

Attachment 6b.
Comments Previously Submitted in 2012-2013

Pima NRC D Comments on December 20, 2016 Draft Jaguar Recovery Plan

Attachment 6b. Comments previously submitted

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Via Certified, Signature-Required Priority Mail

August 14, 2012

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Re: PNRCD Response to “Recovery Outline for Jaguar (*Pantera onca*)” Issued April 16, 2012, and Letter from the Service dated June 19, 2012

Dear Mr. Spangle,

By this letter and its attachments, the Pima Natural Resource Conservation District (PNRCD), an Arizona State agency of natural resource management jurisdiction, responds to and offers comments on the “Recovery Outline for the Jaguar (*Pantera onca*)” issued by the Fish & Wildlife Service on April 16, 2012. The Pima NRCDC also takes this opportunity to respond to your letter of June 19, 2012, signed for you by Jean A. Calhoun, in response to the PNRCD’s request for more specific information about the approximate range of current jaguar residency claimed by the Service in the United States. Both are specifically addressed below.

In addition to these specific comments, the PNRCD also takes this opportunity to provide the Service with new and important information relevant to both the historic record of jaguar presence in Arizona and the characterization thereof by Brown (1983). Further, the PNRCD takes note of and directs the Service’s attention to false and misrepresentative claims published to the Service by Johnson, Van Pelt and Stuart, in footnote of their 2011 *Jaguar Conservation Assessment For Arizona New Mexico and Northern Mexico* cited by the Service in its April, 2012, jaguar recovery outline.

Finally, the PNRCD also takes the opportunity presented here 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 the Service's 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 the soon-to-come draft proposal of critical habitat for it.

A. Neither the Letter of June 19, 2012, Nor the Jaguar Recovery Outline of April 16, 2012, Provide Any Scientific Data Supportive of the Service's Claim That Jaguars Currently Reside in the United States

Recent, documented sightings of four or five jaguars, two of which occurred over a decade and a half ago, are not scientific evidence of past or current jaguar residency in the United States. Neither does the sighting of a single male jaguar in the Whetstones on one occasion in 2011 constitute such evidence. Nor do these sightings of lone, transient males suggest that any area in the United States provides habitat essential to the jaguar's existence as a species either at the time of its listing or today.

Yet, according to Ms. Calhoun of the Service, these "sightings" nevertheless constitute the scientific basis for the Service's 2010 determination that designation of critical habitat for the jaguar in the United States was prudent. Instead, these sightings – both individually and collectively – are consistent with the historic scientific record of *peripheral*, transient, male jaguar presence over time in this area. In short, these sightings are not scientific evidence of the jaguar's alleged residency in the United States.

Moreover, neither can the Service rely on McCain and Childs (2008) for support of its speculation that jaguars currently reside in 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, the baiting methodology employed by McCain and Childs (2008) in at least a part of the area studied casts doubt on that evidence.

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). What the Service doesn't mention, however, is 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 that is subject to the taking of judicial notice, a fact that explains how this baiting could have influenced the observed range of that lone, male jaguar, and a fact that precludes extension of scientific validity to any conclusion reached relative to the jaguar's naturally-occurring residency in the United States.

Simply put, because the methodology of studying jaguar residency employed by McCain and Childs (2008) included attraction and artificial location of jaguars by use of potent, jaguar-specific, sexual scent baiting, the Service, cannot claim, as it attempts to do both in June 19 letter and April 16 outline that McCain and Childs (2008) nonetheless provides reliable scientific evidence of "naturally occurring" resident jaguars in the United States. If the opposite were in

fact the case – that such baiting had no effect on this or any other 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.

This has not been the case, however. Instead, the recovery outline cites no 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 any claim of current residency of naturally-occurring jaguars in the area north of the border in Arizona studied by McCain and Childs (2008), or in any other area north of the border for that matter.

