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***Re: Proposed Rule to Designate Critical Habitat for the Jaguar, Docket No. FWS-R2-ES-2012-0042***

These comments, submitted on behalf of each of the Pima Natural Resources Conservation District (PNRCD), an Arizona State agency of natural resource management jurisdiction; the Santa Cruz Natural Resources Conservation District, an Arizona State agency of natural resource management jurisdiction; the Coalition of Arizona / New Mexico Counties, an organization dedicated to the protection of rural economies; the Southern Arizona Cattlemen's Protective Association, an organization of cattle ranchers in Pinal, Pima and Santa Cruz Counties; the Arizona Cattle Growers Association, a statewide association representing cattle ranchers; and the Arizona Chapter of People for the West, an organization dedicated to the preservation, promotion and protection of the farming, ranching, and rural heritage of our western lands, respond to the proposed rule to designate critical habitat for the jaguar in Arizona and New Mexico published in the Federal Register on August 20, 2012.

At the outset, the PNRCD et al. urges the Service to immediately withdraw this proposed rule because, as shown herein and in attachment, the best scientific information available clearly shows that habitat essential to the jaguar's conservation or existence as a species does not exist in either Arizona or New Mexico and because the proposed rule relies on speculation, assumption and philosophy / theology rather than solely the best scientific information available as is required of the Service by Section 4 of the ESA.

Moreover, as shown herein, all of the models used by the Service to identify habitat in Arizona and New Mexico alleged as “essential” to the jaguar’s existence as a species are fatally flawed and offend Section 4 of the ESA because of their importation and use of inaccurate and/or unreliable data. Thus, because habitat “essential” to the conservation of the jaguar as a species does not exist in either Arizona or New Mexico under any scientifically credible definition of that term, because designation of critical habitat therein cannot possibly help save jaguars, and because the economic consequences of adding yet another layer of regulation and restriction on national security, resource production, water use, hunting and recreation during the worst recession on record since 1929 far outweigh any possibly discernible benefit to jaguars as a species that might be gained by designating critical habitat for them north of the Mexican border where they are but rarely transient, the Service must withdraw this proposed rule.

In addition to the specific comments addressing these issues, which are presented below, the PNRCD et al. also takes this opportunity to provide the Service with new and important information in attachment highly relevant to both the historic record of jaguar presence in Arizona and the characterization thereof by Carmony and Brown (1982), Brown (1983), Brown and Lopez-Gonzales (2000, 2001), Schmitt (1998) and all modelers thereafter. Further, the PNRCD et al. also takes note of and directs the Service’s attention to false and misrepresentative claims published to the Service by the authors of AGFD’s 2011 *Jaguar Conservation Assessment For Arizona New Mexico and Northern Mexico*, cited by the Service in its April, 2012, jaguar recovery outline, which are unfortunately incorporated by reference into this proposed rule.

The PNRCD et al. also takes the opportunity presented by the promulgation of this proposed rule to further protest and document for the administrative record the Service’s continuing refusal to coordinate with the PNRCD under NEPA, to cooperate with the Pima NRC under the ESA, and its continuing refusal to provide the PNRCD with any reason for refusing to do either, under claim of absolute attorney-client privilege (see attached), in the development of both the recently released jaguar recovery outline and this recently published proposed rule to designate critical habitat for that species.

Finally, the PNRCD et al. separately points out why this proposed rule also offends the Data Quality Act (DQA) and NEPA and why its promulgation at this time runs counter to both the President’s February 28, 2012 memorandum to the Secretary of the Interior and the Service’s own policy, as expressed in separately proposed rule (77 FR 165, pp. 51503-51510, August 24, 2012), that economic analyses be completed and made available for public comment at the time the proposed rule to designate critical habitat is published.

***A. The Proposed Rule Fails to Provide Scientific Data Supportive of the Service’s Claim That Jaguars Currently Reside in the United States or Resided in the United States at the Time of the Jaguar’s Listing in the United States***

Contrary to the Service’s apparent belief, the term “occupy” has a meaning separate and distinct from that which the Service would give it in this proposed rule. This is because the question in the critical habitat context under the ESA is whether the area in question provides habitat *essential* to the jaguar’s conservation or survival *as a species*, such as Brazil does, and

not whether the area in question could host or has hosted individual, transient jaguars beyond the northern limits of its breeding range only briefly and on singular occasions over the course of the last fifty years.

Contrary to the claim of the Service in this proposed rule, recent, documented sightings of four or five individual jaguars on singular occasions, two of which occurred over a decade and a half ago, no less, are not scientific evidence of current jaguar residency in or occupancy of the United States for purpose of critical habitat designation. Nor are these sightings scientific evidence that such brief, male-only transience represents use of habitat by jaguars *essential* to their collective existence or conservation as a species because the jaguar's breeding range spans two continents, ends in northern Mexico, and the jaguar's actual epicenter of abundance is located in South America. Neither does the sighting of a single male jaguar in the Whetstones on one occasion in 2011, nor a single photograph of what appears to be a jaguar's tail taken at an unspecified location in September of 2012, well north of the jaguar's breeding range, constitute such evidence either. Instead, these sightings of lone, transient animals provide substantial scientific evidence for the opposite conclusion -- that no area in the United States provides habitat essential to either the jaguar's conservation or existence as a species.

Moreover, neither can the Service rely on McCain and Childs (2008) for support of its speculation that jaguars currently occupy the United States as naturally occurring residents. Although the title of that 2008 work – *Evidence Of Resident Jaguars (Pantera onca) In The Southwestern United States And The Implications For Conservation* – indicates otherwise, as the Service acknowledges in recovery outline, but not in this proposed rule, the artificial baiting methodology employed by McCain and Childs (2008) in at least a part of the area studied fatally compromises both the relevance and reliability, or scientific validity, of that claim.

According to the Service, “[b]ecause female jaguar scat was used at some camera traps at various times throughout their research [McCain and Childs (2008)], it is unknown whether or how this could have influenced the observed range of the jaguar in this study.” (Recovery Outline, at p. 9). In reaching this conclusion, however, the Service fails to mention the critically relevant fact that the “female jaguar scat” used at these camera-traps was actually scat from captive female jaguars *in heat* -- a fact which is subject to the taking of judicial notice, a fact that clearly explains how this baiting could have influenced the observed range of that lone, male jaguar, and a fact which precludes extension of scientific validity to any conclusion reached by McCain and Childs (2008) relative to the jaguar's naturally-occurring residency in the United States.

