



Northwest
1216 Lincoln Street
Eugene, Oregon 97401
(541) 485-2471

Rocky Mountains
103 Reeder's Alley
Helena, Montana 59601
(406) 443-3501

Southwest
208 Paseo del Pueblo Sur #602
Taos, New Mexico 87571
(575) 751-0351

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Western Environmental Law Center

April 4, 2014

Via Certified Mail, Return Receipt Requested

Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Tom Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

David Bergman
Arizona Wildlife Services State Director
U.S. Department of Agriculture
Animal and Plant Health Inspection Service
8836 North 23rd Avenue, Suite 2
Phoenix, AZ 85021

Alan May
New Mexico Wildlife Services State Director
U.S. Department of Agriculture
Animal and Plant Health Inspection Service
8441 Washington St. NE
Albuquerque, NM 87113

Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act Including Failure to Reinitiate Consultation with the U.S. Fish & Wildlife Service on Wildlife Services' Operations That May Affect Designated Jaguar (*Panthera onca*) Critical Habitat.

Dear Sirs/Madams:

On behalf of the Animal Welfare Institute and WildEarth Guardians, we write to notify you of our intent to bring suit against the United States Department of Agriculture's Animal and Plant

Health Inspection Service Wildlife Services program (“Wildlife Services”) and its officials for violations of the Endangered Species Act (“ESA”) 16 U.S.C. § 1536(b), in connection with authorizing, approving, funding, assisting, and/or carrying out activities that may affect jaguar critical habitat without reinitiating consultation with the U.S. Fish and Wildlife Service (“FWS”) pursuant to 50 C.F.R. § 402.16. *See* 62 Fed. Reg. 39147 (July 22, 1997) (listing jaguar as endangered under ESA); 79 Fed. Reg. 12572 (Mar. 5, 2014) (final jaguar critical habitat designation).

As described more fully below, Wildlife Services carries out activities in and near jaguar critical habitat that “may affect” designated critical habitat. Because critical habitat was designated for jaguars in Arizona and New Mexico, and Wildlife Services’ activities may affect this designated critical habitat, Wildlife Services is required to reinitiate formal consultation with FWS.

We request that you take immediate action to remedy ongoing violations of the ESA in designated jaguar critical habitat. This letter constitutes notice required by Section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action. If Wildlife Services and its officials do not take action within 60 days to remedy their violations of the ESA, Animal Welfare Institute and WildEarth Guardians will pursue litigation over these claims. *See Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (“[T]he failure to reinitiate § 7 consultation is a final agency action subject to judicial review.”).

I. BACKGROUND

a. Jaguar (*Panthera onca*)

Historically, jaguars occurred in California, Arizona, New Mexico, Texas, and possibly as far east as Louisiana. 37 Fed. Reg. 6,476 (Mar. 30, 1972). Jaguars were extirpated from California in the early 1900s and Texas in 1948, and nearly eradicated from Arizona and New Mexico, with sightings since 1963 limited to south-central Arizona and extreme southwestern New Mexico. Nowak, R.M. 1975. *Retreat of the jaguar*. National Parks Conservation Magazine 49:10-13.

Undisputed records from Arizona and New Mexico dating to 1965 show a number of instances of confirmed jaguar presence (verified by physical evidence such as skin, skull, or photograph). 79 Fed. Reg. 12572, 12579-80 (Mar. 5, 2014). The placement of remote, trail cameras has led to an increase in confirmed jaguar sightings in Arizona and New Mexico since 2001. *Id.*

Between 1996 and 2011, either five or six individual jaguars were documented in the United States. Recovery Outline for the Jaguar, Technical Subgroup of the Jaguar Recovery Team in conjunction with the Implementation Subgroup of the Jaguar Recovery Team and the U.S. Fish and Wildlife Service, April 2012. From 2001 to 2009, two jaguars, both adult males, referred to as “Macho A” and “Macho B”, were photographed (one repeatedly) using infra-red camera traps in south-central Arizona, near the Mexico border. *Id.* These two jaguars were documented in three different mountain range complexes in southeastern Arizona, over an area extending from the United States-Mexico international border north 66 km (47 mi) and 63 km (39 mi) east to west. *Id.* Furthermore, the jaguars were found using areas from rugged mountains at 1,577 m elevation (5,174 ft) to flat lowland desert floor at 877 m (2,877 ft). A fifth jaguar (adult male)

was observed and photographed in November 2011 in the Whetstone Mountains of southeast Arizona. *Id.* A possible sixth jaguar was photographed in 2004; however, it could not be determined whether the animal was a unique individual or in fact was “Macho A” (the photo was of the animal’s right side and only photos of “Macho A’s” left side were available for comparison). *Id.*