As a result, none of the 12,386 square miles of the Service’s “Northwestern Recovery Unit” already identified in this recovery outline as occurring in the United States qualifies as a “secondary area” essential to the 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 current jaguar residency in this area, because the few breeding records existent for Arizona (3) are more than 100 years old (and may or 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, 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 outline attempts to do (at p. 14), is neither responsible nor scientific. Instead, as stated in previous comment, such an approach is irreconcilably flawed by its basis on the unscientific 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 reliance on kill site, rather than point of initial encounter, to establish both location and habitat of hunted jaguars for modeling of suitable or critical habitat purpose. As shown in attachment, some of these chases went on for days, covered many miles, and included more than one mountain range (see treatment of Colcord jaguar presented in attachment). Therefore, the Service is precluded by the ESA from relying on any models based in whole or in part on the inclusion of unverified, and thus unreliable, Class II observations, and kill site location and habitat derived there from, in designating any critical habitat for the jaguar in the United States. (*see*: PNRCD’s previous September 23, 2010 comments, attached).

Moreover, the Service’s identification of a “northwestern recovery unit” for the jaguar in this recovery outline that includes 12,386 square miles of Arizona / New Mexico, apparently based on nothing more than answers to a questionnaire the Service sent out to jaguar experts,

equally 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. Subjecting those opinions to change by subsequent consensus, as appears to be the case here, does not remedy but only compounds that scientific infirmity.

Equally offensive to sound science and the ESA is the Service's claim in recovery outline 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 is 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) shows 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 Mammologists 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.

Similarly, the outline's attempt to develop a recovery strategy for the jaguar in the United States based 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 use of the concepts and principles of conservation biology in developing critical habitat for the jaguar in the United States on that basis as well.

That these scientific shortcomings of conservation biology are, in fact, very serious 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 use in this recovery outline, 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 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, opinion, consensus building, and unverified sightings 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 this recovery outline, the Service arbitrarily and capriciously exposes itself not only to 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 the inconsistencies, inaccuracies and omissions documented in attachment (see attachment), it casts further doubt on the reliability of Brown’s (1983) conclusion that records of jaguars killed in Arizona and New Mexico between 1900 and 1980 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 this jaguar was actually taken, as appears to be the case here, and cannot identify even the year in which others were killed, then it must also follow that his plotting of jaguars killed in Arizona and New Mexico 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 unreliable. In short, absent evidence proving the opposite – that the Harris jaguar was killed in 1939 and 1949 and that other kills are at the least identified to the years of their occurrence, the Service is precluded by the ESA from relying on Brown (1983) because, as things now stand, that work, as graphically shown in attachment, is both speculative and unreliable.

Similarly, this new information casts doubt on those suggestions about resident populations by McCain and Childs (2008) and Grigione et al. (2007), repeated in the recovery outline, that cite Brown (1983) for support.

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 Jaguar Conservation Assessment that have found their way into this recovery outline. Specifically, in footnote 13 of that assessment, the authors attempt to entirely discount previously submitted, September 23, 2010 comments on the jaguar, to which the PNRCD was a party, 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.

That claim, however, is patently false. 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 those authors, the documentation supporting the September 23, 2010 comments was, in fact, made available to AGFD in October of 2010. As a result, these authors are left with no legitimate excuse for falsely publishing the opposite to the Service in the 2011 jaguar assessment they wrote for AGFD.

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 patently 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 that 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, the AGFD authors' misrepresentation of these 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 to the Service by those authors but instead, when viewed in their actual context, 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 clearly the false creation of the authors of this 2011 assessment alone.

That such is the case is further proven by the fact, unmentioned by those 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, illustrates that 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:

12 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.

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, the Service’s recovery outline doesn’t even mention it.

Instead, we see in the recovery outline that the Service is continuing to act arbitrarily and capriciously despite its receipt of this new, important and highly relevant information by persisting on using the Penrod and Culbreath jaguar records while ignoring all evidence of their unreliability, and, “class II” sightings for which no physical evidence or actual reliability exist, as the “scientifically reliable” basis, no less, from which critical habitat can be accurately modeled for the jaguar in the United States. As shown herein, that continuing practice is irresponsible, unscientific, and contrary to the ESA’s requirement that the Service rely solely on the best scientific data available in designating critical habitat for the jaguar in the United States.

