

## **Talking Points for:**

Proposed Critical Habitat for Jaguar Federal Register (FR) Notice - published August 20, 2012

**Comments Due on Federal Register Notice: October 19, 2012**

**Electronically:** <http://www.regulations.gov>

Search for Docket # FWS-R2-ES-2012-0042

Once found, click on "Comment Now!"

And/or

**Hard Copy:** Attn: FWS-R2-ES-2012-0042

Division of Policy and Directives Management

U.S. Fish and Wildlife Service

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**w/cc to Congressional Delegation**

## **Background Information**

<http://www.fws.gov/southwest/es/arizona/Jaguar.htm> (copy and paste into your web browser) will take you to the web page where the US Fish and Wildlife

Service (Service) has posted links (just click on the saguaro icon) to all Federal Register Notices and other official announcements regarding the jaguar listing, recovery plan, and critical habitat proposal.

The Service is specifically looking for independent specialists to ensure their proposed critical habitat designation and recovery plan for jaguar in the U.S. is based on scientifically sound data, assumptions and analyses. So if you have anyone in your areas that has done research on jaguar and/or their habitat, be sure and get their input when submitting comments.

Since most organizations and individuals do not have a background on jaguar history, sightings, preferred habitat types, or some of the other issues the Service discusses in their proposed Federal Register Notice and/or Recovery Outline, we've assembled some "talking points" for your convenience.

## 1) What's in the Federal Register Notice

The Federal Register (FR) Notice, published on August 20, 2010, is titled, "Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Jaguar; Proposed Rule."

The FR Notice is full of double-speak. Although the Service has no authority to impose regulations abroad, the ESA authorizes the Service to fund protection measures for jaguars in foreign nations through grants, research and other activities.

The definition of occupied has been skewed to include, "areas within the geographic area 'occupied' by the species at the time it was listed", if these areas "contain physical or biological features 1) which are essential to the conservation of the species and 2) which may require special management considerations or protection."

This new definition appears to state that any sighting of a transient male jaguar on no more than a singular occasion over twenty years equates to jaguar "occupancy" or residency of a given area. This is not the intent of the ESA. We believe we can safely presume that this rule will eventually be applied, de facto, to every area where a jaguar is or ever was sighted in the wild within the boundaries of the United States.

The biological features referred to in the Rule are also highly disputable since most of the current sightings are of male, transient jaguars wandering up from Mexico into the U.S. Not enough data exists to make a final determination that the "essential biological features" necessary to sustain a viable population of jaguars are found in these areas.

We do know jaguars are the only feline species that love water and that there is no verifiable and reliable scientific evidence that either Arizona or New Mexico have ever supported a viable, reproducing population of jaguars. In New Mexico there is no record of a naturally occurring female jaguar - ever. And in Arizona, no possibly naturally occurring female has been recorded since 1949. The available evidence suggests that even the 1949 jaguar may have been originally imported for sport hunting, as were at least three females that were killed in Arizona in the late 1950's, very likely a female killed in 1963, and at least one that escaped in New Mexico during the 1970's.

In addition, the Service reserves the right to "designate critical habitat in areas outside the geographic area occupied by the species at the time it was listed, upon a determination that such areas are essential for the conservation of the species" (page 50217). The definition of "essential" appears to have also been skewed in this Rule. It could become another moving target for the Center for Biological Diversity to sue over.

## **2) What is Wrong with the "Best Available Science"**

The Service has always been required to use the best available science in their determinations. However, it appears they are now using the "best available *current*" science (i.e., junk science) with the jaguar.

Included in this "current" science are several "reports" that have not been verified; lack physical evidence for support; rely on false presumptions; fail to examine primary records, data and literature for accuracy; fail to present specific datasets and cite data sources when modeling for jaguar historical presence or habitat; speculate on locations where jaguars were reported to have been sighted and/or killed; speculate that the habitat associated with the end of a chase and kill somehow represents the jaguar's preferred natural habitat; fail to mention omitted data and/or fail to explain why certain data was excluded.

These reports include:

A) Brown, D.E. "On the Status of the Jaguar in the Southwest" (1983) - the "science" used by the Service in their original determination to list the jaguar as endangered in the U.S. in 1997. Brown failed to present his dataset so his results are unverifiable and therefore unreliable. Many inaccuracies and discrepancies have been documented relative to the jaguar records used in later works by Brown and Lopez-Gonzales. Brown (1983) was the original report that presented jaguar "decline" arbitrarily as beginning in 1900, when in fact jaguar occurrences were more rare in the United States before 1900 than after.

B) Sierra Institute (2000) - Although not included in the Recovery Plan or FR notice, this report, which includes a proposal for a breeding facility and introduction program into Arizona and New Mexico, was included

the AZ/NM Jaguar Conservation Team's (JAGCT), Assessment and Strategy for Jaguars. It could become the foundation for building a project to rival the Mexican Wolf Recovery Plan, despite its reliance on speculation.

C) Boydston and Lopez-Gonzales, "Sexual Differentiation in the Distribution Potential of Northern Jaguars (*Panthera onca*)," (2005) - this is the "scientific" model Judge Roll was confused about when he ultimately directed the Service to go back to the drawing board to reconsider their "not prudent" decision of 2008. We now know that report was neither journal published nor peer reviewed and that it lacks scientific rigor (no availability of underlying data). Nonetheless, this report was misrepresented to Judge Roll as the truth.