Simply put, because the methodology of studying jaguar residence employed by McCain and Childs (2008) included artificial attraction and location of jaguars by use of potent, jaguar-specific, *sexual scent baiting*, the Service, cannot claim, as it attempts to do both in April 16 recovery outline and this proposed rule that McCain and Childs (2008) nonetheless provides reliable scientific evidence of “naturally occurring” resident jaguars in the United States. If such were in fact the case – that sexual scent baiting had no effect on this or any other “resident” jaguar's habits, movements or presence in the area -- then it would be reasonable to expect additional jaguar “sightings” in that area of the United States after this baited jaguar's (Macho

B's) demise in 2009 if jaguars were or are currently "occupying," or residing in, that area as claimed by the Service.

This has not been found to be the case, however. Instead, neither the recovery outline nor this proposed rule cites any further indication of jaguar presence within this area of the United States since that animal's unfortunate death in 2009. Thus, the best scientific and commercial information available does not support the Service's claim of current residential occupancy of naturally-occurring jaguars in the area north of the border in Arizona studied by McCain and Childs (2008). Instead, that information which is the best available science, Rabinowitz and Zeller (2010), identifies no suitable habitat for jaguars within the United States.

As a result, none of the 838,232 acres proposed for critical habitat designation for jaguars in Arizona and New Mexico by use of this rule qualifies as a "secondary area" essential to the conservation or existence of the jaguar as a species. Instead, because none of this country north of the border connects core areas (as every other "secondary area" does), because there is no evidence of jaguar residency in this area either historically, currently or at the time of its listing in the United States, because what few breeding records that may exist for Arizona (3) are unverifiable and may not be of animals of naturally-occurring in origin, and because no record of a naturally-occurring female jaguar or record of jaguar breeding exists for New Mexico, *ever*, jaguars are "peripheral" – not "secondary" -- in their occurrence in this area of the United States.

***B. Class II Sightings Are Not Occurrence Records and the Concepts and Principles of Conservation Biology Are Not Scientific Data***

Representing unverified observations of jaguars in the absence of physical evidence (Class II observations) as reliable "occurrence records," as this proposed rule attempts to do, is neither responsible nor scientific. Instead, as stated in previous comment, such an approach is irreconcilably flawed by its basis on the acceptance of the unscientific but policy-driven assumption that a viable and reliable scientific model of jaguar critical habitat can be created from a sparse and highly unreliable dataset that is neither comparable in time nor gives any indication of how many individuals it may represent.

Such approach is also irreconcilably flawed by its heavy reliance on the locations of kill sites of hunt-chased jaguars, rather than the locations where each of these jaguars was initially encountered, to artificially identify suitable jaguar habitat for modeling purpose. As shown in attachment, some of these hunt chases with dogs went on for days, covered many miles, and included more than one mountain range (see treatment of Colcord jaguar presented in attachment, for example), thus precluding the reaching of any rational scientific conclusion relative to that individual's suitable or preferred habitat. Moreover, as also shown in attachment, many of these records are either completely inaccurate or so vague as to confound their use for modeling purposes as well.

Therefore, because much of the data used by all modelers to model suitable jaguar habitat in Arizona and New Mexico is inaccurate and therefore neither reliable nor scientific, the Service is precluded by the ESA from relying on any and all models based in whole or in part on kill site

locations, vague or inaccurate records, and unverified observations of jaguars in designating any critical habitat for jaguars in the United States.

Further, the Service's identification of the critical habitat for jaguars proposed in this rule, as revealed in the recovery outline, is also apparently based in large part on answers to a questionnaire the Service sent out to jaguar experts. That approach similarly offends the ESA. This is because questionnaire answers are opinions, not scientific data, and therefore form an improper basis for triggering the protections of the Endangered Species Act (see: *Bennett v. Spear*). Subjecting those opinions to massage by subsequent consensus, by use of the "Delphi Method," as appears to have been the case here, does not remedy but only compounds the scientific infirmity of such an approach.

Equally offensive to the ESA and the practice of objective science is the Service's claim in both recovery outline and this proposed rule that the IPCC's (2007) report is "unequivocal" in representing the best scientific and commercial information available relative to climate change or "global warming." Such, however, is decidedly not the case. Instead, the IPCC has recently admitted (on June 27, 2012) that its past reports were flawed and a recently journal-published study by Steirou and Koutsoyiannis (2012) has shown that 50% of warming claimed by the IPCC is false. (see attachments). Accordingly, the Service cannot rely on IPCC (2007), or the conclusion reached by the American Society of Mammalogists based there on, to support its speculations about climate change and the possible effects of "global warming" on essential habitat for jaguars under the ESA because, as shown herein and attachment, that information is both inaccurate and unreliable as well.

Similarly, the proposed rule's attempt to base and develop a recovery strategy for the jaguar in the United States on the concepts and principles of "conservation biology" is also precluded by the ESA. This is because an irreconcilable difference also exists between the Service's use of the concepts and principles of conservation biology and the ESA's Section 4 requirement that it rely solely on the best scientific data available in designating critical habitat for the jaguar. Simply put, concepts and principles, by definition, are not scientific data.

Rather, both the concepts and principles of conservation biology are philosophical or theological, and not scientific in nature, because of their reliance on assumptions and incorporation of a variety of emerging interdisciplinary perspectives in the social sciences. (Conservation Biology, Stanford Encyclopedia of Philosophy, Thu Nov 25, 2004; Conservation Biology, Vol. 18, No. 5, 1180-1190, October 2004). Because assumption is, in fact, speculation, and because speculation cannot serve as a basis for triggering the ESA's protections (*Bennett v. Spear*, 520 U.S. 152, 176-77 (1997)), use of these concepts and principles as the biological or scientific basis for designating critical habitat for the jaguar in the United States is precluded by the ESA.

Moreover, because philosophy (i.e., emerging interdisciplinary perspectives in the social sciences) is not scientific data, the ESA precludes the haphazard use of the concepts and principles of conservation biology in developing critical habitat for the jaguar in the United States on this separate basis as well.

