Admin. Code § 232-12-011(1). Contrary to the Service’s assumption that “their habitat is not protected” by state law, 77 Fed. Reg. at 73,783, pocket gopher habitat *is* protected through Washington’s Growth Management Act (GMA) via enforcement of critical area ordinances. *See* Wash. Rev. Code § 36.70A.060. Regulations developed by Washington’s Department of Commerce—which guide implementation of the GMA at the local level—specify that counties and cities must make their critical area programs “fit together” with state programs designed to preserve the environment. Wash. Admin. Code § 365-196-830(9). This requires protection of critical areas such as fish and wildlife habitat, and works in concert with WDFW’s wildlife rules designating endangered and threatened species.

Furthermore, the Service acknowledges that the Mazama pocket gopher is included in WDFW’s Priority Habitat and Species Program, under which WDFW develops species management recommendations to be applied by local governments during the permitting process. 77 Fed. Reg. at 73,783. Yet the Service dismisses the Priority Habitat and Species Program because it is “not regulatory.” *Id.* The Service errs. Non-regulatory measures “are not a legal nullity.” *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011). The Service may consider non-regulatory measures when evaluating whether existing legal mechanisms are adequate to protect a species. *Id.*

With respect to local regulation, the Service catalogues numerous local policies designed to conserve the Mazama pocket gopher. 77 Fed. Reg. at 73,783-85. The Service highlights rules in Pierce, Thurston, and Mason Counties that require developers to assess the impact of proposed development on gopher habitat, and to submit plans outlining habitat conservation practices as part of the permitting process. *Id.* at 73,783-84 (identifying requirements for set-asides, fencing, signs, and long-term management of habitat). Additionally, a “prairie protection” ordinance designed in part to protect pocket gopher habitat is in effect in Thurston County. That ordinance requires landowners to ensure that development does not adversely affect gopher habitat, and includes mitigation requirements. *See id.* at 73,784.

The Service also notes that several cities located within the pocket gopher’s range enforce ordinances meant to restrict development activity that will interfere with gopher habitat. Olympia restricts development within 1,000 feet of pocket gopher habitat. *Id.* at 73,784; Olympia Municipal Code §18.32.305, *et seq.* Lacey prohibits development in habitat conservation areas or buffers where the pocket gopher has a “primary association.” 77 Fed. Reg. at 73,784; Lacey Municipal Code §14.33.117. Tumwater protects gopher habitat through its critical area ordinance. 77 Fed. Reg. at 73,784; Tumwater Municipal Code §16.32.010, *et seq.* Yelm does not allow development on gopher habitat without a management plan approved by WDFW. *See* 77 Fed. Reg. at 73,785; Yelm Municipal Code §14.08.140. Tenino regulates activities that may alter gopher habitat. 77 Fed. Reg. at 73,785; Tenino Municipal Code §112.40.010, *et seq.* Rainier “mandates protective measures that include avoiding impact” to gopher habitat. 77 Fed. Reg. at 73,785; *see* Rainier Municipal Code 18.112.010, *et seq.* And Roy imposes a system under which impact to gopher habitat must be mitigated. 77 Fed. Reg. at 73,785; Roy Municipal Code §10-5E-1, *et seq.* Clearly, local governments throughout the species’ range are employing measures designed to promote the continued viability of the Mazama pocket gopher.

The Service does not explain in any detail why, in its opinion, current state and local regulations fail to adequately protect the pocket gopher or its habitat. While the Service does indicate that it is concerned about a lack of “connectivity,” 77 Fed. Reg. at 73,786, the Service does not give reasons why listing four pocket gopher subspecies under the ESA will promote connectivity, or why state and local regulations do not. Those are substantial oversights that call into question the rationality of the Service’s proposed rule, which exemplifies “an absurd overabundance of regulation.” *Friends of Blackwater*, 691 F.3d at 436.

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CONCLUSION

The Service should reexamine its conclusion that existing regulatory mechanisms are inadequate to promote conservation of the Mazama pocket gopher. The data available to the agency indicate that existing regulations are protective, and that the pocket gopher should not be listed under the ESA.

Sincerely,



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