

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R2-ES-2012-0073; 4500030113]

**Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List *Phoenix dactylifera* ‘Sphinx’ (Sphinx Date Palm)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list *Phoenix dactylifera* ‘Sphinx’ (sphinx date palm) as endangered or threatened under the Endangered Species Act of 1973, as amended (Act). We find that the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted. We find that the petition does not identify an entity that is listable under the Act. Therefore, we are not initiating a status review for the sphinx date palm in response to this petition.

**DATES:** The finding announced in this document was made on December 4, 2012.

**ADDRESSES:** This finding is also available on the Internet at <http://www.regulations.gov> at [Docket No. FWS-R2-ES-2012-0073]. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021-4951. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

**FOR FURTHER INFORMATION CONTACT:** Steve Spangle, Field Supervisor, Arizona Ecological Services Office (see **ADDRESSES**), by telephone at (602) 242-0210, or by facsimile to (602) 242-2513. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Background**

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or

commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time that the petition was submitted to us. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and to publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted” (50 CFR 424.14(b)). If we find that substantial scientific or commercial information for a listable entity was presented, we are required to promptly conduct a species status review, which we subsequently summarize in a 12-month finding.

**Petition History**

On July 11, 2011, we received a petition dated July 7, 2011, from Richard C. Malone, on behalf of the Mountgrove Property Owners Association (petitioner), requesting that the single existing grove of *Phoenix dactylifera* ‘Sphinx’ (sphinx date palm) be listed as endangered under the Act. For the purposes of this document, we will hereafter refer to *Phoenix dactylifera* ‘Sphinx’ as the sphinx date palm.

The petition discusses the origin and taxonomy of the sphinx date palm, and provides details of its life history. The petitioner mentions threats to the entity, and provides brief examples of potential population declines. The petition also discusses the petitioners’ views on the advantages of protection for the sphinx date palm for research, education, propagation, as well as the economic advantages of the grove’s production of high-quality fruit. The petition includes citations for various references and resources used to support the statements in the petition.

The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). This finding addresses the petition. Below, we address the petitioner’s request to list *Phoenix dactylifera* ‘Sphinx’ as endangered.

**Species Information**

All information in this section is from the petition. The Service has no information in its files on the sphinx

date palm beyond that presented in the petition.

The grove in Phoenix consists of 450 mature trees and is the only known stand (contiguous area occupied by trees of similar type) of sphinx date palm. The grove is located in the Mountgrove district, south of Lafayette Boulevard, north of the Arizona canal, bordered by 46th Place on the west and 47th place on the east in the Arcadia area of central Phoenix. There are a few additional individual palms in the Phoenix Metro and Yuma areas of Arizona, and two sphinx date palms are reported to exist in California.

The petitioner does not provide descriptive information specific to the sphinx cultivar. They do provide information for the date palm (*Phoenix dactylifera* Linnaeus), the taxon from which the sphinx date palm was cultivated. The date palm is an erect palm with solitary or clustered stems. It can reach heights of 30 to 35 meters (m) (100 to 115 feet (ft)) and grow to diameters of 50 centimeters (cm) (20 inches (in)). The trunk is covered from the ground up with overlapping diamond-shaped, woody leaf bases. Feather-like green-gray pinnae (leaves) are arranged irregularly on long (3 to 5 m (9 to 16 ft)) petioles (stalk or stem that connects the pinnae to the plant). Inflorescences (arrangements or clusters of multiple flowers on a stem) have waxy, cream-colored flowers and grow to 1 m (3.3 ft) on male plants and 2 m (2.6 ft) on female plants (these palms are dioecious; that is, individual palms contain either male reproductive parts or female reproductive parts).

The sphinx date palm has a lifespan of 100 to 130 years. Reproduction in the cultivar is vegetative (asexual; only one plant is involved and the offspring is genetically identical to its parent). Propagation is accomplished by removing offshoots (lateral shoot from the main stem of the plant) from mature palms. These offshoots must contain their own root ball (main mass of roots at the base of a plant). Propagation in this slow-growing cultivar is a long process, spanning 3 generations of 8 years each. Approximately 25 years were required to propagate the 450 offshoots needed to plant the grove. Pollination, and thus fruit production, is fully dependent on human intervention as male palms are not sufficiently numerous or near to date-bearing (female) palms for pollination to occur by natural means.

It is believed that Southwest Asia is the native region of the sphinx date palm’s parent taxon, the date palm; however, its origin is not known with certainty. The sphinx date palm was

described in the late 1910s or early 1920s from a grove in Phoenix, Arizona, where it had been propagated from a seedling around 1917. The sphinx cultivar is thought to be a chance hybrid between Hayani (a variety of date palm) and another heirloom (a plant cultivated for multiple human generations and typically particular to a given region). Currently this entity is known only from cultivation.