E. 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

Finally, the PNRCD also takes the opportunity afforded here to 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) 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 develops 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 collaborative or cooperative. (see attachments).

This is despite the fact, as the PNRCD now learns from the recovery outline (p. 15) that, based 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. At the least, this requirement raises further and important water resource

issues, which in turn, *requires* the Service to cooperate with the PNRCD to resolve those water resource issues 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.

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 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 requests for formal Arizona Attorney General opinions.

F. Conclusions

As shown herein and attachment, the Service's April 2012 Recovery Outline for the Jaguar lacks scientific credibility. Its use of unreliable records of jaguars, including the Penrod and Culbreath jaguars, while ignoring the mounting evidence of the unreliability of these and other records provided by AGFD (2011) and herein, and its use of "sightings" for which no physical evidence actually exists in modeling critical habitat for the jaguar in the United States is both irresponsible and scientifically untenable.

Similarly, this outline'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 "principles" nonetheless. Moreover, as also shown herein, there is no scientific evidence supporting the Service's and the recovery outline's speculation that jaguars were at the time of their listing, or are now, residential in their occurrence within the United States.

Further, development of specific requirements for the jaguar in this recovery outline, including the identification of 12,386 square miles of jaguar habitat in Arizona and New Mexico alleged as essential to jaguar's existence as a species, and water for jaguars every 6.2 miles within that area, during the worst economic recession since 1929, no less, and based on nothing more than answers to a questionnaire the Service sent out to experts (9 of 11 respondents to that questionnaire also authored this recovery outline), and apparent subsequent subjection of those opinions to change 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 collaboration 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 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.

In closing, for the many reasons, facts and new and highly relevant information provided the Service herein and in attachment, the PNRCD once again strongly urges the Service to reevaluate and reverse its determination that the designation of critical habitat is prudent for the jaguar in Arizona and New Mexico where, in actuality, the best scientific information / evidence available shows that male jaguars occur only as transients, females and breeding do not occur, and habitat "essential" to the jaguar's existence as a species clearly does not exist under any scientifically credible definition of that term.

Sincerely,

Dennis Parker
Attorney at Law
Representing the Pima Natural Resource Conservation District (PNRCD)

cc: Pima NRCB Board of Directors



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In reply refer to:

AESO/SE

FWS-R2-ES-2012-0042

September 13, 2012

Re: Proposal to Designate Critical Habitat for the Jaguar under the Endangered Species Act

Dear Interested Parties:

On August 20, 2012, the U.S. Fish and Wildlife Service (Service) published in the *Federal Register* (77 FR 50214) a proposal to designate critical habitat for the jaguar under the Endangered Species Act (ESA) in portions of southeastern Arizona and southwestern New Mexico. We are seeking comments on the proposal through October 19, 2012.

Jaguars in the U.S. are part of the northern range of a population that occurs primarily in Mexico. A total of 838,232 acres in six units in primarily mountainous portions of Pima, Santa Cruz, and Cochise counties, Arizona, and Hidalgo County, New Mexico has been proposed for critical habitat designation. These include 547,000 acres of Federal land; 111,741 acres of State of Arizona land; 76,329 acres of Tribal land; and 103,143 acres of private lands.

Our identification of areas proposed for critical habitat designation was informed by the Recovery Outline for the jaguar that was recently completed by a Service-assembled, binational team of scientists. The team relied on a scientific population viability analysis and a population and habitat viability analysis for the jaguar in the northern extent of its range in Mexico and the U.S.

A critical habitat designation identifies areas important to the recovery of a species. Federal agencies that undertake, fund or permit activities that may affect critical habitat must consult with the Service to ensure such actions are conducted in a manner that does not destroy or adversely modify designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Critical habitat designations have no effect on actions taking place on non-federal lands unless proposed activities involve Federal funding or permitting.

