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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

Center for Biological Diversity, Plaintiff, vs. Dirk Kempthorne, Secretary of the Interior, et al., Defendants.	Case No. CV-07-372-TUC JMR (Consolidated with Case No. CV-08-335 RCC) **Plaintiff Defenders of Wildlife's Motion for Summary Judgment, and Accompanying Memorandum of Points and Authorities** Oral Argument Requested
Defenders of Wildlife, Plaintiff, vs. Dale Hall, Director, U.S. Fish and Wildlife Service, et al., Defendants.	

Plaintiff Defenders of Wildlife's Motion for Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Local Rule of Civil Procedure 56.1, plaintiff Defenders of Wildlife hereby moves for summary judgment. For the reasons set forth in the accompanying memorandum, there are no genuine issues of material fact in dispute and plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff submits the accompanying memorandum of points and authorities, a joint statement of material facts, Exhibits 1-3, and a proposed order.

Respectfully submitted,

s/ Brian Segee

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Dated: August 14, 2008

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INTRODUCTION

In this case of first impression, plaintiff Defenders of Wildlife challenges the unprecedented and unsupportable decision by the U.S. Fish and Wildlife Service ("FWS") not to prepare a recovery plan for the endangered jaguar (*Panthera onca*) pursuant to section 4(f)(1) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1533(f)(1). Under section 4(f)(1), FWS must prepare recovery plans for all listed species, except for those very rare circumstances where the agency determines that such a plan "will not promote the conservation of the species." Id. Here, FWS has arbitrarily exempted the jaguar from recovery planning requirements under a policy provision that by its plain terms applies only to wholly foreign species, despite the uncontroverted fact that the jaguar's historic and current range encompasses significant portions of the United States.

Indeed, this adaptable species is native to large swaths of the southern U.S., from the peninsular ranges of coastal California to the swampy bottomlands of Louisiana, with jaguar presence within Arizona being particularly well-documented. While the jaguar was largely eliminated from its historic range within the U.S. by the mid-20th century, the past decade has witnessed a remarkable resurgence of the great cat, and researchers have repeatedly documented individual jaguars that they believe have taken up residence within the borderlands area. As a result of this dramatic recolonization of its historic habitats, FWS in 1997 finally listed jaguars within Arizona, New Mexico, Texas, California, and Louisiana as endangered, correcting an administrative oversight under which the agency had left domestic jaguars without ESA protections for nearly twenty-five years. In light of the jaguar's extensive historic range within, and inspiring return to, the U.S., FWS's decision to forego recovery planning based on its characterization of the jaguar as a foreign species is both deeply disappointing and plainly counter to its own recovery planning policy, which limits recovery plan exemptions to species whose historic and current ranges are entirely outside of U.S. jurisdiction.

In addition, FWS's decision goes against more than twenty-five years of agency practice preparing recovery plans for species which occur in both the U.S. and foreign nations. Bald eagles, grizzly bears, northern and Mexican gray wolves, and Sonoran pronghorn are just a few examples of species that have significant, and in many cases much larger, ranges in foreign countries for which FWS has prepared recovery plans, in accordance with the clear intent expressed by Congress that the protections of the ESA should be invoked to prevent domestic extinctions of wildlife, regardless of their distribution in other countries. FWS's decision not to prepare a recovery plan in this case, based on its assertion that domestic jaguars can simply be written off as "peripheral" to the overall species, is a flagrant affront to its own conservation legacy and the plain mandate of the ESA.

Moreover, in violation of the ESA's requirement that FWS prioritize the development of recovery plans for species threatened by development projects, the agency's decision ignored the fact that the jaguar's continued existence within the U.S. is gravely threatened by proposed fence construction along the U.S.-Mexico border. Plaintiff Defenders of Wildlife has invested many years of effort both to further jaguar conservation in the U.S. and Mexico, and to advocate for approaches to border security that better integrate environmental protection for all the remarkable public lands and imperiled species that exist within the borderlands area. A jaguar recovery plan is an essential means to ensure that the complimentary goals of national security and jaguar conservation are both met.

Importantly, a species' listing is only the first step in fulfilling the Act's primary purpose, recovering species to the point where ESA protection is no longer necessary. 16 U.S.C. § 1531(b) (identifying the ESA's purposes to include "provid[ing] a means whereby . . . [listed] species [] may be conserved"); id. § 1532(3) (defining "conservation" to include "the use of all methods and procedures which are necessary to bring a [listed species] to the point at which the measures provided [by the ESA] are no

longer necessary."). Recovery plans are thus by definition the central mechanism for identifying the actions necessary to achieve the Act's most fundamental purpose. FWS's illegal decision would eliminate this vital planning process, needlessly threatening what otherwise promises to be one of our nation's first great conservation success stories in the 21st century.

FACTUAL BACKGROUND

A. The Listing of Domestic Jaguars Under The Endangered Species Act

As the Supreme Court has repeatedly emphasized, the "plain intent of Congress in passing the [ESA] was to halt and reverse the trend towards extinction, whatever the cost." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 699 (1995) (citing TVA v. Hill, 437 U.S. 153, 184 (1978)). In order to achieve these goals, the Act establishes a listing process to identify species that are "threatened" or "endangered" with extinction. 16 U.S.C. § 1533(a). Once a species is listed, the ESA provides several substantive and procedural mechanisms intended to protect that species, including the requirement that FWS "develop and implement" recovery plans for all listed species, except for those rare circumstances in which it "finds that such a plan will not promote the conservation of the species." Id. § 1533(f)(1). The ESA further directs FWS to "give priority to those [species] . . . that are 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).