The petition consistently refers to the sphinx date palm as a cultivar of *P. dactylifera*. The International Code of Nomenclature for Cultivated Plants defines a cultivar as “an assemblage of plants that (a) has been selected for a particular character or combination of characters, (b) is distinct, uniform, and stable in these characters, and (c) when propagated by appropriate means, retains those characters” (Art. 2.3). It further notes that cultivars vary in origin and modes of reproduction, and that plants “which are asexually propagated from any part of a plant \* \* \* may form a cultivar.” By this definition, and as indicated in the petition, the sphinx date palm is a cultivar of the date palm (*Phoenix dactylifera* Linnaeus).

#### Previous Federal Actions

There have been no previous Federal actions for this entity.

#### Evaluation of Listable Entity

Upon receipt of a petition to list, delist, or reclassify a species, we are to consider whether such petition “clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved” (50 CFR 424.14(b)(2)(i)). Under the Act, a species is defined as including any subspecies of fish or wildlife or plants, and any distinct population segment (DPS) of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532).

The sphinx date palm, like many vascular plants, is of hybrid origin. We acknowledge that hybridization is an important mechanism of plant speciation, as hybrids can display new phenotypes and promote adaptive evolution. We also acknowledge that it is conceivable that over time, the sphinx date palm could become sufficiently reproductively isolated to accrue substantial genetic distinction from its parent species to become a species itself. At this time, however, Phoenix’s grove of sphinx date palms is a collection of individuals which does not represent a cohesive population entity with an evolutionary lineage separate from its parent species. In modern

taxonomic practice, entities such as the sphinx date palm hybrid do not constitute a species.

The sphinx date palm is a cultivar. Cultivars are not eligible for protection under the Act. Speaking to this distinction, there has been much litigation on the subject of the intent of the relative ambiguity of the term “species” in the Act. In *Trout Unlimited v. Lohn* (559 F. 3d 946 9th Cir. 2009), the 9th Circuit Court of Appeals found that “the [Act’s] primary goal is to preserve the ability of natural populations to survive in the wild.” The Act (16 U.S.C. 1531(b)) states “[t]he purposes of this [Act] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species \* \* \*.” Regarding this provision, the court found “[t]hat the purpose of the [Act] is to promote populations that are self-sustaining without human interference can be deduced from the statute’s emphasis on the protection and preservation of the habitats of endangered and threatened species.” The court also points to the use in the statute of the term [artificial] propagation as merely a means “to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary” (16 U.S.C. 1532(3)). *Trout Unlimited v. Lohn*, therefore, interprets the Act as a statutory means to protect animal and plant resources that are natural and self-sustaining. The sphinx date palm, as a cultivar whose propagation depends fully on human intervention, does not meet these criteria.

The Act defines a species as including “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature” (16 U.S.C. 1532 (16)). The Service considers plant varieties and subspecies to be essentially identical (“Determination that 11 Plant Taxa are Endangered Species and 2 Plant Taxa are Threatened Species”, 43 FR 17910). Cultivar is a taxonomic level below that of subspecies and variety, and, therefore, cultivars are not listable entities as defined in the Act.

We conclude that the sphinx date palm is not a listable entity as defined under the Act. Therefore, after a review of the guiding regulations, we conclude that the petitioned entity does not constitute a “listable entity” and cannot be listed under the Act.

The District Court in the District of Oregon in their determination for *Alsea Valley Alliance v. Evans* (161 F. Supp. 2d 1154 D. Ore.), referenced cases in which it was found that “[l]isting distinctions below that of subspecies or a DPS of a species are not allowed under the [Act]” (*Southwest Center*, 980 F. Supp at 1085). The court noted that the “term ‘distinct population segment’ was amended in the [Act] in 1978 so that it would ‘exclude taxonomic [biological] categories below subspecies [smaller taxa] from the definition’ (H.R. CONF. REP. No. 95–1804, at 17 (1978) reprinted in 1978 U.S.C.C.A.N. 9485, 14855). Under the definition in the Act, and as analyzed above, the sphinx date palm does not meet the criteria for species or subspecies.

We conclude that the sphinx date palm is not a valid taxonomic entity and does not meet the definition of a species or a subspecies under the Act. Therefore, after a review of the guiding regulations and litigated precedents, we conclude that the petitioned entity does not constitute a “listable entity” and cannot be listed under the Act.

#### Finding

In summary, the petition does not present substantial information indicating that listing the Sphinx date palm as endangered is warranted, because the entity as petitioned is not listable under the Act.

#### Authors

The primary authors of this notice are the staff members of the Southwest Region of the U.S. Fish and Wildlife Service (see **ADDRESSES**).

#### Authority

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

Dated: September 5, 2012.

#### Rowan W Gould,

Director, U.S. Fish and Wildlife Service.

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**BILLING CODE 4310–55–P**