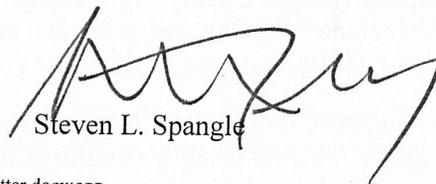
Because we intend that the final determination be as accurate and effective as possible, we are seeking comments on the proposal. Specifically we seek information on how to better understand and characterize the essential habitat features for jaguars in the U.S., special management considerations or protection that may be needed to maintain habitat features, and assumptions and conclusions used to develop the critical habitat proposal.

To ensure that the possible economic impacts of the proposed designation are considered as required under the ESA, we are preparing a draft economic analysis. The analysis will be used to inform the development of the final designation of critical habitat for the jaguar. If we determine that the designation of any given areas would cause unacceptable economic or other impacts, such areas could be excluded from the final designation. We will publish an announcement and seek public comments on the draft economic analysis when it is completed.

The public comment period for this proposal will be reopened upon announcement of the availability of the draft economic and a draft environmental assessment (under the National Environmental Policy Act). We will make a final critical habitat determination within one year.

The proposed rule and other information about the jaguar (including the Recovery Outline for the jaguar) are available on our web site at <http://www.fws.gov/southwest/es/arizona/>, or by contacting this office at (602) 242-0210. Comments can be submitted electronically via the Federal eRulemaking Portal: at <http://www.regulations.gov/>, or can be mailed or hand delivered to Public Comments Processing, Attn: FWS-R2-ES-2012-0042; Division of Policy and Directives Management; U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203. Requests for a public hearing must be submitted by October 4, 2012. Comments must be submitted by October 19, 2012.

If you have questions regarding the critical habitat proposal, contact Jean Calhoun at (520) 670-6144 (x223) or Jeff Humphrey at (602) 242-0210 (x222). Thank you for your consideration of threatened and endangered species.



Steven L. Spangle

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PUBLIC SUBMISSION

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Docket: FWS-R2-ES-2012-0042
Designation of Critical Habitat for Jaguar

Comment On: FWS-R2-ES-2012-0042-0001
Endangered and Threatened Wildlife and Plants: Designation of Critical Habitat for Jaguar

Document: FWS-R2-ES-2012-0042-0081
Comment on FR Doc # 2012-19950

Submitter Information

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Address:
P.O. Box 1100
Patagonia, AZ, 85624

General Comment

Please accept the uploaded files of comments and attachments.

Attachments

1. Cover letter for jaguar comments submission October 15, 2012
2. PNRCD comments on proposed rule to designate critical habitat for jaguars in Arizona and New Mexico, final
3. Jaguar literature discrepancies, final submitted 10-15-2012
4. Summary Table of Jaguar Occurrences in the United States copy
5. Histogram chart of historic jaguar occurrences in AZ, NM
6. AZ Star on use of scat from female jaguar in heat
7. Steirou and Koutsoyiannis (2012)
8. Jaguar, Red Harris, 1949 photo
9. Regulatory Daubert
10. 9.12.11 letter to Jean Calhoun