Jaguars, the endangered species at issue in this case, are the largest cat species within the western hemisphere. Identifiable by their distinctive black rosette spots over a background color that most commonly ranges from a golden orange to a lighter yellow, jaguars grow as large as 2 ½ feet in height (standing on all fours), and have a massive head, wide chest, and a heavy set body with powerful limbs. Jaguars historically ranged widely across the southern U.S., and "have been recorded most commonly from Arizona," with sightings as far north as the Grand Canyon. Final Rule to Extend Listing

Status for the Jaguar in the United States, 62 Fed. Reg. 39,147 (July 22, 1997) ("Final Listing Rule"); RAR 823; Statement of Facts ("SF") ¶ 6.[1] It is believed that "there was a resident breeding population of jaguars in the southwestern United States at least into the 20th century." Id. Through a pattern of widespread killings "associated with the settlement of land and the development of the cattle industry," however, jaguars were largely extirpated from our Nation by the mid-20th century. Id. at 39,154. For example, a "minimum of 64 jaguars were killed in Arizona after 1900," and one scientist has described the 20th century killings of jaguars in Arizona and New Mexico as causing a "decline characteristic of an over-exploited resident population." Id.

Upon the ESA's enactment in 1973, only foreign populations of jaguars were listed as endangered under the Act. SF ¶23. On July 25, 1979, however, FWS published a notice stating that "it ha[d] always been the intent" of the agency to include the U.S. population of the jaguar in the endangered species listing, and that its failure to include such protection resulted from an administrative oversight. 44 Fed. Reg. 43,705. Nonetheless, FWS would take no final action to remedy this oversight for nearly 20 additional years. SF ¶27.

In the past decade, significant evidence has emerged that the jaguar has begun recolonizing areas in the U.S.—beginning in March 1996, when a mountain lion hunting guide photographed a jaguar his hunting dogs had treed in the Peloncillo Mountains, located in far southeastern Arizona. Six months later a different jaguar was photographed in the Baboquivari Mountains of south-central Arizona. Emil McCain and Jack Childs, Evidence of Resident Jaguars in the Southwestern United States and the Implications for Conservation ("McCain and Childs"), SAR 789-90; SF ¶16. These documented jaguar sightings helped catalyze efforts to better understand and conserve the species within the

[1] All Administrative Record references in this brief are to the Recovery Plan portion of the record, and are either RAR (Original Recovery Plan Administrative Record) or SAR (Supplemental Administrative Record) followed by the applicable Bates Number.

U.S., resulting in state agencies forming the Arizona-New Mexico Jaguar Conservation Team ("JAGCT"), and increased pressure to extend ESA protections to domestic jaguars, which culminated with an endangered listing under the ESA in 1997. In addition to Arizona, FWS listed the jaguar in New Mexico, Texas, California, and Louisiana, noting the extensive evidence that the jaguar's range encompasses those areas. Final listing rule, 62 Fed. Reg. at 39,148 ("several accounts of jaguars, from various locations in California"); id. ("jaguars seemed to be native in southern New Mexico," and "occurred as far north as northern New Mexico"); id. ("the jaguar was once reported as common in southern and eastern Texas," and "an established population once occurred in the dense thickets along the lower Nueces River and northeast to the Guadalupe River.").

In determining that jaguars within the U.S. should be listed as an endangered species, FWS found that it met four of the five statutory factors contained at section 4(a)(1) of the ESA, 16 U.S.C. § 1533(a)(1): (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) the inadequacy of existing regulatory mechanisms; and (4) other natural or manmade factors affecting its continued existence. 62 Fed. Reg. at 39,154; ¶28. In its listing rule, FWS placed particular emphasis on the maintenance of cross-border wildlife corridors along the U.S.-Mexico border as a critical element in ensuring the species' recovery within the U.S. Id. ("Clearing of habitat, destruction of riparian areas, and fragmentation or blocking of corridors may prevent jaguars from recolonizing previously inhabited areas. Although there is currently no known resident population of jaguars in the United States, wanderers from Mexico may cross the border and take up residency in available habitat.").

Subsequent to its listing, researchers have initiated efforts to obtain data on jaguar presence in Arizona by placing trail cameras in areas considered to be potentially suitable habitat for the species. Operating between 9 and 44 trail cameras from March 2001 to July 2007, the researchers obtained 69 photographs of jaguars, including five video clips,

as well as 28 sets of jaguar tracks, leading them to conclude that the data "clearly demonstrate" the presence of resident, rather than dispersing or transient jaguars. McCain and Childs, SAR 795; SF ¶18. This documentation was temporally clustered, with several sightings occurring in a relatively discrete and defined time frame followed by an absence of documentation for a similar discrete and defined time frame, suggesting that the jaguars were moving in and out of the surveyed area (i.e. crossing and re-crossing the U.S.-Mexico border). SAR 796. These jaguar cross-border movements appear to be focused in a relatively small number of key and readily identifiable connective habitats in several mountain ranges and canyon bottoms that span the international border, and it is believed that the southwestern U.S. and northern Mexican jaguar populations are an interdependent, widely distributed, low-density population at the northern end of the species' range. SAR 798-800. In addition, researchers have identified large tracts of suitable habitat for the species in Arizona and New Mexico. RAR 2257-63 (Arizona Game and Fish Department Report: "Characterizing and mapping potential jaguar habitat in Arizona"); RAR 2875-77 (report on New Mexico habitat done in cooperation with JACT).

B. FWS's January 7, 2008 Decision Not To Prepare a Recovery Plan for the Endangered Jaguar

On January 7, 2008 FWS Director Dale Hall in a memorandum entitled "4(f)(1) Determination Regarding Recovery Planning for the Jaguar," made a final agency decision that development of a recovery plan would not promote the conservation of the jaguar pursuant to section 4(f) of the ESA, 16 U.S.C. § 1533(f)(1). SAR 572-77; SF ¶49. Director Hall purportedly based his decision on 2004 "Draft Recovery Planning Guidance" developed by FWS and the National Marine Fisheries Service ("NMFS"), under which 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' historic 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. SAR 1040.

