



March 10, 2008

Hon. Dirk Kempthorne, Secretary
Department of the Interior
United States Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Mr. Dale Hall, Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

SENT VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

**RE: NOTICE OF VIOLATIONS OF THE ENDANGERED SPECIES ACT:
4(f)(1) DETERMINATION REGARDING RECOVERY PLANNING FOR
THE JAGUAR (*Panthera onca*)**

Dear Secretary Kempthorne and Director Hall:

On January 2, 2008 U.S. Fish and Wildlife Service (“FWS”) Director Dale Hall approved a December 21, 2007 memorandum by Region 2 Director Benjamin Tuggle requesting that Director Hall make a determination under section 4(f)(1) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(f)(1), that development of a recovery plan would not promote the conservation of the jaguar (*Panthera onca*). For the reasons outlined in this letter, Defenders of Wildlife believes this determination is a violation of the ESA, and is arbitrary, capricious and unlawful. This letter provides notice, as required by section 11 of the ESA, that Defenders of Wildlife intends to seek judicial relief if FWS does not reverse its determination, and initiate a jaguar recovery plan within 60 days. *Id.* § 1540(g)(A).

Section 4 of the ESA mandates that FWS “develop and implement” recovery plans for listed species. *Id.* § 1533(f)(1). The ESA further directs that FWS shall prioritize the development of recovery plans for those species “most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.” *Id.* § 1533(f)(1)(A). Recovery plans must be developed and implemented for *all* listed species, except for those rare circumstances in which FWS “finds that such a plan will not promote the conservation of the species.” *Id.* “The statutory scheme contemplates orderly and timely progression of action to list the

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species; designate its critical habitat; and create a recovery plan.” *S.W. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 118, 1136 (S.D. Cal. 2006).

In 2004 draft Recovery Planning Guidance jointly developed by FWS and National Marine Fisheries Service (“NMFS”), the agencies identified three circumstances in which recovery plans generally would be less likely to promote the conservation of a listed species: (1) delisting is anticipated due to extinction or listing error; (2) the species’ historical and current ranges occur entirely under the jurisdiction of other countries; or (3) other circumstances not easily foreseen, but in which the species would not benefit from a recovery plan.

Director Hall’s January 2 decision concludes that a Jaguar Recovery Plan would not promote the conservation of the species under factors (2) and (3) of this draft guidance. Although FWS concedes the jaguar “is not an exclusively foreign species,” it nonetheless devotes substantial energy to marginalizing the importance of U.S. conservation efforts to jaguar recovery:

[T]his population represents a small fraction of the overall species and its range. Further, the area represented in the United States and Mexico is not large enough to independently provide for the conservation and recovery of the species. Any conservation actions for the jaguar that may bring the species to the point that the measures of the Act are no longer necessary will need to be implemented throughout Mexico and Central and South America.

Based on this analysis, FWS concludes that the jaguar “qualifies” as a foreign species under its draft guidance, and then relies upon this conclusion to justify its decision not to prepare a recovery plan for the species.

As discussed in detail below, FWS’s determination that a recovery plan will not promote the conservation of the jaguar is arbitrary and capricious in a number of fundamental respects, including but not limited to: (1) The jaguar is not a foreign species, and thus FWS’s application of its guidance is arbitrary and capricious; (2) due to proposed border security infrastructure construction projects within its habitat, the jaguar should in fact be given priority for recovery plan development under section 4(f); and (3) the best available science, which FWS has failed to address, demonstrates the importance of preparing a recovery plan for the American jaguar.