The FWS first listed jaguar as an endangered species in 1972, however only in its range from the United States-Mexico border south through Mexico and Central America. 37 Fed. Reg. 6476 (Mar. 30, 1972). In 1997, FWS extended endangered status to the jaguar across its range, including in the United States. 62 Fed. Reg. 39147 (July 22, 1997). At that time, FWS determined that designation of critical habitat was not prudent. *Id.* at 39155. In 2006, FWS reaffirmed its determination that the designation of critical habitat for jaguar was not prudent. 71 Fed. Reg. 39335, 39337 (July 12, 2006). This determination was challenged in court, resulting in the decision to not designate critical habitat being vacated and remanded to FWS for additional consideration. *Ctr. for Biological Diversity v. Kempthorne*, 607 F.Supp.2d 1078, 1088-89 (D.Ariz. 2009). In response, FWS issued a proposed rule designating critical habitat for jaguar in southern portions of both Arizona and New Mexico in 2012. 77 Fed. Reg. 50213 (Aug. 20, 2012) (critical habitat proposed rule). Critical habitat for the jaguar was finalized and designated in 2014. 79 Fed. Reg. 12572 (Mar. 5, 2014) (final designation of critical habitat rule).

In 2007, FWS made a §4(f)(1) determination that development of a formal recovery plan at that time would not promote the conservation of the jaguar. *See Kempthorne*, 607 F.Supp.2d at 1083 (citing Recovery Plan Decision 4(f) Letter). The rationale for this determination was that the jaguar’s habitat in the United States represented less than 1% of its total range, and that therefore FWS could not implement necessary actions to recover the jaguar across its entire range, including those portions in other countries. *Id.* This decision was vacated and remanded to FWS for additional consideration. *Id.* In response, FWS determined that a recovery plan for jaguar would contribute to their conservation and agreed to prepare one. Recovery Plan Decision 4(f) Letter (Jan. 10, 2010).¹ On April 18, 2012, FWS released a Recovery Outline for the jaguar to provide a preliminary strategy for jaguar conservation until a full Recovery Plan could be completed.²

b. Jaguar Critical Habitat

On March 5, 2014, FWS published a final rule designating critical habitat for the jaguar covering approximately 764,207 acres in Pima, Santa Cruz, and Cochise Counties in Arizona, and Hidalgo County, New Mexico. 79 Fed. Reg. 12572, 12572 (Mar. 5, 2014). The designated critical habitat is spread across six units: Unit 1 - Baboquivari Unit, 63,134 acres, Baboquivari, Saucito, Quinlan, and Coyote Mountains in Pima County, Arizona; Unit 2 – Atascosa Uni,

¹ Recovery Plan Decision 4(f) Letter available at: <http://www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/Jaguar/JaguarRPmemo1-12-10.pdf>.

² Jaguar Recovery Outline available at: <http://www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/Jaguar/049777%20-%20Jaguar%20Recovery%20Outline.pdf>

144,865 acres, Tumacacori, Atascosa, and Pajarito Mountains in Pima and Santa Cruz Counties, Arizona; Unit 3 – Patagonia Unit, 351,501 acres, Santa Rita, Patagonia, Empire, and Huachuca Mountains, and Grosvenor and Canelo Hills in Pima, Santa Cruz, and Cochise Counties, Arizona; Unit 4 – Whetstone Unit, 94,269 acres, Whetstone Mountains in Pima, Santa Cruz, and Cochise Counties, Arizona; Unit 5 – Peloncillo Unit, 102,724 acres, Peloncillo Mountains in Cochise County, Arizona and Hidalgo County, New Mexico; Unit 6 – San Luis Unit, 7,714 acres, San Luis Mountains, Hidalgo County, New Mexico. *Id.* All units, and subunits, were occupied at the time of listing, except for the Southern Baboquivari Subunit (Unit 1b), the Whetstone-Santa Subunit (Unit 4b), and the Whetstone-Huachuca Subunit (Unit 4c). *Id.* at 12591-92.