That these scientific shortcomings of conservation biology are, in fact, very real is acknowledged by the conservation biology community itself. Although the ESA demands that science specify when a species is in need of federal protection, “[t]hirty years later, a haphazard mix of science and societal values continues to drive biodiversity conservation (Czech and Krausman 2001), and setting quantitative objectives for imperiled species remains contentious, even for well-studied species like Pacific Salmon (Peery et al. 2003).” (BioScience, October 2005, Vol. 55, No. 10: 835-849). “Conservation biology is confronted with the pitfalls such as: lack of exploration in underlying mechanism, too few or no field experiment, no control experiment in the field; consequently the theoretic frame of the science branch is not sound.” (*Status quo, challenges and strategy in Conservation Biology*, Biodiversity Science, 2009, Volume 17, Issue (2): 107-116).

That such scientific infirmity extends to the three principles of conservation biology specifically identified for haphazard use in the recovery outline and this proposed rule, is similarly recognized by the conservation biology community. “[A]lthough relatively simple in concept, it is remarkably difficult in practice to justify appropriate thresholds for representation, resilience, and redundancy (the three Rs) – a problem central to quantitative objective setting. ... One of the remaining challenges in conservation objective setting is to document the benefits of successful efforts and the consequences of mistakes. Currently we have few examples that can verify either. Conservation biologists must advance the science of objective setting so that we can objectively assess the outcomes of these efforts. This is critical if we are to effectively link science with government policy in a way that can survive the tests of the courts.” (Bioscience, October 2005 at p. 847).

Scientifically verified assessment of those outcomes is also imperative if the Service is to avoid separate Establishment Clause challenge, and test of the courts, over its use of the principles of redundancy, resiliency and representation in developing both critical habitat and a recovery strategy for the jaguar in the United States. Because the principles of conservation biology, as shown above, are currently belief-driven and governmentally imposed almost exclusively in the absence of verified scientific example, those principles are neither scientific nor representative of the best scientific data or information available. They are, however, pronouncedly theological in nature.

Central to the theology of conservation biology, is the belief that a significant number of its principles (including the three Rs) “are not simply empirical facts or theoretical predictions, but are desired outcomes based on value-laden beliefs.” (Conservation Biology, Volume 18, No. 5, October 2004 at p. 1181). Among those value-laden beliefs is the belief that human alteration of natural ecosystems is invariably negative (Id.) and that “biodiversity,” whatever that term may actually mean, is invariably “good.” (*The Gospel According to Conservation Biology*, June 1, 2007, Robert H. Nelson, Philosophy and Public Policy Quarterly).

In short, the Service’s reliance on theology (i.e., the principles of conservation biology), assumption, speculation, opinion, consensus building, unverified sightings and inaccurate records to develop critical habitat for the jaguar in the United States is neither responsible nor scientific. Nor is that reliance consistent with the ESA’s requirement that the Service rely solely on the best scientific data available when designating critical habitat there under. By choosing to

ignore that requirement, as it does in both its recovery outline and this proposed rule, the Service arbitrarily and capriciously exposes itself to not only possible ESA challenge, but additional Establishment Clause challenge as well.

***C. New and Important Information Relevant to Both the Record of Jaguar Presence in Arizona and the Characterization Thereof by Brown and Lopez-Gonzales***

In July, 2012, the Pima NRCDC received a captioned photograph of Red Harris and a jaguar taken by Mr. Harris west of Rio Rico in Arizona from Mr. George R. Proctor (USFS, retired) of Patagonia, Arizona. According to Mr. Proctor, the photograph (see copy attached) was given to him directly by Mr. Harris several years ago and the caption on it was written by Mr. Harris. That caption reads as follows:

“Lloyd F Harris (Red  
Thanksgiving day 1949  
west of Rio Rico AZ”

The importance of this photograph and its caption lies in the difference in the date of this jaguar’s taking as reported on this photograph by Mr. Harris, Brown (1983), and Brown and Lopez-Gonzales (2001), respectively. According to Brown (1983) and Brown and Lopez-Gonzales (2001), this male jaguar was taken on November 23, 1939 (Thanksgiving Day), in Ramanote Canyon, Atascosa Mountains, Arizona. Ramanote Canyon is located to the west of Rio Rico. According to the caption on the photograph given by Mr. Harris to Mr. Proctor, however, this jaguar was taken on Thanksgiving Day 1949, or November 24, 1949.

This new information is both important and relevant because, in addition to other discrepancies, inaccuracies and omissions documented in attachment (see attachment), it casts further doubt on the reliability of Brown’s (1983) conclusion, assumed in the absence of relevant baseline comparison, that records of jaguars killed in Arizona and New Mexico between 1900 and 1980 nonetheless show a decline characteristic of an over-exploited resident population when plotted over 10-year intervals. Clearly, if Brown (1983) is ten years off on when the Harris jaguar was actually taken, as appears to be the case here, cannot identify even the year in which several others were killed or where they were actually taken, and does not offer any baseline comparison (i.e., consideration of any of the “records” of jaguars he identifies from Arizona prior to 1900) to test the validity of his conclusion, then it must also follow that Brown’s (1983) plotting of jaguars killed in Arizona and New Mexico since 1900 at 10-year intervals is also off and that his conclusion reached there from (i.e., a decline characteristic of an over-exploited resident population is shown) is both speculative and unreliable.

In short, absent evidence proving the opposite – that the Harris jaguar was killed in 1939 and not 1949, that other kills are at the least reliable and identified to their respective years of occurrence and correct locations, and that the year 1900 is somehow anything other than a biased starting point for measuring alleged jaguar “decline” from an assumed state of former residency

in the absence of any baseline comparison (i.e., to “records” of jaguar occurrences in Arizona prior to 1900), the Service is precluded by the ESA from relying on Brown (1983) because, as things now stand, that work, as clearly shown in attachment, is scientifically compromised by its bias, inaccuracies, speculations and overall unreliability. Similarly, this new information casts equal doubt on those suggestions about resident populations made by McCain and Childs (2008) and Grigione et al. (2007), citing Brown (1983) for support, that are repeated in the recovery outline and in this proposed rule.

***D. False and Misrepresentative Statements Published to the Service by the Authors of the 2011 Jaguar Conservation Assessment For Arizona, New Mexico And Northern Mexico***

Another serious problem, which requires addressing here, is that false and misrepresentative statements published by the authors of this 2011 AGFD Jaguar Conservation Assessment have unfortunately found their way into the recovery outline and thus have been incorporated into this proposed rule by reference. Specifically, in footnote 13 of that assessment, the authors attempt to entirely discount previously submitted, September 23, 2010 comments on the jaguar, to which all of those represented herein were parties, based in large part on the claim that the supporting documentation for those comments’ challenges of the 1963 Penrod and 1964 Culbreath jaguar records was “not available” to AGFD.