Despite the fact that the jaguar's historic and current range indisputably encompasses portions of the U.S., FWS's decision asserts that it "qualifies" as a foreign species under the draft guidance, and that "actions taken within the United States are likely to benefit a small number of individual jaguars peripheral to the species, with little potential to effect recovery of the species." In summarizing the basis for its decision, FWS concludes that "[t]he vast majority of the jaguar's geographic distribution occurs south of the United States [and] [r]ecovery of the jaguar must [thus] be focused on its core range outside of United States jurisdiction." SAR 575.[2]

STANDARD OF REVIEW

Summary judgment is appropriate where the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., provides the applicable standard for reviewing FWS's decision not to prepare a recovery plan for the jaguar. Aluminum Co. of Am. v. Bonneville Power Admin., 175 F.3d 1156, 1160

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[2] FWS also notes, in passing, a second purported basis for its decision, that "[s]ubstantial protection for the northern Mexico population of jaguars, which extends into the borders of the United States, can be gained through supporting the existing voluntary approach of the JAGCT." However, FWS's decision makes clear that regardless of the alleged benefits of the JAGCT, the agency's refusal to prepare a recovery plan is ultimately based on its position that U.S. jaguars and conservation efforts are unimportant to the overall conservation of the species. See SAR 574 ("Although we maintain that [the efforts of the JAGCT] are valuable for the conservation and maintenance of the northern jaguar population, this population represents a small fraction of the overall species and its range. Further, the area represented in the United States and northern Mexico is not large enough to independently provide for the conservation and recovery of the species. Any conservation actions [to recover the species] will need to be implemented throughout Mexico and Central and South America.").

(9th Cir. 1999) (The APA "governs judicial review of administrative decisions involving the Endangered Species Act."). Under the APA, this Court must decide whether FWS's decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993) (quoting 5 U.S.C. § 706(2)(a)). A FWS decision is arbitrary and capricious if the agency:

> has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

O'Keefe's, Inc. v. U.S. Consumer Prod. Safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). "There is an abuse of discretion when an agency's decision is based on an erroneous conclusion of law or when the record contains no evidence on which it could have rationally based that decision." Mendenhall v. Nat'l Transp. Safety Bd., 92 F.3d 871, 874 (9th Cir. 1996).

JURISDICTION

This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g), because the Complaint alleges causes of action arising under the ESA citizen suit provision. In addition, this Court has jurisdiction under 28 U.S.C. § 1331 and § 1361, because the Complaint alleges violations of the laws of the United States. Defenders of Wildlife has standing to assert its challenges: it files herewith declarations from members attesting to injuries they have or will suffer based on the challenged FWS decision that satisfy constitutional requirements, and are within the relevant zone of interests of the ESA. Declaration of Scotty Johnson (Plf. Exh. 1); Declaration of Sergio Avila (Plf. Exh. 2); see e.g., Citizens for Better Forestry v. U.S. Dep't of Agriculture, 341 F.3d 961, 970-72 (9th Cir. 2003) (defining zone of interests test).

ARGUMENT

I. FWS's Decision to Exempt the Jaguar From Recovery Planning Violates the Endangered Species Act

A. Overview of the ESA Recovery Planning Requirements

As recently affirmed by the Ninth Circuit, Congress did not intend the ESA "merely to forestall the extinction of species (i.e. promote a species' survival), but to allow species to recover to the point where it may be delisted." Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004). One of the most important mechanisms Congress created for achieving this goal is the recovery plan. As noted above, pursuant to section 4(f)(1) of the ESA, FWS must "develop and implement" recovery plans 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." 16 U.S.C. § 1533(f)(1). Moreover, the statute specifically directs FWS to "give priority to those [species] . . . that are 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).

Once prepared, a recovery plan "is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a species and neutralizes threats to its existence." Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 131 (D.D.C. 2001) (quoting Fund for Animals, 903 F. Supp. 96, 103 (D.D.C. 1995)). Under the ESA, this recovery plan "road map" must contain three essential elements: (1) a description of site-specific management actions that may be necessary to recover the species; (2) objective and measurable criteria that when met, would result in a determination that the species be removed from the list; and (3) estimates of the time and cost required to carry out those measures needed to recover the species and to achieve intermediate steps towards that goal. 16 U.S.C. § 1533(f)(1)(B)(i)-(iii). In sum, "[t]he statutory scheme contemplates orderly and timely progression of action to list the species; designate its critical habitat;

and create a recovery plan." S.W. Ctr. for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1136 (S.D. Cal. 2006).

B. The Jaguar Does Not "Qualify" As a Foreign Species Under FWS Recovery Planning Policy

The draft recovery planning guidance relied upon by FWS in its decision not to prepare a recovery plan for the jaguar "strives to ensure consistency in approach to the application of statutory, regulatory, and policy requirements in the development of recovery plans." SAR 1024. Emphasizing that "[t]here are very few acceptable justifications" for a recovery plan exemption, and that all exemptions "should be well documented in the administrative record," the draft guidance identifies three circumstances upon which an exemption may be based, one of which is that the species is "foreign." SAR 1040. Under the unambiguous language of the guidance, a species is considered foreign when "current and historic ranges occur entirely under the jurisdiction of other countries." Id. (emphasis added).