D) Robinson, Bradley and Boyd "Potential Habitat for Jaguars in New Mexico," (2006) - this report, written on behalf of the Center for Biological Diversity (CBD), is highly speculative, includes unsubstantiated "sightings" of jaguars from California to Texas and jaguar fossil records from the Pleistocene era. It was written to replace the peer-reviewed and previously accepted Menke and Hayes/New Mexico Department of Game and Fish (2003) report: "Evaluation of the Relative Suitability of Potential Jaguar Habitat in New Mexico." Robinson et al. (2006) uses many inaccurate and unreliable "sightings," misrepresented as "documented" "occurrence records," and therefore does not meet the basic test of scientific evidence (i.e., relevance and reliability). Moreover, this report was commissioned by the Arizona Game and Fish Department (AZGFD) to the CBD under the table in the absence of public bid (one cent under the radar of public bid for \$999.99) or any form of parliamentary procedure approving such.

E) McCain and Childs, "Evidence Of Resident Jaguars (*Panthera Onca*) In The Southwestern United States And The Implications For Conservation" (2008) -Terry Johnson, AZ Game and Fish Department - Nongame Branch, criticized the report in a Jaguar Conservation Team (JAGCT) meeting (October 6, 2008) because it was highly presumptive and based on unsound science.

Although the minutes of the JAGCT meeting do not reflect Mr.

Johnson's criticisms, it was noted that Alan Rabinowitz's comments on the report should have been sent to the authors or to the Society of Mammalogy (Society) in rebuttal.

The Society used McCain and Childs (2008), along with the IPCC (2007) global warming report and Robinson et al. (2006) as their basis for developing a Resolution to Protect Jaguars in the U.S. That resolution is scientifically infirm because the IPCC's (2007) report and Robinson et al (2006) have been shown to be both inaccurate and unreliable, and because McCain and Childs (2008), which has been shown not only to rely on inaccurate arithmetic and unreliable historical records, further used urine and scat of captive female jaguars in heat, or sexual scent luring, to both artificially attract and locate the jaguar (Macho B), which they nonetheless unscientifically claim was a naturally occurring resident.

### **3) Procedural Background**

The Service is proposing a Critical Habitat designation for the jaguar of 838,232 acres, or roughly 1,300 square miles in Arizona and New Mexico. As such, the Service must perform a National Environmental Policy Act (NEPA) analysis, in the form of an Environmental Impacts Statement (EIS), including an economic analysis, before any critical habitat for jaguars can be designated in Arizona and New Mexico.

Arizona is in the 9th Circuit Court District. That Court has established steps that a federal agency must follow in order to comply with NEPA. The 9th Circuit, however, does not require NEPA analysis for proposals to designate critical habitat where the habitat is located solely within its own jurisdiction.

The 10<sup>th</sup> Circuit, which includes New Mexico, has held that NEPA analysis is required when a major federal action, i.e. critical habitat designation, is being proposed for an endangered species.<sup>1</sup> However, it has not set the specific procedures the 9<sup>th</sup> Circuit has for performing such NEPA analysis.

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<sup>1</sup> Specifically, the Ninth Circuit held that NEPA does not apply to critical habitat designations made pursuant to ESA. *Douglas County v. Babbitt*, 48 F.3d 1495, 1507 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 1996). In contrast the Tenth Circuit held that NEPA does apply to critical habitat designations made under ESA. *Catron County Bd. of Comm'r v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996).

Based on these differences between the Circuit courts, it appears the Service is following a hybrid approach for the jaguar relative to NEPA. By publishing the Federal Register Notice on Critical Habitat (FR Rule) before performing NEPA, the Fish & Wildlife Service has served notice that it will not follow the 9<sup>th</sup> Circuit's direction that NEPA be performed 'up-front,' or before any proposed rule is published. Instead, as it has done recently with other required NEPA and economic impact analyses, those requirements are handled by piece-meal publications after the proposal of the rule. This tactic both obscures the issues and prevents meaningful comment on the rule previously proposed.

This procedure was recently used on three other species; the Southwestern willow flycatcher and the Spikedace and the Loach minnow. As you may be aware, these new "rules" become the "law" of our land. This should be of great concern and brought to the attention of our Senators and Representatives, as well as the Service. The agency should be required to follow NEPA and in this case, due to significant economic impacts, an EIS should be prepared 'up-front' and before the proposal of any rule to designate critical habitat for jaguars in Arizona and New Mexico.

### **Summary**

There are many more conflicting ideas and data in the Federal Register Notice and Recovery Outline for Jaguars but these are some of the highlights that we believe should be included in all the comments submitted. Feel free to amend, modify and/or add as you see fit for your particular area and according to your own expertise. If you have knowledge that no jaguar was ever sighted in your particular area, or on your property, be sure to note this in your comments.

You should inquire in your comments why and on what basis the agency is designating critical habitat in areas outside the geographic area that is considered "occupied" if these areas are currently unoccupied and most likely unsuitable for jaguars.

For further information see:

Federal Register Notices and other actions on Jaguar by the USFWS:  
<http://www.fws.gov/southwest/es/arizona/Jaguar.htm>

AZ/NM Jaguar Assessment and Strategy - Arizona Game and Fish Dept:  
[http://www.azgfd.gov/w\\_c/es/jaguar\\_management.shtm](http://www.azgfd.gov/w_c/es/jaguar_management.shtm)

Comments previously submitted on Critical Habitat (2008):  
<http://www.sacpaaz.org/sacpa-actions/endangered-species/jaguar-criticalhabitat/>

For further information, you may also call:  
Cindy Coping - 520-971-2962 or Judy Keeler - 575-548-2520