Instead, as shown in attachment (see attachment), a complete package of those September 23, 2010 comments and their supporting documentation was emailed to Mr. Larry Voyles, Director of AGFD, on October 11, 2010. Therefore, contrary to the claim of the authors of this assessment, the documentation supporting the September 23, 2010 comments was, in fact, made available to AGFD in October of 2010. As a result, the authors of this assessment are left with no legitimate excuse for recklessly and falsely publishing the opposite to the Service.

Nor do these authors have any legitimate excuse for misrepresenting to the Service what the September 23, 2010 comments actually state – not infer – about the little, imported female jaguar Mr. Prock allowed to escape in New Mexico during the 1972-73 hunts. According to the authors of AGFD’s 2011 assessment: “Parker referenced an August 5, 2010 personal communication from Prock from which Parker inferred that a small female jaguar (and perhaps others) released in the 1972-73 NM hunts had not been killed.”

That statement is also false. Contrary to these AGFD authors’ claim, the comments make no inferences. Instead, the September 23, 2010 comments plainly state what Mr. Prock actually said in August 5, 2010, interview in Texas: that this little female, turned loose and rejected by the hunter, was not recaptured.

Similarly, those comments also plainly state – not infer – what Mr. Prock actually reported about other escapees: that every now and then a jaguar did get away from him on a hunt, but not often. According to Mr. Prock, this usually occurred when a jaguar made it onto land where he wasn’t allowed to follow it. As a result, these authors’ misrepresentation of those comments to the Service as inferences, rather than statements, is also wholly inaccurate and equally without basis in fact or excuse.



Further misrepresentative and inaccurate, is these authors' subsequent claim, made immediately following the sentence quoted above, that "[b]ased on Prock's comments, Parker asserted the 1963-64 AZ jaguars taken by Penrod and Culbreath should be rejected as legitimate records. At one point, Parker seemed to imply that a small female jaguar Prock released in the 1972-73 NM hunts escaped and might be the 78 lb female that Penrod killed in AZ in 1963." The September 23, 2010 comments, however, are not written in the context misrepresented by these authors to the Service. Instead, when viewed in their actual context, those comments clearly reveal no inference or implication of the sort.

In their actual context, the September 23, 2010 comments reveal that Mr. Prock was of the specific, expert opinion that neither the Penrod nor Culbreath jaguars were naturally-occurring and that both had plenty of help getting to where they got to in Arizona. Those comments then go on to immediately state that Mr. Prock's expert opinion about the origin of these jaguars is particularly relevant because it provides question of those records, *in addition to* the question presented by the oddity their presence out of habitat referred to by Brown and Lopez-Gonzales (2000), that makes those records unreliable for critical habitat mapping purpose (i.e., the Penrod jaguar is the only record of a jaguar to our knowledge taken out of habitat in spruce-fir forest above 9,500' in elevation, while the Culbreath jaguar was also taken out of habitat for that time of the year -- in high pine forest in January).

Contrary to the false impression published to the Service by the authors of this 2011 assessment, the little, imported female released during the 1972-73 New Mexico hunts is neither mentioned nor discussed in the section of comment relevant to Mr. Prock's opinion about the origins of the Penrod and Culbreath jaguars and why that opinion is highly relevant. Thus, any "implication," seeming or otherwise, that the little female and the Penrod jaguar are one and the same, is solely that of the authors of this 2011 assessment.

That such is the case is further proven by the fact, unmentioned by these same authors, that Mr. Prock's expert opinion about the Penrod and Culbreath jaguars as reported in previous comment is, in actuality, not only consistent with, but corroborated by, new, important and highly relevant information about Mr. Prock they themselves provide in this same, 2011 assessment.

According to the 2011 assessment:

"In the White Mountains of east-central AZ, in 1963, a hunter (T. Penrod) killed a small female and in 1964 a government trapper (R. Culbreath) killed a male (Brown and Lopez-Gonzales 2001). AGFD law enforcement officers speculated one or both of the jaguars had been imported for "canned hunts" (hunts involving release of captive animals) by C.J. Prock, a guide who was investigated for canned hunts involving other species of wildlife. The premise was that the Penrod and Culbreath jaguars had escaped from Prock hunts but the jaguar case could not be made (R. Kohls personal communication; R. Thompson personal communication). Prock, who did not guide Penrod or Culbreath, later asserted he had "never let a jaguar get

away in Arizona and that is the whole truth” (Brown and Thompson 2010). However, Prock did lead three successful jaguar hunts in southern AZ in 1958-59 and was fined in 1964 in U.S. District Court in Phoenix AZ for violating the Lacey Act by importing mountain lions into AZ and turning them loose for canned hunts (see: Dean 1974; Jones 1974; W. Swank personal communication). Because of the circumstances, all jaguars taken on hunts guided by C.J. Prock were dropped from the occurrence record for AZ years ago (AGFD unpublished data; Brown and Lopez-Gonzales 2001).”

Footnote 11, 2011 Jaguar Conservation Assessment.

Thus, in footnote 11, we learn for the first time that AGFD law enforcement officers involved in the 1964 case presumed the Penrod and Culbreath jaguars were imported by Mr. Prock. This highly relevant revelation casts further doubt on the reliability of the Penrod and Culbreath jaguar records and therefore, per the caution of Brown and Lopez-Gonzales (2000), precludes their use for the purpose of modeling of jaguar critical habitat. Importantly, this highly relevant information is not indicated in any previously published information we have examined to date. Nor was it provided by AGFD to the PNRCD for viewing in response to proper public records request.

Neither is the reliability of either the Penrod and Culbreath jaguar records resolved by these authors’ less than satisfactory resort to citation to “Brown and Thompson (2010)” for support of the claim that Mr. Prock later asserted that he had “never let a jaguar get away in Arizona and that is the whole truth.” This is because, first, the citation for this quote stated by these authors, Brown and Thompson (2010), is not identified among the “literature cited” by them in this assessment and therefore is not verifiable, and, second, because even if entirely correct, Mr. Prock’s alleged assertion says nothing about the little female jaguar he stated he did let go, and others he stated did get away from him, in New Mexico.