C017170

- 10.1 Letter to Spangle 10.18.11
- 10.2 Letter From USFWS 10.19.11
- 10.3. Letter to Lupo 11.4.11
- 10.4. Calhoun response 11.23.11
- 10.5. Lupo response 12.15.11
- 10.6. FWS Jaguar FOIA Response 4.25.12
- 10.7 Coordination chronology
- 10.8 Emails & response regarding FOIA
- 10.9 List of Studies sent to PNRCD by FWS
- 10.10 USFWS:PNRCD 8.17.11 approved minutes
- 11. 7.6.12 article Jaguar found in Piedras Negras stash house
- 12. PNRCD response to jaguar guidelines and response of june 19, 2012 final
- 13. Comments sent on prudency determination Sept 23 2010
- 14. Jaguar Attachments for Sept 23 2010 submission
- 15. Prock hunts, jaguar kills map attachment to comments Sept 23 2010
- 16. Jaguar comments on prudency of critical habitat to FWS, March 30, 2010
- 17. CBD contract \$999.99
- 18. CBD FOIA response from AGFD
- 19. 6.12.2009 Article on jaguar killers
- 20. Jaguar Attachments (emailed to L. Voyles 10:11:11)
- 21. copy of Email sending 9:23:10 comments, attachments to AGFD Dir. Voyles
- 22. jaguar final comments and index to AGFD public records (emailed to L. Voyles 10:11:10)
- 23. USFWS pub 8:17:2012
- 24. Scent Lures « 4.20.2012whistlingforthejaguar
- 26. Narco zoos
- 27. Scent Lures 2 « 4.23.2012whistlingforthejaguar
- 28. Jaguar, Public Records Request, Voyles , April 2, 2010 on behalf of SACPA
originalPhocionWayDiaryJune25.1858

C017171

Dennis Parker
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October 15, 2012

Dear Public Comments Processing
Attn.: FWS-R2-ES-2012-0042
U.S. Fish & Wildlife Service

Please accept the electronically filed comments and attachments with this cover letter in place of those comments and attachments regarding the proposed rule to designate critical habitat for the jaguar submitted previously by certified priority mail. Thank you.

Sincerely,

Dennis Parker
Attorney at Law

C017172

*Dennis Parker
Arizona Attorney at Law,
Biologist, Consultant
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dennisparker36@gmail.com*

Via Certified, Signature-Required Priority Mail

October 8, 2012

Public Comments Processing
Attn.: FWS-R2-ES-2012-0042
Division of Policy and Directives Management
U.S. Fish & Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

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 NRCDC 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:

¹² 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 10th Circuit Court of Appeals (*Catron County Board of Supervisors v. U.S. Fish & Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996)), but the law of the 9th Circuit Court of Appeals as well (*Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157 (9th Cir. 2003)).

The 9th 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 *Daubert*” 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 NRCD, Santa Cruz NRCD, Coalition of Arizona / New Mexico Counties, Southern Arizona Cattlemen’s Protective Association, Arizona Cattle Growers Association, Arizona Chapter of People for the West

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Via Certified, Signature-Required Priority Mail

July 30, 2013

Public Comments Processing
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Re: Revised Proposed Rule to Designate Critical Habitat for the Jaguar, Docket No. FWS-R2-ES-2012-0042; 4500030114; Reopening of Comment Period on the Revised Proposed Rule, the Draft Environmental Analysis of its Effects under NEPA, and the Draft Economic Analysis of its Economic Impacts

These comments, submitted on behalf of each of Jim and Sue Chilton, the Chilton Ranch, the Pima Natural Resources Conservation District (PNRCD), an Arizona State agency of watershed and natural resource management jurisdiction, the Arizona Cattle Growers' Association (ACGA), the Southern Arizona Cattlemen's Protective Association (SACPA), and the Coalition of Arizona / New Mexico Counties respond to the invitation by the USFWS to comment on (1) its revised proposed rule to designate critical habitat for the jaguar in Arizona and New Mexico, 2) the draft EA the Services offers in support of this rule, and 3), the draft Economic Analysis used by the Service to discount its economic effects, published in the Federal Register on July 1, 2013 (78 FR 39237-50, Monday, July 1, 2013).

At the outset, PNRCD et al. once again urge the Service to immediately withdraw this revised proposed rule because, as shown previously, herein, in attachment, and by reference, the best scientific information available clearly shows that critical habitat *essential* to the jaguar's conservation or existence as a species, as required by the ESA, does not exist in either Arizona or New Mexico under any scientifically credible definition of that term. The recent, and perhaps

current, presence of a sole, transient male in southern Arizona is further clear and convincing evidence supportive of that biological fact.