I. THE JAGUAR IS NOT A FOREIGN SPECIES

Jaguars historically occupied large tracts of the southern United States, from the peninsular ranges of coastal California to the swampy bottomlands of Louisiana. Records of jaguar are by no means confined to the immediate border region; the species has been documented as far north as Monterey Bay, the Grand Canyon, and the southern Great Plains (American Society of Mammalogists 2007). This documentation includes males as

well as female jaguars, suggesting the presence of breeding populations as opposed to solitary dispersing males (Brown and Lopez-Gonzalez 2000).¹ Jaguars have been extirpated from the majority of this range, but in recent years have recolonized areas in Arizona and New Mexico; researchers have identified vast tracts of suitable habitat for the species in both states (AZGFD and NMDGF 2007; Brown and Lopez-Gonzalez 2000; Van Pelt 2006).² Although foreign populations have been designated as endangered since a 1969 listing under the Endangered Species Conservation Act, the jaguar was initially not listed within the United States through an administrative “oversight.” FWS took its first step to remedy this oversight in 1979, but did not finalize the listing until compelled by court order in 1997, nearly twenty years later. *Final Rule to Extend Listing Status for the Jaguar in the United States*, 62 *Fed. Reg.* 39,147 (July 22, 1997).

In extending endangered status to American jaguars in 1997, FWS made clear its belief that domestic protection was imperative to the overall resilience and survival of the species. For example, in response to comments on its draft listing rule that the “jaguar is not native to the United States,” the “United States is merely peripheral to the historic range,” and the “species was never more than wandering individuals that occasionally crossed the border into the United States,” FWS countered in the final listing rule that it “believes that the jaguar is native to the United States,” and that the “evidence strongly indicates that the historical range of the jaguar included portions of the southwestern United States.” 62 *Fed. Reg.* at 39150. The agency thus concluded that “[u]pon listing, it would probably be appropriate to develop a more extensive recovery plan for the species.” *Id.* In addition, in a recent biological opinion (USFWS 2007), FWS states:

It is clear that the amount of potential jaguar habitat in Arizona represents about as much or more of the area where jaguars are currently distributed in Sonora, Mexico. This area in Arizona could become increasingly important to the survival of the jaguar as threats (i.e., poaching, land conversion, etc.) continue in Sonora and throughout the range of the jaguar.

FWS’s decision to list the American jaguar is consistent with Congress’s intent to protect domestic species. Under the ESA, the importance of protecting imperiled wildlife within our nation’s borders “included the possibility of declaring a species endangered within the United States where its principal range is another country, such as Canada or Mexico, and members of that species are only found in this country insofar as they exist on

¹ All scientific references in this notice will be sent to FWS under separate cover, and should be added to FWS’s administrative record for its decision not to prepare a recovery plan.

² Virtually all of the documentation of jaguars in the U.S. prior to 1996 involved pelts of jaguars killed in this country, thus representing a bare-minimum portrayal of jaguar presence.

the periphery of its range.” A Legislative History of the Endangered Species Act, 97th Cong., 2d Sess. 1397 (1982) at 149. Indeed, in enacting the ESA, Congress placed particular emphasis on preventing domestic extinctions. *See e.g.*, 16 U.S.C. § 1531(a)(1), (5) (Congressional findings that “various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation,” and that the ESA is intended to “better safeguard[], for the benefit of all citizens, *the Nation’s* heritage in fish, wildlife, and plants.”) (emphasis added).

Consequently, FWS routinely lists—and develops and implements recovery plans for—species with limited domestic ranges in comparison to foreign distribution. These recovery plans include:

- Fishes of the Rio Yaqui Recovery Plan
http://ecos.fws.gov/docs/recovery_plan/950329.pdf
- Sonoran pronghorn Recovery Plan
http://ecos.fws.gov/docs/recovery_plan/981203.pdf
- Recovery Plan for Bighorn Sheep in the Peninsular Ranges, California
http://ecos.fws.gov/docs/recovery_plan/001025.pdf
- Recovery Plan for Selkirk Mountain Woodland Caribou
http://ecos.fws.gov/docs/recovery_plan/940304.pdf
- Light-footed Clapper Rail Recovery Plan
http://ecos.fws.gov/docs/recovery_plan/850624.pdf
- Masked Bobwhite Quail Recovery Plan
http://ecos.fws.gov/docs/recovery_plan/950421.pdf
- Aplomado Falcon Recovery Plan.
http://ecos.fws.gov/docs/recovery_plan/900608.pdf
- Wood Stork Recovery Plan
http://ecos.fws.gov/docs/recovery_plan/970127.pdf
- Yuma Clapper Rail Recovery Plan
http://ecos.fws.gov/docs/recovery_plan/830204.pdf
- Recovery Plan for Audubon’s Crested Caracara (South Florida Multi-Species Recovery Plan)
http://ecos.fws.gov/docs/recovery_plan/990518_1.pdf
- New Mexico Ridge-nosed Rattlesnake Recovery Plan

http://ecos.fws.gov/docs/recovery_plan/850322.pdf

○ Recovery Plans for Green, Hawksbill, Loggerhead, Kemp's Ridley, Olive Ridley, and Leatherback Sea Turtles

○ Short-tailed Albatross Recovery Plan (draft)

http://ecos.fws.gov/docs/recovery_plan/051027.pdf

FWS's January 2 decision is especially nonsensical in this case given the agency's specific action in 1997 to extend protections to domestic jaguars. In addition, the determination also conflicts with the plain language of FWS's draft guidance, which is directed at "exclusively foreign species." FWS's refusal to prepare a recovery plan for the jaguar on the basis that it is a foreign species is thus arbitrary and capricious, and a violation of section 4(f).

II. A RECOVERY PLAN FOR THE JAGUAR MUST BE PRIORITIZED UNDER SECTION 4(f)

Section 4(f) of the ESA, by its plain terms, directs FWS to prioritize the development of recovery plans for those species "most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity." 16 U.S.C. § 1533(f)(1)(A). In this case, a recovery plan would not only promote jaguar conservation, but is urgently needed at a time when the species is seriously threatened by undocumented immigration, other illegal activities, and associated border security efforts, in particular the construction of border fences and other physical barriers that impede trans-boundary movements of large animals such as the jaguar.

As FWS is aware, key jaguar migratory corridors, though unfenced currently, will likely be the subject of border fence proposals in the immediate future. If impermeable fencing is constructed across these corridors, the American jaguar will likely be extirpated from the United States. As stated in a recent study of jaguars in the American Southwest borderlands area, "[t]he most critical and imminent threat to jaguars in the United States is the proposed fence," and "[a]n extensive fence along the United States-Mexico border would likely effectively fence jaguars out of the United States, preventing dispersal and gene flow from northern Mexico, and *bring an end to naturally occurring jaguars in the United States.*" (McCain and Childs 2008) (emphasis added).³ In addition, current border

³ Similarly, FWS noted in a recent biological opinion that: "Pedestrian fences designed to prevent UDAs from entering the U.S. will inherently restrict jaguar movement across the border. Maintaining connectivity between Arizona and Sonora *is critical to the continued persistence of jaguars in[] Arizona.* Should all jaguar corridors be compromised, it is possible that the jaguar will become extirpated from Arizona, as it [is] believed the Arizona population relies on interchange with jaguars in Sonora for its continued survival." (U.S. FWS 2007).

infrastructure projects are already indirectly impacting key jaguar migratory corridors, by shifting illegal traffic and associated enforcement efforts into those areas.

With imminent border fence proposals threatening the continued existence of the jaguar in the U.S., FWS was mandated under section 4(f) to prioritize the development of a recovery plan. It is imperative that FWS utilize the recovery plan process to identify critical cross-border jaguar corridors so that, among other reasons, it can effectively work and cooperate with the Department of Homeland Security (“DHS”) on border infrastructure proposals. Congress has recently amended the Secure Fence Act to require DHS to consult with local citizens as well as federal and state agencies; initiating a recovery plan process would play an integral role in this consultation and help ensure that border security is conducted in a manner that doesn’t preclude the ability of the American jaguar to survive and recolonize suitable habitat in the southwestern United States. 8 U.S.C. § 1103 *note*.