Here, the jaguar is indisputably a domestic species with both current and historic range within the U.S., yet FWS nonetheless argues that under its draft guidance, "for the purposes of formal recovery planning, it qualifies" as a foreign species. SAR 573. Although courts "will generally afford deference" to an agency's interpretation of its own regulations and policies, this deference is not absolute. Regents of Univ. of Cal. v. Shalala, 82 F.3d 291, 294 (9th Cir. 1996). Instead, the Ninth Circuit conducts a "two-pronged analysis" to determine the lawfulness of the interpretation. Id. First, the court considers "the plain language of the regulation," inquiring whether its words are "reasonably susceptible" to the agency's interpretation, "both on their face and in light of their previous interpretation and application." Id. (quoting Pacific Coast Medical Enters. v. Harris, 633 F.2d 123, 131 (9th Cir. 1980)). Second, the court reviews the agency's interpretation "in relation to the governing statute," in an effort to determine whether it is "consistent with and in furtherance of" the statute's purposes and policies. Id. As

discussed in detail below, FWS's decision to exempt the jaguar from recovery planning relies on an unreasonable and unlawful interpretation of its draft recovery planning guidance under both of these factors.[3]

1. FWS's Decision is Counter to the Plain Language of Its Policy

Applying the Ninth Circuit's Shalala analysis here, the plain language of FWS's guidance is not even remotely susceptible to the agency's interpretation that the jaguar "qualifies" as a foreign species, in light of the policy's unequivocal direction that it is limited to purely foreign species. As noted above, the jaguar's historic domestic range is extensive—as underscored by FWS's decision in 1997 to specifically extend listing to domestic jaguars in Arizona, New Mexico, Texas, California, and Louisiana. In addition, researchers now believe the species has again taken up residency within the U.S. McCain and Childs, SAR 798 ("These data clearly demonstrate the presence of resident, adult jaguars within at least some portion of their home ranges/territories within the continental United States."); SAR 128 (FWS presentation map showing extensive historic as well as some current range within U.S.). In circumstances such as this, when there is no ambiguity in the provision at issue, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." Christensen v. Harris County, 529 U.S. 576, 588 (2000).

FWS's flouting of its policy's plain language, standing alone, should be fatal to its argument that the jaguar "qualifies" under the foreign species exemption. However, the arbitrariness of its decision is further heightened by the fact that the policy—on the very next page—specifically defines species which occur in both the U.S. and foreign

[3] Importantly, plaintiff is not attempting to enforce the conditions of the draft guidance or claim that it has "the independent force and effect of law." Western Radio Servs. Co. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996). To the contrary, FWS itself has expressly relied upon the draft guidance as the justification for its decision, and thus it is the agency's own interpretation that has put the guidance at issue in this case (indeed, plaintiff in fact believes FWS's administration of the ESA would be better served by developing binding regulations through notice and comment rulemaking pursuant to the APA).

countries, such as the jaguar, as "transnational" for purposes of recovery planning. SAR 1041 ("For purposes of this guidance, transnational species are those listed species with geographical ranges both within the U.S. and within one or more international borders."). Rather than exempting transnational species from recovery planning requirements, the policy instead makes several recommendations to improve the effectiveness of the recovery planning process.[4] Notably, the provision addressing recovery planning exemptions and the provision addressing transnational species are addressed in the same section of the policy, comprising two of four "special considerations" in recovery preplanning. SAR 1040-42. Despite the direct applicability of this transnational section of the draft guidance to the jaguar, FWS impermissibly applies the foreign species exemption in isolation, and makes no effort to address or explain why the transnational provisions are not being applied to the species. Campesinos Unidos, Inc. v. U.S. Dep't of Labor, 803 F.2d 1063, 1069 (9th Cir. 1986) ("[O]ur task is to interpret the regulation as a whole, in light of the overall statutory and regulatory scheme, and not to give force to one phrase in isolation.").[5]

2. *FWS's Decision Conflicts With Its Long-Standing, Bright-Line Distinction Between Foreign and Domestic Species In Recovery Planning*

FWS's interpretation of the draft guidance is also arbitrary in light of the agency's

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[4] The draft recovery planning guidance's explicit applicability to transnational species also undermines the unexplained claim by FWS that its decision falls within the "other circumstances not easily foreseen" exemption to recovery planning. See SAR 573.

[5] The draft policy's clear distinction between "foreign" and "transnational" species is further reinforced by FWS's bright-line division of listing responsibilities between the FWS Office of Scientific Authority in Washington, D.C. (foreign species) and appropriate Regional Office (domestic species). Compare 65 Fed. Reg. 26,762 (May 9, 2000) (listing the Australian koala as threatened) and 65 Fed. Reg. 24,171 (April 25, 2000) (90-day finding on petition to list the Tibetan antelope as endangered in China, Tibet, India, and Nepal) (both administered by the Office of Scientific Authority) with 62 Fed. Reg. 39,147 (listing the domestic population of jaguar as threatened) (administered by FWS Southwestern Regional Office).