Nor does this statement, even if entirely correct, necessarily mean that Mr. Prock did not release or cause the release of any imported jaguars in Arizona because, in our interview experience with him, that would be viewed by Mr. Prock as an entirely different subject from letting a jaguar “get away” on a hunt. In short, it is entirely possible based on the timing of the killings of the Penrod (1963) and Culbreath (1964) jaguars – after Mr. Prock’s arrest but before his conviction – that both were intentionally released in Arizona as a means of avoiding the filing of further charges against Mr. Prock.

That imported jaguars were apparently intentionally released into southeastern Arizona by the Lee brothers, and therefore didn’t “get away” from them on a hunt, further illustrates this point. In footnote 12 of the assessment, we also learn for the first time of an importantly relevant 2008 email subject to PNRCD’s previous public record request but also withheld from the PNRCD’s viewing by AGFD. The relevance of this footnote to the unreliability of jaguar records currently being used by the Service to model critical habitat for the jaguar in the United States is clear and therefore is presented for the administrative record in its entirety:

<sup>12</sup> T.B. Johnson: In a January 2008 email, D. Robertson said that world-famous lion and jaguar hunter Dale Lee had confided to him long ago over a campfire in the Chiricahua Mountains (southeastern AZ) that Dale Lee and his brother [Clell] had “gone down to Guatemala for the Guatemalan government ... and brought back a litter of jungle cats [jaguars], nurtured them to a survivable state, and turned them loose in that area (Twixt Wilcox [sic] and the Chiricahuas [sic].)” Robertson said Lee had sworn him to secrecy and he was only making a “public statement” because Lee “passed in the 1980s” and, now that he was in his own “twilight years,” he “felt it was time to say something.” To date, I have not found corroborating evidence for Robertson’s comments.

Footnote 12, 2011 Jaguar Conservation Assessment

Thus, we learn that jaguars of foreign origin were not only released by jaguar hunters in Arizona for the purpose of immediate hunting, but apparently “seeded” or released in Arizona with the view of creating a population to hunt in the future. While this critically important revelation introduces yet another huge element of doubt highly relevant to the reliability of the jaguar records the Service is currently using to model critical habitat for the jaguar in the United States, incredibly, neither the Service’s recovery outline nor this proposed rule even mention it.

To its credit, the Service does state that it has rejected both the Penrod and Culbreath jaguar records and is using only “Class I” records in developing the critical habitat for jaguars in Arizona and New Mexico it is proposing by use of this rule. While the PNRCD views this statement as positive on its face, the PNRCD importantly and conversely notes that, in fact, each of the models on which the Service is relying in the proposal of this rule (Boydston and Lopez-Gonzales 2005, Hatten et al. 2002, 2005, Robinson et al. 2006, and Grigione et al. 2007, 2009) nonetheless used either the Penrod jaguar or the Penrod and Culbreath jaguar records and other unreliable “records” – or unreliable data -- for such habitat modeling purposes despite the Service’s claim to the contrary stated in this proposed rule.

Further, the PNRCD et al. also importantly notes that on August 17, 2012, or just three days before this proposed rule was published in the Federal Register, the Service published information recognizing the use of the Penrod jaguar in the development of both its population and viability assessments for the jaguar “in the northern extent of its range in Mexico and the U.S.” (see attachment). Moreover, in that same August 17, 2012 publication, the Service also misrepresents the distribution of jaguars within the United States by erroneously claiming that jaguars once occurred as far north as Santa Fe, New Mexico. In point of fact, however, as shown in attachment and as pointed out by Brown and Lopez-Gonzales (2001), the “record” on which that claim is based is actually that of a jaguar from Santa Fe, Argentina, and not from New Mexico or the North American continent at all.

Similarly, while the Service now also claims in this proposed rule that it is using only Class I records for purpose of critical habitat designation (or those records for which physical evidence exists), the same models on which it is currently relying, particularly those of Boydston

and Lopez-Gonzales (2005), Robinson et al. (2006), Grigione et al. (2007), McCain and Childs (2008), and Fisher (2011, database) are nonetheless riddled with misuse of unreliable sightings posited as “Class I records” for which no physical evidence or reliability actually exist.

In regard to the latter, the Service states (77 FR 161 at p. 50221) that it collected 130 “undisputed” Class I reports of jaguar locations (or those locations supported by some form of physical evidence of jaguar presence) since the time the jaguar was listed, using data compiled by Sanderson and Fisher (2011, database) and McCain and Childs (2008, entire, and unpublished data), to determine distance between water sources for jaguars in Arizona and New Mexico. As shown clearly in attachment, that claim is false. Instead, only a bare fraction of the 130 reports the Service now posits as “Class I” actually are supported by physical evidence, or are, in fact, Class I reports. Nor are the vast majority of those reports “undisputed,” as the Service also errantly claims. Instead, the Service attempted to avoid any dispute of this ludicrous claim by failing to provide these “reports” to the PNRCD in response to point-blank FOIA request. (See attachments).

Thus, the Service is precluded by the ESA from using any of these models as a “scientifically reliable” basis from which critical habitat or water for jaguars can be accurately or reliably modeled in Arizona and New Mexico. As shown herein, the Service’s continuing attempt in this proposed rule to characterize these models, and the unreliable “records” on which they are based, as “scientifically reliable” while also disclaiming the scientific validity of much of the data on which those same models are actually based, is clearly irreconcilable and therefore both arbitrary and capricious.

***E. The Premise that Resident Populations of Jaguars Existed in Arizona and New Mexico before 1900 is Unsupported by the Scientific Record and the Scientific Record of Jaguars Killed in Arizona and New Mexico after 1900 is Fraught with Discrepancies, Inaccuracies, Duplications and Unreliability***

The speculation that southern Arizona, at least, may have had a resident jaguar population prior to settlement originates with the publication in 1982 of Goode P. Davis Jr’s. *Man and Wildlife In Arizona*, as edited by Neil B. Carmony and David E. Brown. According to Carmony and Brown (1982 at p. 184-85), that conclusion was based on more references in the early reports “to this large, secretive cat” than to elk or javelina; a jaguar reportedly bagged by a member of the Pattie party when it came into their camp on the lower Colorado River in 1827 (which, in fact is off two years (1829) and occurred in Mexico, not Arizona); another reported by a member of Emory’s Boundary Commission in the vicinity of Guadalupe Canyon near the Arizona / New Mexico / Mexican border in 1855; Kennerly of the Boundary Commission being told by local residents of Santa Cruz, Sonora, that jaguars were common in the Santa Cruz River bottoms near the International Boundary in 1855; and a specimen reportedly taken by a member of Phocion Way’s party in the Santa Rita Mountains of southern Arizona in 1858. Such meager information and inordinate reliance on unsubstantiated hearsay is scientifically insufficient to conclude, as Carmony and Brown (1982) claim, “that southern Arizona, at least, may have had a resident jaguar population prior to settlement.” (See attachment).

