

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AU58

Endangered and Threatened Wildlife and Plants, Notice of Reinstatement of the 1993 Proposed Rule to List the Flat-Tailed Horned Lizard as a Threatened Species**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of reinstatement of proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reinstatement of the November 29, 1993, proposed rule to list the flat-tailed horned lizard (*Phrynosoma mcallii*) as a threatened species under the Endangered Species Act of 1973, as amended (Act). On November 17, 2005, the U.S. District Court for the District of Arizona vacated the January 3, 2003, withdrawal of the proposed rule to list the flat-tailed horned lizard, reinstated the 1993 proposed rule, and remanded the matter to us for further consideration in accordance with its August 30, 2005, and November 17, 2005, orders. The District Court ordered us to submit for publication in the **Federal Register**, as soon as practicable, a notice advising the public that the January 3, 2003, withdrawal has been vacated and that the 1993 proposed rule is reinstated, and to submit for publication in the **Federal Register** a new final listing decision on the proposed rule to list the flat-tailed horned lizard by April 30, 2006. Consequently, we are hereby providing notice that the 1993 proposed rule to list the flat-tailed horned lizard is reinstated, and that we will complete a final listing decision for the flat-tailed horned lizard by April 30, 2006.

ADDRESSES: The complete file for this notice is available for inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92011.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, at the above address, by telephone at 760/431-9440, or by facsimile at 760/431-9624.

SUPPLEMENTARY INFORMATION:**Background**

The flat-tailed horned lizard (*Phrynosoma mcallii*) is a small, cryptically colored, phrynosomatid

lizard that reaches a maximum adult body length (excluding the tail) of approximately 87 millimeters (3.4 inches). The lizard has a flattened body, short tail, and dagger-like head spines like other horned lizards. It is distinguished from other horned lizards in its range by a dark vertebral stripe, two slender elongated occipital spines, and the absence of external ear openings. The dorsal surface of the flat-tailed horned lizard is pale gray to light rusty brown. The ventral side is white and unmarked, with the exception of a prominent umbilical scar.

The flat-tailed horned lizard is endemic (restricted) to the Sonoran Desert in southern California, Arizona and northwestern Mexico. The species is documented from the Coachella Valley in Riverside County, California; the Imperial and Borrego Valleys in Imperial and eastern San Diego Counties, California; south of the Gila River and west of the Gila and Butler Mountains in Yuma County, Arizona; east of the Sierra de Juarez in the Laguna Salada and Yreka Basins in northeastern Baja California Norte, Mexico; and north and west of Bahia de San Jorge to the delta of the Colorado River in northwestern Sonora, Mexico (Grismer 2002; Rodriguez 2002). The flat-tailed horned lizard occurs at elevations up to 800 meters (2600 feet) above sea level, but most populations are below 300 meters (980 feet) elevation.

On November 29, 1993, we published a proposed rule to list the flat-tailed horned lizard as a threatened species pursuant to the Act (58 FR 62624). On July 15, 1997, we issued a final decision to withdraw the 1993 proposed rule (62 FR 37852). Defenders of Wildlife and other groups challenged the 1997 withdrawal decision. On June 16, 1999, the District Court for the Southern District of California granted summary judgment in our favor upholding our decision not to list the flat-tailed horned lizard. However, on July 31, 2001, the Ninth Circuit Court of Appeals reversed the lower court's ruling and directed the District Court to remand the matter to us for further consideration in accordance with the legal standards outlined in its opinion (*Defenders of Wildlife v. Norton*, 258 F.3d 1136). On October 24, 2001, the District Court for the Southern District of California remanded the 1997 withdrawal decision. Consistent with the District Court's remand order, we published a withdrawal of the proposed rule to list the flat-tailed horned lizard on January 3, 2003 (68 FR 331). The Tucson Herpetological Society and other groups challenged this withdrawal

decision in the United States District Court for the District of Arizona.

On August 30, 2005, the District Court for the District of Arizona issued an order granting plaintiffs' motion for summary judgment "on the ground that the Secretary's withdrawal of the proposed rule violated the Endangered Species Act and the Ninth Circuit's remand order by failing to evaluate the lizard's lost habitat and whether that habitat was a significant portion of the range." The court upheld all other aspects of the January 3, 2003, withdrawal decision. On November 17, 2005, the District Court issued a subsequent order, consistent with its August 30, 2005, order, vacating the 2003 withdrawal and remanding the matter to us for further consideration. The District Court reinstated the 1993 proposed rule to list the flat-tailed horned lizard as a threatened species for the duration of the remand, and ordered us to submit for publication in the **Federal Register**, as soon as practicable, a notice advising the public that the January 3, 2003, withdrawal has been vacated and that the 1993 proposed rule is reinstated. The District Court further ordered us to make a new listing decision by April 30, 2006, stating that, "on remand the agency need only address the matters on which the court's August 30, 2005 Order * * * found the January 3, 2003 Withdrawal unlawful, which may summarily be identified as whether the lizard's lost historical habitat renders the species in danger of extinction in a significant portion of its range."

For additional background information and previous Federal actions related to the listing determinations for the flat-tailed horned lizard, please refer to the January 3, 2003, **Federal Register** notice (68 FR 331).

Author

The primary author of this notice is the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Authority: The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: November 30, 2005.

Marshall Jones,

Acting Director, U.S. Fish and Wildlife Service.

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