"prior interpretation and application" of its provisions and the requirements of ESA section 4(f)(1). Shalala, 82 F.3d at 294. In particular, FWS's finding that the jaguar qualifies as a foreign species is directly counter to the agency's longstanding practice of drawing a bright-line distinction between wholly foreign and domestic species in recovery planning, a distinction reflected in the draft guidance's explicit limitation of the foreign species exemption to those species whose "current and historic ranges occur entirely under the jurisdiction of other countries." SAR 1040. Accordingly, FWS has apparently never prepared a recovery plan for a foreign species.[6]

In contrast, it is exceedingly rare for the agency to affirmatively decide under section 4(f) that such a plan will not promote the conservation of a domestic species (including transnational species such as the jaguar). According to the agency, FWS has exempted only 11 domestic species from the recovery plan requirements in the history of the ESA, less than 2% of all domestic listings. SAR 571. Moreover, plaintiff is aware of no prior decisions where FWS has exempted a species from recovery plan requirements on the basis of a limited domestic or largely international range.[7] See SAR 516 (FWS Regional Endangered Species Coordinator acknowledging "no pre-existing examples to follow."). Here too, this past practice is incorporated into FWS's guidance on "transnational" species, which rather than exempting recovery planning, provides specific

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[6] FWS's interpretation of recovery planning requirements is only one example of how the agency has applied the ESA's protections in bright-line fashion between domestic and foreign species in its administration of the Act. The agency has, for example, promulgated regulations expressly limiting the provisions of section 7 consultation requirements to domestic species. 50 C.F.R. § 402.01 (section 7 consultation defined to apply only to actions "in the United States or upon the high seas"). FWS regulations similarly restrict the designation of critical habitat. 50 C.F.R. § 424.12(h) ("Critical habitat shall not be designated in foreign countries or in other areas outside of United States jurisdiction").

[7] Notably, it appears that FWS itself does not know why it exempted the 11 species. SAR 533. However, at least three of these species were presumably exempted because they are believed extinct: Bachman's warbler, Scioto madtom (a fish), and the Eskimo curlew.

recommendations for improving the planning process. SAR 1041.

These transnational species in fact include many of the most well-known and high-profile species listed under the ESA, and can be divided into two general categories. The first encompasses those species which are "present in both the United States and a neighboring nation (either Mexico or Canada), but [are listed as] threatened or endangered only in the United States," and includes "many, if not most, of the large mammals listed in the western United States, including the grizzly bear, the gray wolf, [] the Canada lynx," and the woodland caribou. S.W. Ctr. for Biological Diversity v. Norton, 2002 U.S. Dist. LEXIS 13661, at *40 (D.D.C. July 29, 2002). Despite the fact that all of these species have extensive ranges in foreign nations—and some have quite limited domestic ranges—FWS has prepared or is in the process of preparing recovery plans for all of them.

The second category of transnational species encompasses those species, like the jaguar, which are listed in both the U.S. and one or more foreign countries. These species are particularly common in the Southwest, which from an ecological perspective is located at the northern extent of tropical ecosystems that predominate Mexico, and Central and South America, and thus contains many species with relatively limited domestic ranges, including the Mexican gray wolf and Mexican spotted owl. FWS has also produced recovery plans for all of these species.

For example, in 1990 FWS prepared a recovery plan for the ocelot, which like the jaguar, has a far more extensive range in Latin American countries than in the U.S. RAR 114. Similarly, in 1998 the agency finalized its recovery plan for the Sonoran pronghorn, which currently has one U.S. population and two Mexican populations. See Sonoran Pronghorn Recovery Plan.[8] As part of the recovery planning process, and as now

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[8] Excerpts of this and other Recovery Plans are included as attachments to the Declaration of Andrew Hawley. Plf. Exh. 3. All are available on FWS's website at: http://www.fws.gov/endangered/recovery/index.html.

expressly directed by its draft recovery planning policy, FWS included Mexican pronghorn specialists in recovery planning efforts. In addition, the agency comprehensively addressed the status and threats to populations in both countries, and identified opportunities to improve coordination and collaboration between U.S. and Mexican stakeholders. FWS was thus able to better assess and describe actions needed to recover the species within the U.S. and across its range.

FWS has taken similar recovery planning action with respect to numerous other Southwestern species with limited—and in some cases, highly restricted—U.S. ranges. See Masked Bobwhite Recovery Plan (recovery criteria for bird with three populations in Mexico and one in United States includes establishing viable populations in the United States, cooperating with the Mexican government to reintroduce additional populations in Mexico, and maintaining or increasing existing populations in Mexico); Mexican Spotted Owl Recovery Plan (establishing recovery planning units in both U.S. and Mexico); lesser long-nosed bat (recovery criteria includes monitoring of stable or increasing major roost sites in both Arizona and Mexico); Mexican long-nosed bat (recovery criteria for species with extensive Mexican range and very limited U.S. range identified as protection of six populations—five wholly in Mexico, one U.S.-Mexico population); Northern Aplomado Falcon Recovery Plan (identifying "critical information needed" to recover bird with limited U.S. range as including "the extent to which pesticide contamination is impacting populations in eastern Mexico," "densities and total numbers in Mexico," and the "amount of suitable habitat remaining in Mexico and the U.S."); Fishes of the Rio Yaqui Recovery Plan (recovery plan for four fish with extremely limited U.S. range prepared in conjunction with Mexican officials includes recovery criteria as stabilization of populations in Mexico and recommends extensive cooperation and habitat protection in Mexico).

FWS's decision not to prepare a recovery plan for the jaguar thus marks an unprecedented departure from long-standing agency practice to afford full recovery plan

protections for transnational species with limited domestic ranges, yet the agency has made no effort to explain this departure. Agency interpretations that conflict with earlier views are entitled to "considerably less deference" than a "consistently held agency view." S.W. Ctr. for Biological Diversity v. Babbitt, 980 F.Supp. 1080, 1082 (D. Ariz. 1997) (citing INS v. Cardozo-Fonseca, 480 U.S. 421, 446 n.30 (1987), and Watt v. Alaska, 451 U.S. 259, 273 (1981)). Moreover, the Ninth Circuit has consistently invalidated similar efforts by FWS or NMFS to change course under the ESA without adequate explanation. See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 799 (9th Cir. 2005) (upholding District Court grant of preliminary injunction where NMFS "completely reversed course" in a biological opinion, "particularly in its statutory interpretation" of the required analysis within the opinion); Inst. for Wildlife Prot. v. Norton, 174 Fed. Appx. 363, 366 (9th Cir. 2006) (rejecting FWS's change in position on listing of a species where "FWS has not explained the principles it has employed to [make that decision], and the principles it has employed have been undermined by independent experts and FWS's own policies and previous decisions."). As FWS has failed to explain its departure from its own policies, as well as its previous decisions to consistently prepare recovery plan for species with limited domestic ranges, its decision should be afforded no deference.