The Service must also withdraw this revised proposed rule because it does not rely solely on the best scientific information available as is also required by Section 4 of the ESA. Instead, the revised proposed rule continues to improperly rely on abundant use of unreliable jaguar records, undisclosed “jaguar events,” speculation, assumption, cave paintings, philosophy / theology, opinion and consensus building, rather than solely sound scientific data, as its basis for determining occupancy, modeling and designating critical habitat for jaguars in the United States. This approach not only offends the ESA’s sound science requirement, but also separately offends similar requirements ensuring the scientific integrity of the data used by the FWS found in both the federal Data Quality Act and the FWS’s own code of ethics (incorporated herein by reference thereto).

Similarly, the revised proposed rule must also be immediately withdrawn because both its text and maps fail to specifically define the boundaries of the areas proposed for critical habitat designation as is also required by law.

Additionally, relative to the PNRCD, the revised proposed rule must also be withdrawn because the FWS did not fulfill its specifically affirmative duty under Section 2 of the ESA to cooperate with the PNRCD to resolve water issues in concert with developing critical habitat for jaguars within the PNRCD’s jurisdiction. Instead, as shown by PNRCD in previous October 8, 2012 comments (incorporated herein by reference thereto), the FWS refused to do so, without explanation, under claim of absolute attorney / client privilege. Nevertheless, in this revised proposed rule, the FWS, in the further absence of cooperation with the PNRCD, has once again unilaterally determined that permanent surface waters must be allocated for use by jaguars every 12.4 miles within the PNRCD’s boundaries and throughout the areas of critical habitat it now proposes to designate for them.

Moreover, this revised proposed rule must also be immediately withdrawn because it is in fundamental noncompliance with NEPA. Specifically, contrary to the claim of the Service made in Draft EA, an EIS, rather than a mere EA, is clearly required where, as here, the action proposed is unprecedented, highly publicly and scientifically controversial, seeks to include portions of a municipality within its ambit (draft Economic Assessment at p. 7-3, para. 181), has no conservation value for the jaguar as a species, and its impacts on the human environment are indeed quite substantial (see: AGFD comments on Jaguar Critical Habitat – AGFD Input October 19, 2012 pp. 1-12; New Mexico Department of Agriculture October 17, 2012 comments, pp. 1-6 (incorporated herein by reference thereto)). The revised proposed rule’s increase in critical habitat acreage correspondingly increases these impacts.

Further, this revised proposed rule must also be immediately withdrawn because the draft economic analysis of its alleged impacts under-includes and under-estimates its actual economic impacts while misstating its actual purpose and ignoring the actual overall economic conditions under which those impacts would occur.

Finally, in addition to the specific comments addressing these issues, PNRCD et al. takes the opportunity afforded by the FWS's invitation to discuss how Congress, the President, the FWS, and the courts can better improve ESA implementation to ensure that Congress's "best scientific data available" evidentiary requirement is actually met, and the actions that can be taken by each to put a stop to the kind of rampant abuse of the ESA's scientific evidentiary standard that this revised proposed rule once again represents.

I. Habitat Essential To The Jaguar's Conservation Or Existence As A Species Does Not Exist In Either Arizona or New Mexico

As amply shown by PNRCD et al. in previous comments made before and after the FWS proposed the designation of critical habitat for jaguars in Arizona and New Mexico (incorporated herein by reference), habitat essential to the jaguar's conservation or existence as a species does not exist in either Arizona or New Mexico. As shown previously by PNRCD et al., there are no documented records of jaguars breeding in Arizona or New Mexico – either in pre-settlement or recent times. In regard to Arizona, no possibly naturally-occurring female jaguar has been documented to have occurred within that state since 1949. In regard to New Mexico, no naturally-occurring female jaguar has ever been documented to have occurred within that state. With minor exception, the Arizona Game & Fish Department's (AGFD's) October 19, 2012, comments concur with this assessment.