II. STATUTORY FRAMEWORK

a. ESA Section 7

The fundamental purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend for survival and recovery. 16 U.S.C. § 1531(b). Section 7 of the ESA imposes a substantive duty on federal agencies to ensure that their activities do not jeopardize the continued existence of a listed species nor adversely modify a listed species’ critical habitat. 16 U.S.C. § 1536(a)(4). The ESA also establishes an interagency consultation process to assist federal agencies in complying with this duty. 16 U.S.C. § 1536(a)(2). This process includes reinitiating consultation after formal consultation has concluded if: (1) new information reveals effects not previously considered, or (2) a new species is listed or critical habitat designated that may be affected by an agency action. 50 C.F.R. § 402.16.

Under the ESA, “agency action” includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02. An agency must reinitiate formal consultation under ESA Section 7 whenever it retains discretionary involvement or control over an action that “may affect” designated critical habitat. 50 C.F.R. § 402.16. The threshold for such a determination is low and includes: “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character.” 51 Fed. Reg. 19926, 19949 (June 3, 1986).

b. Formal Consultation

Wildlife Services requested initiation of formal consultation with FWS in 1995 for effects of the nationwide Wildlife Services program on the jaguar. That formal consultation resulted in a 1999 Biological Opinion and a determination that the level of take³ expected from Wildlife Services activities was “not likely to jeopardize the continued existence of the jaguar throughout its range.” 1999 Biological Opinion at 13. The 1999 Biological Opinion included an Incidental Take Statement⁴ allowing for the incidental take of one jaguar on the condition that five Reasonable

³ Under the ESA, take “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

⁴ Absent an Incidental Take Statement, Wildlife Services would be prohibited from taking a jaguar under Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B). Such a take in violation of

and Prudent Measures were followed and implemented according to a series of Terms and Conditions. 1999 Biological Opinion at 12-17.

The 1999 Biological Opinion, however, explicitly stated that at the time of the Biological Opinion, “[n]o critical habitat has been proposed or designated for the jaguar; thus none will be affected.” 1999 Biological Opinion at 12. Because the 1999 Biological Opinion did not consider the effects of Wildlife Services’ operations on designated critical habitat for jaguar, Wildlife Services has an obligation to reinitiate consultation with FWS. “A reinitiation based on a ... critical habitat designation is treated as a new consultation...” Final ESA Section 7 Consultation Handbook, March 1998 at 4-65.

c. Wildlife Services Activities May Affect Designated Critical Habitat

Wildlife Services carries out activities in and near jaguar critical habitat that “may affect” designated critical habitat. Critical habitat may be affected if an agency action risks interfering with any of the physical or biological features that were the basis of the original designation. *See* 50 C.F.R. § 424.12(b). Such features include space for population growth and normal behavior, usual prey species and hunting areas, cover or shelter, water, breeding sites and rearing of offspring. 50 C.F.R. § 424.12(b).

There is ample evidence that Wildlife Services’ activities substantially and adversely affect the jaguar population, as acknowledged by FWS itself in the 1999 Biological Opinion, which implemented five mandatory reasonable and prudent measures to address Wildlife Services’ activities precisely because such activities “may adversely affect the jaguar.” The 1999 Biological Opinion described some of the effects of the Wildlife Services program:

Actions that may affect the jaguar include clearing of habitat, destruction of riparian areas, fragmentation or blocking of corridors that jaguars may use, and any trapping or animal control activities designed to target the jaguar or other large predators. Such activities may also prevent jaguars from recolonizing previously inhabited, or otherwise suitable, areas. M-44 ejector devices with cyanide capsules used by [Wildlife Services] to accommodate stockmen concerns over predator losses may be of threat to the jaguar (Terry B. Johnson, AGFD, *in litt.*, 1993). The jaguar may also be victims of traps targeted for other predators such as bears and mountain lions.

1999 Biological Opinion at 5. The 1999 Biological Opinion further found that Wildlife Services’ “animal damage control activities ... could result in the direct take of jaguars.” 1999 Biological Opinion at 6.