3. FWS's Decision is Inconsistent With the ESA and Its Purposes

FWS's decision also runs afoul of the second prong of the Shalala test, whether it is "consistent with and in furtherance of the purposes and policies embodied" in the ESA. Shalala, 82 F.3d at 294 (quoting Pacific Coast, 633 F.2d at 131). While the issue of when FWS may lawfully exempt a species from section 4(f) recovery planning requirements appears to be one of first impression, the plain language of the ESA, its legislative history, and judicial interpretations of other provisions of the Act strongly demonstrate that denying recovery plan protections to the jaguar is inconsistent with its purposes and policies. For example, the ESA's Findings place particular emphasis on preventing

domestic extinction, without evident concern for the relative extent of foreign distributions. See e.g., 16 U.S.C. § 1531(a)(1) (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"); id. § 1531(a)(5) (Congressional finding 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).[9] This textual emphasis is further supported by the Act's policies and legislative history. See S.W. Ctr. for Biological Diversity v. Babbitt, 926 F. Supp. 920, 924 (D. Ariz. 1996) (finding that legislative history of the statute demonstrates a "consistent policy decision by Congress that the United States should not wait until an entire species faces global extinction before affording a domestic population segment of a species protected status.") (citing H.R. Rep. No. 412, 93d Cong., 1st Sess. 10 (1973), reprinted in 1978 U.S.C.C.A.N. 2989, 2998).

Noting these policies and purposes, courts have consistently struck down similar efforts by the agency to deny species with limited domestic ranges full protections under the Act. For example, in Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 684 (D.D.C. 1997), FWS argued that listing the Canada lynx under the ESA was unnecessary based on the fact that the lynx remains "plentiful in Canada and Alaska and is not threatened with

[9] This emphasis on domestic species does not diminish the fact that protection of imperiled foreign species, which comprise approximately 30% (574 of 1927) of all species listed under the Act, is an essential facet of the ESA. Indeed, implementation of U.S. obligations to protect foreign species pursuant to the Convention on International Trade in Endangered Species ("CITES"), 27 U.S.T. § 1087, and other international agreements is one of the primary purposes of the ESA. 16 U.S.C. § 1531(b). There exist, however, significant differences in the treatment of and protections afforded to foreign species demonstrating that "Congress [] obviously thought about endangered species abroad and devised specific sections of the ESA to protect them." Defenders of Wildlife v. Lujan, 504 U.S. 555, 588 (1992) (Stevens, J. concurring); id. at 589 n. 7 (ESA's applicability to foreign species "indicate[s] a more narrow congressional intent that the United States abide by its international commitments."). See, e.g., 16 U.S.C. § 1538(a)(1)(B) (limiting section 9 "take" prohibitions to areas "within the United States or the territorial seas of the United States.").

the possibility of extinction" in those areas. The Court squarely rejected this argument, holding "that the FWS cannot be allowed to dismiss the contiguous United States population of a species merely because it is more plentiful elsewhere." Id. at 685. The Court went on to explain that FWS "has listed the grizzly bear, eastern timber wolf, and woodland caribou under the ESA even though these species are also 'remnant populations'" and have "far more abundant populations in Canada and Alaska," because "the fact that an animal population consisted of a mere 'remnant' of a larger historical population argued for, rather than against, protecting the species from further depletion." Id.; see also Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 n.10 (9th Cir. 2001) ("The text of the ESA and its subsequent application seems to have been guided by the following maxim: 'There seems to be a tacit assumption that if grizzlies survive in Canada and Alaska, that is good enough. It is not good enough for me. . . . Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there.'") (quoting Aldo Leopold, A Sand County Almanac 277 (1966)).

Similarly, by refusing to prepare a recovery plan, FWS would impermissibly relegate the jaguar to nations other than the United States, undermining the ESA's emphasis on preventing domestic extinctions. FWS's decision is especially specious given that it specifically listed the jaguar in Arizona, New Mexico, Texas, California, and Louisiana in 1997, correcting an administrative oversight that left domestic jaguars without ESA protections for nearly twenty-five years.[10] Indeed, during that listing process, FWS rejected comments submitted by interests opposed to the listing that the "United States was merely peripheral to the [jaguar's] historic range"; that the "species was never more than wandering individuals that occasionally crossed the border into the United States"; and that "[n]o breeding population of the jaguar exists in the United States." 62 Fed. Reg. at 39,150. Instead, in the final listing rule FWS strongly affirmed

[10] Notably, FWS's decision to exempt jaguar recovery planning incorrectly states that its listing was "limited to southeastern Arizona and southwestern New Mexico." SAR 572.

the need to protect domestic jaguars—and notably, argued that such listing was indeed required under the Act:

> The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final . . . <u>A decision to take no action would exclude the jaguar in the United States from needed protection pursuant to the Act</u>. A decision to extend only threatened status would not adequately express the drastic distributional decline of the species and the continued jeopardy of any individuals in the United States. Therefore, no action or listing as threatened <u>would be contrary to the intent of the Act</u>.

<u>Id.</u> at 39,155 (emphasis added).