III. FWS IGNORED THE BEST AVAILABLE SCIENCE, WHICH DEMONSTRATES THAT A RECOVERY PLAN WILL PROMOTE AMERICAN JAGUAR CONSERVATION

“The best scientific and commercial data available” standard has been called the “mantra” of the ESA. *Bluewater Fisherman’s Ass’n v. NMFS*, 226 F. Supp. 2d 330, 338 (D. Mass. 2002). FWS’s decision, fundamentally at odds with section 4(f) and its own draft policy guidance, was also made in conscious disregard of readily available, peer-reviewed scientific study demonstrating that a jaguar recovery plan is necessary, and thus violates the ESA’s best available science mandate. Indeed, FWS has conspicuously ignored a recent resolution passed by the American Society of Mammalogists stating that “[h]abitats for the jaguar in the United States, including Arizona and New Mexico, are vital to the long-term resilience and survival of the species, especially in response to ongoing climate change.” The 500 members of the Society thus unanimously urged FWS to develop a recovery plan for the jaguar.

The Society’s resolution is consistent with peer-reviewed scientific literature addressing the importance of edge populations to overall species survival. For example, a recent study conducted by Channell and Lomolino (2000) notes that the “geography of recent extinctions is largely the geography of humanity,” and thus the conservation of species along the edge of their range is often just as essential as conserving their core—especially when that core is under heavy anthropogenic threats. The authors conclude:

Although they may have represented suboptimal habitats in historical times, areas along the range periphery and on remote islands and mountain ranges often provide valuable opportunities for conserving endangered species . . . Although once viewed as the land of the living dead, sites along the range periphery now hold great promise for conserving endangered species and biological diversity in general.

Furthermore, scientists are increasingly noting the conservation value of populations at the edge of a species’ range in the face of rapid climate change, corresponding ecosystem

changes, and species range shifts (Root *et al.* 2003). Finally, populations at the geographic margins of their ranges may be important for the long-term survival and evolution of species, as they are major contributors to evolutionary change (Fraser 1999, Lesica and Allendorf 1995, Noss 1994). These findings have direct applicability to the jaguar, which reaches the northern extent of its range within the southwestern U.S., and which continues to decline throughout significant portions of its core range in Mexico, and Central and South America (Nowell and Jackson 1996). According to the results of a Wildlife Conservation Society jaguar workshop in 1999, which involved the world's foremost jaguar experts, jaguars have been lost from more than 50% of their range since 1900.

In its January 2 determination that a recovery plan would not promote the conservation of the American jaguar, FWS nonetheless neither addressed nor acknowledged the American Society of Mammalogist's recommendation that a recovery plan should be produced for the jaguar. Nor did the agency attempt to address relevant and readily available peer-reviewed scientific literature demonstrating the importance of conserving the U.S. population. Because the agency failed to utilize or address the best scientific information available, FWS's 4(f) determination is contrary to the ESA.

CONCLUSION

Defenders of Wildlife urges FWS to reconsider its determination pursuant to section 4(f) of the Endangered Species Act not to produce a recovery plan for the jaguar. FWS's decision is inconsistent with its own practices and policy, in conflict with the best available science, and unlawful under the ESA. In addition, FWS's decision ignores the significant conservation and habitat protection tools available in the U.S., as well as the presence of abundant intact public lands and significant private conservation partnerships. A recovery plan would help synthesize all of these factors to complete a picture of what a viable northern jaguar population would look like and what would be required to sustain it. Should you fail to withdraw the January 2, 2008 determination and commence a recovery plan process, Defenders of Wildlife intends to bring suit in Federal District Court. Please contact me at (202) 682-9400 should you wish to further discuss this issue.

Sincerely,

Brian Segee
Staff Attorney

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