This is especially so when it is considered, as stated in previous comment, that neither Padre Kino nor Juan Mateo Manje make any mention of jaguars in what is today Arizona despite their many entradas into southern Arizona conducted during the late 1600s and early 1700s, and when it is also considered that the Spanish offered no bounties on jaguars, ever, in what is today Arizona and New Mexico, respectively. In regard to the latter, the Spanish offered bounties only on wolves.

Moreover, as acknowledged by Carmony and Brown (1982), the only journal-published work of the time relevant to their residency conclusion, or that information representing the best scientific information available, does not agree with that conclusion at all. Instead, Elliot Coues, in his 1867 work, *The Quadrupeds of Arizona* (The American Naturalist, Vol. 1), states that “[T]wo other species of true long-tailed cats may possibly exist, particularly in the south-eastern portions. These are the Ocelot and the Jaguar. Within the limits of the United States, however, they have as yet only been found in the valley of the Rio Grande of Texas.”

Nonetheless, despite such meager historic mention of jaguars in Arizona prior to 1900, and despite Coues’s (1867) journal published report to the contrary, Carmony and Brown (1982) nevertheless claim that their conclusion of residency of jaguars in southern Arizona prior to settlement -- based on only two “records” of jaguars taken in or near Arizona (1829, lower Colorado River in Mexico, and, 1858, Santa Rita Mountains in Arizona) -- over the course of 29 years (1829 and 1858) for which no physical evidence exists, and hearsay from Santa Cruz, Sonora, Mexico – is somehow scientifically “reinforced” by reports of more than 40 jaguar kills from a time period (between 1900 and 1950) irrelevant to the time period in question. If anything, these kill reports support an opposite hypothesis – that jaguar presence in Arizona is much more recent than historic in nature.

In short, because one record in 1858 (even if actually verifiable) does not rationally indicate historic residency of jaguars in Arizona prior to settlement and because many of the kill records after 1900 used by Brown (1983) citing Lange and others to “reinforce,” rather than to attempt to disprove, the validity of his pre-settlement jaguar residency hypothesis are, in fact, inaccurate and thus unreliable, the Service is precluded by the ESA from relying on Brown (1983) in designating any critical habitat for jaguars in the United States.

In attachment to these comments, incorporated herein by reference thereto, the PNRCD et al. provides thorough review of the historic records of jaguar occurrence for Arizona and New Mexico. As the PNRCD’s review clearly reveals, many of those records heretofore assumed by all researchers to be accurate and reliable are, in fact, both inaccurate and unreliable. Moreover, this review found ten fatal flaws that compromise the scientific integrity of both the characterization of those records by editors, researchers and the Service to date, and, all conclusions and models of alleged suitable jaguar habitat and residency based on the use thereof.

These ten, fatal scientific flaws are: 1) use of inaccurate and unreliable records; 2) reliance on the unfounded assumption that all recorded natural history of jaguars in Arizona and New Mexico began in the year 1900; 3) reliance on and propagation of the false assumption that all sightings of jaguars in Arizona and New Mexico are of “naturally occurring” animals when many were actually of foreign origin and imported and released by humans for hunting purposes;

4) failure to examine primary records and adequately verify cited data and literature for accuracy (a universal error); 5) failure to present the specific dataset used in the model; 6) failure to cite data sources or other sources for specific records; 7) speculation that the location where a jaguar was killed, or in some cases where it was first sighted in the United States, somehow represents its preferred natural habitat; 8) failure to acknowledge the existence of data rejected or omitted, and failure to explain why certain data was rejected or omitted when the reason is neither obvious nor apparent to the reader; 9) failure to identify a specific jaguar in an occurrence record; and, 10) failure to properly verify the data to prevent according duplicative records to the same jaguar. (See attachment).

#### ***F. The Proposed Rule Offends the DQA, NEPA, and the President's Memorandum Relative to Economic Analyses***

The proposed rule must also be withdrawn because it also fails to meet Data Quality Act (DQA) standards. The DQA attempts to ensure that federal agencies, such as the Service, use and disseminate accurate information by requiring those agencies to issue information guidelines ensuring the quality, utility, objectivity and integrity of the information disseminated. Here, as amply shown in comment and attachment, the information disseminated by the Service in this proposed rule fails to meet DQA standards because it is both biased and inaccurate and therefore inconsistent with the Service's own information guidelines.

Moreover, the proposed rule must also be withdrawn because it fails to comply with NEPA. When applicable to a proposed rule to designate critical habitat, as is admitted in proposed rule by the Service here, NEPA requires the performance of an Environmental Impact Statement (EIS) up-front, and not as an after-the-fact afterthought as wrongly perceived by the Service in this proposed rule. This requirement of up-front NEPA performance is not only the law of the 10<sup>th</sup> Circuit Court of Appeals (*Catron County Board of Supervisors v. U.S. Fish & Wildlife Service*, 75 F.3d 1429 (10<sup>th</sup> Cir. 1996)), but the law of the 9<sup>th</sup> Circuit Court of Appeals as well (*Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157 (9<sup>th</sup> Cir. 2003)).

The 9<sup>th</sup> Circuit's instruction on the need for up-front performance of NEPA analysis is particularly relevant here: "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to insure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Center for Biological Diversity*, 349 F.3d at 1166 (emphasis added). Moreover, such up-front performance of NEPA analysis provides the Secretary with critical information regarding the "other impacts" of the proposed designation that also require evaluation under Section 4 of the ESA (16 U.S.C. Sec. 1532(b)(2)).