Remarkably, in its decision to exempt the jaguar from recovery plan requirements, FWS has now embraced many of the same arguments that the agency expressly rejected in its decision to list the species within the U.S. <u>See</u> SAR 572 (rationale that a recovery plan is not needed because "actions taken within the United States are likely to benefit a small number of individual jaguars peripheral to the species, with little potential to effect recovery of the species as a whole"). By essentially writing off domestic jaguars, FWS's decision is thus not only impermissibly counter to the purposes and policies of the ESA, but is a 180 degree change from its earlier position that conservation of domestic jaguars is important to the overall conservation of the species. FWS's decision must be rejected.

C. <u>FWS Has Determined That Jaguar Conservation Is In Conflict with Development Projects, and Thus Was Required to Prioritize Recovery Plan Development</u>

As discussed above, section 4(f) of the ESA 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). Under FWS policy promulgated in 1980, the agency "developed guidelines governing the

assignment of priorities" for the "development and implementation of recovery plans" for listed species. 48 Fed. Reg. 43,098 (Sept. 21, 1983) ("recovery priority guidelines") (RAR 1). These recovery priority guidelines established a three-part analysis based on degree of threat; recovery potential; and taxonomy. Id. at 43,103. After Congress amended the ESA in 1982 to add section 4(f)(1)(A), FWS accordingly amended the recovery planning guidelines to include a "conflict criterion" as a fourth factor "which, if applicable, elevates the species in priority for development of a recovery plan." Id. at 43,104. Such conflict will be determined "in large part" through the section 7 consultation process, but the policy also directs FWS to "contact other Federal agencies for their identification" of species that may also meet the criteria. Id.

In this case, the jaguar is gravely threatened by construction and development projects and thus the agency should have prioritized—rather than exempted—the species from recovery plan requirements. Specifically, under the Secure Fence Act of 2006, as amended, 8 U.S.C. § 1103 note, Congress directed the Department of Homeland Security ("DHS") to build at least 700 miles of fence along the U.S. southern border with Mexico, including extensive sections within key jaguar habitat. For example, in a biological opinion conducted on a portion of fence now constructed within and adjacent to the Buenos Aires National Wildlife Refuge (southwest of Tucson) under this Act, FWS noted that "development of infrastructure projects (i.e. vehicle barriers, pedestrian fences, etc.) along the U.S. border may impede movement of jaguars across the border," and that "preventing jaguar movement and exchange between the U.S. and Mexico would likely have deleterious effects on jaguars, particularly those in Arizona and New Mexico." RAR 1157. Noting that "[m]aintaining connectively between Arizona and Sonora is critical to the continued persistence of jaguars in Arizona," FWS concluded that "[s]hould all jaguar movement corridors be compromised, it is possible that the jaguar will become extirpated from Arizona." RAR 1160. The recently released, peer-reviewed study by the preeminent jaguar researchers McCain and Childs presents the threat in

starker terms. As stated in that study, "[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." SAR 802 (emphasis added).

It is thus 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 DHS to ensure that proposed border fencing is constructed in a manner that doesn't preclude the ability of the jaguar to persist within the southwestern U.S. Such an effort could not be timelier, as Congress has recently amended the Secure Fence Act to require DHS to consult with local citizens as well as federal agencies in its planning of border fencing. 8 U.S.C. § 1103 note. Initiating a recovery plan process would ensure that FWS plays an integral role in this consultation.

Indeed, FWS has itself recognized the gravity of this threat in 2007. Noting that "[c]onstruction of fences (both pedestrian and vehicle barriers) along the Arizona-Sonora border may impede movement of jaguars between the U.S. and Mexico," the agency determined that the jaguar met the conflict criterion under FWS's guidance and section 4(f) of the ESA. RAR 3084. Although the jaguar was already in the top tier of priority for recovery plan development in light of the pronounced threats to its continued survival, the identification of this conflict further "elevate[d] the species in priority." Id. The administrative record, however, contains no evidence that FWS officials considered this change in priority status in exempting the jaguar from recovery planning requirements, an arbitrary and capricious failure. Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (failure to consider an important aspect of the problem renders decision unlawful).

D. A Recovery Plan Would Promote Jaguar Conservation

Finally, a recovery plan would in fact strongly "promote the conservation" of the jaguar. 16 U.S.C. § 1533(f)(1). Contrary to FWS's assertion in its decision that "actions

taken within the United States are likely to benefit a small number of individual jaguars peripheral to the species, with little potential to effect recovery of the species as a whole," the administrative record convincingly demonstrates that: (1) protection of domestic jaguars is important to the overall conservation of the species; and (2) preparation of a recovery plan will help promote such conservation.

For example, McCain and Childs note that the best available science demonstrates that "conservation of populations at the periphery of a species range is now considered extremely important to the long-term survival of endangered species," and thus "conservation of jaguars in the northernmost portion of their range (i.e. the borderlands population) deserves attention equal to or greater than that of core populations." SAR 790. Similarly, a group of three eminent jaguar scientists, in direct response to an inquiry from the JAGCT as to whether "animals on the fringes of their range contribute to the maintenance of a metapopulation," affirmed that "all individuals of an endangered or threatened species are important whether they exist on the fringe or in the core of the historic range. The important issue is to restore connectivity throughout the range to allow movement between, and survival of, the now isolated animals." RAR 1991 (emphasis added). Finally, a similar sentiment was also recently expressed by the American Society of Mammalogists, which passed a unanimous resolution calling on FWS to prepare a recovery plan based in part upon the Society's belief that "habitats for jaguars in the United States . . . are vital to the long-term resilience and survival of the species, especially in response to ongoing climate change." RAR 5548-49.

The importance of domestic jaguar conservation is further heightened by the increasing threats to the species in foreign countries throughout its range. See, e.g., RAR 1990 ("If present trends continue, by the year 2040 there may be no tropical forest left (the present core of jaguar range), except for a few isolated protected areas."); SAR 977 ("Amazonia is the largest remaining stronghold for the cat, but the region is being increasingly deforested and developed . . . The total area of protected land [is] large . . .