Wildlife Services employs multiple lethal and non-lethal management techniques in and near designated critical habitat for jaguar, including blind sets, baited and scented traps, draw stations, leg and foot snares, and M-44 cyanide capsule ejectors. These techniques may affect jaguar

Section 9 of the ESA would expose Wildlife Services to liability to penalties authorized by the ESA through an enforcement action. 16 U.S.C. § 1540.

critical habitat by altering the distribution of prey species that serve as food; altering jaguar movement; removing tree cover; clearing habitat; deterring the use of habitat that would otherwise be appropriate for population growth, shelter, and breeding; and affecting water quality through the use of herbicides near critical habitat, among other impacts. *See* 79 Fed. Reg. 12572, 12595 (Mar. 5, 2014) (“Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the jaguar.”). Further underlining the likelihood of adverse modification, according to FWS itself, in Arizona, the jaguar’s gradual decline was concurrent with predator control activities associated with the development of the cattle industry.⁵

In addition to predator management activities described above, Wildlife Services is also contracted to carry out other activities, such as the Pink Bollworm Eradication Program, which may affect jaguars and designated critical habitat. This program includes pesticide application in Arizona and New Mexico in the vicinity of known occupied jaguar habitat. Wildlife Services acknowledged in its Environmental Monitoring Plan that chlorpyrifos⁶ and permethrin⁷, two insecticides used by the program, could be applied to fields within 300 feet of known occupied jaguar habitat. Furthermore, the insecticides could “drift” into jaguar habitat. Permethrin, in particular, is known to affect aquatic organisms that are a potential prey species for jaguars.

Because critical habitat was designated for jaguars in Arizona and New Mexico, and Wildlife Services’ activities may affect this designated critical habitat, Wildlife Services is required to reinitiate formal consultation with FWS.

III. NOTICE OF VIOLATION

Wildlife Services and its officials are violating, and will continue to violate, Section 7 of the ESA, 16 U.S.C. § 1536(b), by failing to reinitiate consultation with FWS after the designation of critical habitat for jaguar as required by 50 C.F.R. § 402.16. Wildlife Services must reinitiate consultation with FWS to determine whether its actions, and their effects on designated critical habitat for jaguar, appreciably reduce the likelihood of survival and/or recovery of jaguars.

⁵ Brown, D.E. 1983. On the status of the jaguar in the Southwest. *Southwest Naturalist* 28:459-460; FWS 1990.

⁶ *See* U.S. Environmental Protection Agency, *Chlorpyrifos Facts* (February 2002) available at: http://www.epa.gov/oppsrrd1/REDS/factsheets/chlorpyrifos_fs.htm (Chlorpyrifos is an insecticide that can overstimulate the nervous system causing nausea, dizziness, and confusion. High exposure can cause respiratory paralysis and death).

⁷ *See* U.S. Environmental Protection Agency, *Permethrin Facts* (June 2006) available at: http://www.epa.gov/oppsrrd1/REDS/factsheets/permethrin_fs.htm (Permethrin is a restricted use pesticide because of its high toxicity to aquatic organisms. It modifies the biochemistry and physiology of nerve membrane channels. These effects have been widely studied in freshwater and estuarine fish, invertebrates, and benthic organisms. There is potential concern for direct effects and chronic risks to aquatic organisms).

IV. CONCLUSION

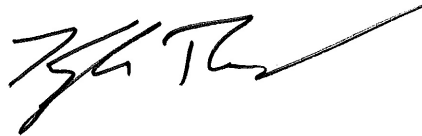
We request that the agency take immediate action to remedy ongoing violations of the ESA in designated jaguar critical habitat. We are hopeful that the agency will take all necessary measures to avoid continuing violation of section 7. During the pendency of this 60-day notice period, Wildlife Services may wish to meet with Animal Welfare Institute and WildEarth Guardians to discuss the effects of its predator management activities in designated jaguar critical habitat, as well as to consider the agency's duties under the ESA to reinstate formal consultation with FWS. Animal Welfare Institute and WildEarth Guardians welcome such engagement.

Please feel free to contact me if Wildlife Services is interested in meeting, or if you have any questions or concerns regarding this notice of intent to sue.

Sincerely,



John Mellgren
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97405
Ph: (541) 359-0990
Email: mellgren@westernlaw.org



Kyle Tisdell
Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, New Mexico 87571
Ph: (575) 613-8050
Email: tisdell@westernlaw.org

On Behalf of:

Tara Zuardo
Animal Welfare Institute
900 Pennsylvania Ave, S.E.
Washington, D.C. 20003
Ph: (202) 446-2148
Email: tara@awionline.org

Bethany Cotton
WildEarth Guardians
620 16th Street, Suite 300
Denver, CO 80202
Ph: (503) 327-4923
Email: bcotton@wildearthguardians.org