Contrary to the position taken by the Service in this proposed rule, where applicable as admitted by the Service here, NEPA requires the Service to take a hard look at the environmental consequences of the actions it proposes up-front and before it is too late. *Robertson v. Methow Valley Citizen's Counsel*, 490 U.S. 332,350 (1989). That "hard look" obligates federal agencies, such as the Service here, to prepare an environmental impact statement (EIS) for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. Sec.

4332(2)(C). Here, despite the unprecedented designation of critical habitat for the jaguar sought by the Service and despite the sweeping restrictions on national security, resource production, land use, water use, hunting and recreation on the alleged behalf of a single species the Service also seeks by use of this proposed rule, which constitute a major federal action, the Service has not performed an EIS in a timely manner or at all under NEPA.

Moreover, here, the Service's failure to perform an EIS under NEPA prior to promulgating this proposed rule prevented the required reasonable evaluation, analysis, "hard look" at, and disclosure of the harms of implementing the designation of critical habitat for jaguars to human health and safety, the human environment, and other environmental values. Where required, as here, an EIS is intended to disclose environmental effects of a proposed action and consider alternative courses of action. 42 U.S.C. Sec. 4332(2)(C).

Further, here, the Service has completely abdicated its responsibility to consider reasonable alternatives to the sweeping and unprecedented designation of critical habitat for jaguars it is now proposing that would not only protect the few jaguars that occasionally enter the United States on a transient basis, but would also minimize the seriously adverse impacts that the adoption of this now-pending rule would inflict on humans and the human environment. The result is the promulgation of a one-sided, unscientific, single-purpose proposed rule that cannot possibly benefit jaguars, but would surely inflict drastic consequences on border security, resource production and transport, and human water, land, hunting and recreational use over no less than 832,232 acres of federal, state, county and private lands in two States, a situation that NEPA specifically prohibits. As a result, this proposed rule must be withdrawn because it is also in fundamental noncompliance with NEPA.

Similarly, here, the rule proposed at 77 FR 161, p. 50214 et seq. does not contain the economic analysis required by Section 4 of the ESA (16 U.S.C. Sec. 1533(b)(2)). This critical omission not only prevents this proposed rule from being transparent, but also prevents the submission of meaningful public comment on its full ramifications. It also inflicts undue hardship on those who wish to comment on this proposed rule because it forces them to address the proposed rule not just once, but at least twice, through the submission of additional comments at their own added and personal expense. Nonetheless, no economic analysis exists here because it has yet to be done by the Service. As a result, the failure of the Service to provide and expose the economic analysis to public scrutiny and comment with the proposal of this rule violates the provisions of the ESA cited above, 50 C.F.R. Sec. 424.13, and Executive Orders 12630, 12866 and 13563.

Moreover, the Service's failure to provide an economic analysis at the time of the publication of this proposed rule is also directly counter to specific Presidential direction as expressed in the President's February 28, 2012, memorandum to the Secretary of Interior. In that memorandum, the President directed the Secretary to revise the regulations implementing the ESA to provide that a draft economic analysis be completed and made available for public comment at the time of the publication of a proposed rule to designate critical habitat. Nearly six months later, on August 24, 2012, the Service published proposed revisions to the regulations for impact analyses of proposed critical habitat designations, per the President's February 28, 2012, direction, in the Federal Register (77 FR 165, pp. 51503-51510). According to the Service,

“[b]oth transparency and public comment will be improved if the public has access to both the scientific analysis and the draft economic analysis at the same time.” 77 FR 165, at p. 51503.

Nonetheless, on August 20, 2012, or just four days before this proposed rule change was published by the Service, the Service acted in direct violation of the ESA, its own policy and Presidential direction by publishing this proposed rule without a draft economic analysis. As a result, this proposed rule must be withdrawn because it fails to include the required draft economic analysis of its effects.

***G. The Service’s Continuing Refusal to Coordinate with the PNRCD under NEPA, to Cooperate with the PNRCD under the ESA, and Its Continuing Refusal to Provide the PNRCD with any Reason for Refusing to Do Either Under Claim of Absolute Attorney-Client Privilege***

The PNRCD et al. also takes the opportunity afforded here to once again strongly protest and document for the administrative record the Service’s continuing refusal to coordinate with the PNRCD on the development of critical habitat for the jaguar under NEPA, its continuing refusal to cooperate with the PNRCD on that matter under the ESA, and its continuing refusal to provide the PNRCD with any reason for refusing to do either under claim of absolute attorney-client privilege. (See attachments).

While the recovery outline (at p. 45) incorporated into this proposed rule recommends that the Service collaborate with the Departments of Transportation, regional transportation authorities, landowners, Department of Homeland Security, county planning offices, and others to voluntarily include jaguar conservation in their plans and activities, such collaboration has not been extended to the PNRCD by the Service despite the PNRCD’s status as a local state agency of resource management jurisdiction that includes development of natural resource management plans in Pima County, Arizona. Instead, the Service’s relationship with the PNRCD regarding the development of critical habitat for the jaguar in the United States has been anything but transparent, collaborative or cooperative. (See attachments).

This is despite the fact, as the PNRCD et al. learned from the recovery outline (p. 15) that, based in part on answers to a questionnaire sent out by the Service, water for jaguars must be made available within 10 km (6.2 miles) year round for “high quality” jaguar habitat to exist in the American Southwest and within 12.4 miles by use of this rule everywhere else in the area proposed as critical habitat for jaguars based on unreliable data misrepresented as “undisputed” Class I records. At the least, these water for jaguar requirements raise further, important water resource issues, which in turn, *require* the Service to cooperate with the PNRCD to resolve in concert with developing critical habitat for the jaguar under Section 2(c)(2) of the ESA. Nonetheless, despite such clear direction by Congress, the Service has refused and is continuing to refuse to cooperate with the PNRCD to resolve water resource issues associated with the designation of critical habitat for jaguars in direct and continuing violation of Sec. 2(c)(2) of the ESA. Such behavior is clearly arbitrary, capricious and unlawful.



Similarly, the Service has refused and is continuing to refuse to coordinate with the PNRCD under NEPA in the development of the EIS for this critical habitat designation despite clear direction from Congress in NEPA to the contrary. 42 U.S.C. 4332, Sec. 102(1)(c)(v) and Sec. 102(1)(D)(iii).