[h]owever, their effectiveness is almost non-existent."); SAR 1183 ("Jaguar conservation in Central America faces great difficulties because of the short-term political, economic, and social crises. The natural resource base is rapidly deteriorating and the governments have been unable to reverse this trend."); SAR 788 ("At risk throughout their range because of habitat loss and overhunting, jaguars currently occupy only 46% of their former (pre-1900) range."); SAR 801 ("In Sonora, Mexico, jaguars are seriously threatened by loss of habitat, reduced prey populations, and hunting."). Because this habitat destruction is occurring in other sovereign countries, however, the United States has little authority to address the forces causing it.[11]

In contrast, the United States can—and under the ESA, must—ensure jaguar conservation within its own borders. Unlike Mexico and nations within its range in Latin America, jaguars in the U.S. "occupy large expanses of public lands where federal protection for jaguars is enforced, native prey are managed at healthy numbers, and a program to compensate producers for losses of livestock to jaguar depredation has alleviated concerns of local stakeholders." SAR 801. Consequently, "the availability of suitable habitat for jaguars in the southwestern [U.S.] will be increasingly important for the long-term survival of the species in the borderlands region." Id.

Moreover, FWS's draft recovery planning policy provides express recommendations for better ensuring the value of recovery plans for transnational species such as the jaguar. Far from suggesting that recovery plans should be exempted for such species, the policy instead emphasizes robust and early coordination with other countries within the species' range. SAR 1041 ("If management actions outside the U.S. are necessary, early and continuing international cooperation is very important"); id. ("For

[11] In light of these pervasive threats, the fact that "the United States has little authority to implement actions needed to recover species outside its borders"—as noted in FWS's January 7 decision (SAR 573)—counsels for rather than against the conservation value of a jaguar recovery plan.

the development of reclassification or delisting criteria, an early decision must be made as to whether individuals of the species that occur outside the U.S. or management actions taken outside the U.S. are necessary in order to achieve the recovery goal."). In addition, the policy also directs that FWS should "consider appointing one or more recovery team members from the other nation(s)." FWS's past practice in accordance with the principles of this policy, as described above, demonstrates how recovery planning helps "promote the conservation" of transnational species—even when recovery of those species within the U.S. cannot, on its own, ensure the recovery of the species throughout its range.

A jaguar recovery plan would similarly promote the species' conservation. Such an effort would naturally focus on the actions necessary to protect jaguars within the U.S., which are likely part of the same population of jaguars inhabiting the Mexican state of Sonora. See SAR 800 (U.S. jaguars are likely "small segments of a large but widely distributed, low-density population at the northern extreme of the species range," with a "single, thinly distributed population likely inhabit[ing] the large area from southern Arizona and New Mexico, south through the mountains of eastern Sonora, Mexico."). The jaguar recovery planning process should mirror previous FWS recovery planning efforts for imperiled species within the southwestern U.S. that have relatively limited ranges and population numbers compared to their foreign distributions by, for example: including experts on the species from Mexico and other countries on the recovery team; identifying monitoring protocols, other research needs,[12] and possible funding sources; prioritizing efforts to detect jaguar occurrences; and identifying mechanisms to increase cooperation and collaboration with government officials and other experts in Mexico.[13]

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[12] Such research is vitally needed, as the species' borderlands population is poorly understood. See SAR 781 ("The status, distribution, and basic ecology of jaguars living in the borderlands remain virtually unknown.").

[13] In its January 7 decision, FWS argues that the JACT is already undertaking several of these efforts, and that these "incentive-based approaches to conservation" provide an

Finally, the recovery planning process should look beyond the borderlands jaguar population, and as directed by the ESA, describe the actions necessary to recover the species throughout its range. While it is obvious that the United States cannot take sole responsibility for recovering this magnificent species, our Nation's conservation initiatives and environmental protections have served as a model for many other countries throughout the western hemisphere. Providing a "blueprint" for jaguar recovery across its range is vitally needed, and the U.S. has significant resources and expertise to help prepare such a document. Instead, FWS's January 7 decision sends a disturbing and unprecedented message that the U.S. is largely willing to write off the jaguar within its own borders simply because it cannot carry the burden alone. Plaintiff Defenders of Wildlife respectfully requests the Court to declare that decision illegal under the ESA.

CONCLUSION

For the foregoing reasons, plaintiff Defenders of Wildlife respectfully requests that its motion for summary judgment be GRANTED, FWS's Decision exempting the jaguar from recovery planning requirements be DECLARED UNLAWFUL and VACATED, and FWS ORDERED to immediately begin the recovery planning process.

Dated: August 14, 2008.

Respectfully Submitted,

s/ Brian Segee

Attorney for Plaintiff Defenders of Wildlife

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additional ground for exempting the jaguar from recovery planning requirements. SAR 574. However, as noted by the American Society of Mammalogists, in its 10 years of existence the JAGCT "has not specified recovery criteria or management actions for jaguars, and formally opposes potential mechanisms for recovery that are specified in the [ESA]." RAR 5549. Moreover, the JAGCT only addresses the species in Arizona and New Mexico, while it is also listed in Texas, California, and Louisiana.

Certificate of Service

I hereby certify that on August 14, 2008, I electronically filed Plaintiff Defenders of Wildlife's MOTION FOR SUMMARY JUDGMENT, accompanying MEMORANDUM OF POINTS AND AUTHORITIES, proposed ORDER, and a separate STATEMENT OF MATERIAL FACTS (submitted jointly with plaintiff Center for Biological Diversity) with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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