Finally, when asked by the PNRCD why the Service was refusing to cooperate or coordinate with the PNRCD in the development of critical habitat for the jaguar, the Service refused to offer any explanation under claim of absolute attorney-client privilege. (See attachments). The PNRCD strongly objects to this lack of transparency and wholly uncooperative behavior and disputes its basis in law. As a result, the PNRCD, through elected State Representatives, has caused these issues to become the matter of currently pending request for formal Arizona Attorney General Opinion.

### ***Conclusions***

As shown herein and attachment, both the Service's April 2012 Recovery Outline for the Jaguar and this proposed rule incorporating that outline lack scientific credibility. The proposed rule's continuing reliance on unreliable records of jaguars, including the Penrod and/or Culbreath jaguars, and use of "sightings" for which no physical evidence actually exists to develop viability and population assessments, to model critical habitat for jaguars in Arizona and New Mexico, and to establish distance between water for jaguars, also squarely contradict the Service's opposite claim that only Class I jaguar records, or records of jaguars for which physical evidence exists, were considered for purposes of proposing this rule. As shown herein and in attachment, that statement is incorrect. It is also irresponsible and unscientific because of the uncontested fact that the viability assessments, habitat modeling, water for jaguars, and identification of 838,232 acres of Arizona and New Mexico as critical habitat for jaguars are all actually based on use of the unreliable records the Service nonetheless now attempts to disclaim.

Similarly, the outline's, and therefore this proposed rule's, use of the "principles" of conservation biology as the basis for developing a recovery plan for the jaguar is also irresponsible and unscientific because, as shown herein and attachment, those principles are actually representative of a theology or philosophy and not a biological science. Accordingly, the Service opens itself to Establishment Clause challenge by relying on and attempting to governmentally impose these theological "principles" on the American public nonetheless.

Moreover, as also shown herein and in attachment, there is no scientific evidence supporting the recovery outline's or this proposed rule's speculation that jaguars were historically, at the time of their listing, or are now, residential in their occurrence within the boundaries of the United States, or that any habitat located therein is essential to either the jaguar's conservation or survival as a species. Instead, the best scientific information supports the opposite conclusion – that designation of critical habitat in Arizona and New Mexico cannot possibly help save jaguars.

Further, development of specific requirements for the jaguar in this proposed rule, including the identification of 838,232 acres in Arizona and New Mexico alleged as critical or

essential to jaguar's existence as a species, and water for jaguars every 12.4 miles within that area, in the added absence of economic analysis and NEPA performance during the worst economic recession on record since 1929, no less, and based on nothing more than misrepresentation of unreliable reports as reliable Class I records and answers to a questionnaire the Service sent out to experts (9 of 11 respondents to that questionnaire also authored the recovery outline), and apparent subsequent subjection of those opinions to massage by consensus (i.e., use of the "Delphi Technique"), is also irresponsible and unscientific. It is also an approach, like the others recounted above, that is contrary to the requirement placed on the Service by Section 4 of the ESA that it rely solely on the best scientific data available.

Use of this approach also separately offends the ESA because although, here, water resources issues are further raised that require active cooperation between the Service and PNRCD to resolve in concert with the development of critical habitat for the jaguar under Sec. 2(c)(2) of the ESA, the Service has refused and is continuing to refuse to do so. That arbitrary and capricious failure to abide by this separate requirement of the ESA is only exacerbated by the Service's refusal to cooperate with the PNRCD without provision of any reason under claim of absolute attorney-client privilege. That failure is further exacerbated by the Service's refusal to provide the so-called "undisputed Class I reports of jaguar locations" in the United States since the time jaguars were listed, which the Service then used in proposing this rule, in response to previous, point-blank FOIA request for such information made by the PNRCD.

Further, as touched on above, the Service's failure to provide a draft economic analysis with this proposed rule is also contrary to requirement of the ESA, Presidential direction, and the Service's own policy. Similarly, the Service's failure to conduct proper NEPA analysis of this proposed major federal action *up-front*, or before promulgating this specific rule, is contrary to the relevant jurisprudence on this subject matter. Moreover, the Service's failure to abide by the DQA also fatally compromises the validity of this proposed rule, as does its failure to provide anything other than vague and generalized maps depicting the critical habitat it would designate by use of this rule.

Finally, because of the Service's many abuses of the ESA's best available science standard in this proposed rule, as shown herein and attachment, the PNRCD et al. also urges the Service to adopt "regulatory *Daubert*" by informal rulemaking to prevent further subordination of science to political policy and such wasteful expenditure of precious ESA funds on a proposed rule such as this one that will not benefit jaguars in the least, but will surely have needless and severely adverse economic and human environment consequences, from occurring again in the future. Absent the adoption of "regulatory *Daubert*," as clearly shown herein and in attachment, there is no means of holding the Service accountable for the science charade that currently fuels both the listing and critical habitat designation processes. (See: J. Tavener Holland, "Regulatory *Daubert*: A Panacea for the Endangered Species Act's "Best Available Science" Mandate?" (2008), attached).

Instead, at the only level where the possibility of such accountability exists, at the 90-Day petition finding level, the ESA offends Equal Protection by extending access to the courts to only those who wish to challenge a negative petition finding. Ironically, those who would attempt to enforce Congress's intent that solely the best scientific available through challenge of a positive

finding are inexplicably, and unscientifically, denied access to the courts. Such a result is contrary to both the practice of basic scientific methodology and the pursuit of sound, scientific inquiry.

In closing, for the many reasons, facts and new and highly relevant information provided the Service herein and in attachment, the PNRCD et al. strongly urges the Service to withdraw this proposed rule to designate critical habitat for jaguars in Arizona and New Mexico where, in actuality, the best scientific information / evidence available clearly shows that male jaguars occur only as singular transients, females and breeding do not occur, and habitat “essential” to the jaguar’s conservation or existence as a species clearly does not exist under any scientifically credible definition of that term. Finally, the PNRCD et al. also urges the Service to adopt “regulatory *Dauber*” by informal rulemaking to prevent further subordination of science to political policy and wasteful expenditure of precious public funds on a rule that will not benefit jaguars in the least, but will surely have severely adverse consequences on the human environment, from occurring again in the future. (See attachment).

Sincerely,

Dennis Parker  
Arizona Attorney at Law,  
Biologist, Consultant

cc: Pima NRC, Santa Cruz NRC, Coalition of Arizona / New Mexico Counties, Southern Arizona Cattlemen’s Protective Association, Arizona Cattle Growers Association, Arizona Chapter of People for the West