In its October 19, 2012 comments regarding the existence of critical habitat essential to the conservation of the jaguar as a species in Arizona and New Mexico, AGFD states the following at page 1:

"We request that USFWS withdraw the proposed rule 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. . . . In the course of jaguar conservation efforts since 1996 (including recovery planning in 2010-2012), AGFD has repeatedly stated its belief that designation of critical habitat for the jaguar in AZ-NM is not consistent with the ESA standard of "essential to the conservation of the species" and that it will not provide significant, measurable conservation benefits or recovery potential for the species. AGFD has diligently led jaguar conservation efforts in AZ-NM since 1996 and has affirmed that it would work with USFWS to develop a legally-sound proposal that is informed by science. It was, and continues to be, AGFD's contention that a legally-sound proposal would not include the designation of critical habitat in the U.S. We further believe that designating critical habitat for the less than 1% of historic jaguar range which occurs in the U.S. would jeopardize the credibility and long-term viability of the ESA, and lead to erosion of public support for jaguar conservation activities in AZ. The USFWS proposal also fails to meet the Service's own operational ESA-

implementation standard of a population consisting, at a minimum, of occupancy of a breeding pair for at least two consecutive years. By that standard, occurrence records for recent history (i.e., post 1850s) fail to show that AZ and or NM has ever been occupied by a jaguar “population.”

As PNRCD et al. previously pointed out in October 8, 2012, comments and discrepancies attachment thereto (incorporated herein by reference), occurrence records fail to show that a jaguar “population” occupied either Arizona or New Mexico prior to and including the 1850s, either. Thus, because the revised proposed rule fails to meet the Service’s own operational ESA-implementation standard of occupancy by a breeding pair for at least two consecutive years in those areas of Arizona and New Mexico it now seeks to designate as habitat critical or essential to the jaguar’s conservation or existence as a species, the proposed rule must be withdrawn.

Moreover, because the Service’s new interpretation of the term “essential” relative to the designation of critical habitat is contrary to the Service’s current operational ESA-implementation standard and represents a broad and unprecedented “first impression” interpretation of the ESA’s critical habitat language neither grounded in policy nor regulation, that new interpretation is not entitled to *Chevron* deference from the courts upon judicial review.

II. The Proposed Rule Does not Rely on the Best Scientific Information Available and Fails to Provide Scientific Data Supportive of the Service’s Claim That Jaguars Occupied Habitat in Arizona and New Mexico Essential to the Jaguar’s Conservation Or Existence As A Species At the Time of Jaguar’s Listing in the U.S. in 1997.

Contrary to the Service’s apparent belief, the term “occupy” has a meaning separate and distinct from that which the Service would give it by use of this revised proposed rule. This is because the question in the critical habitat context under Section 3(5)(A)(i)(I) of the ESA is whether the area in question provides habitat *essential* to the jaguar’s conservation or existence *as a species*, such as Brazil and Belize do, and not whether the area in question could briefly host, has hosted, or is hosting a transient male jaguar travelling well beyond the northern limits of its breeding range on very few occasions over the course of the last 50+ years.

Moreover, “occupancy” is determined at the time of listing, not over the course of 30+ years and/or 50+ years as the FWS would now have it as its latest new interpretation of that term (equally un-entitled to *Chevron* deference) by use of this rule. Section 3(5)(A)(i) of the ESA, however, restricts occupancy analysis in the critical habitat context to “the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, . . .”

Here, the jaguar was listed as endangered in the United States on July 22, 1997 (62 FR 140, July 22, 1997, pp. 39147 et seq.) – not in 1992 as the FWS inaccurately claims in this revised proposed rule. Thus, the relevant occupancy analysis in the critical habitat context is of the specific areas within the geographical area of the United States occupied by jaguars in July of 1997. The FWS seemed to have at least partially accepted this clear direction when, on January 13, 2010, it determined that designation of critical habitat for the jaguar in Arizona and New

Mexico would be beneficial to the species and should include the areas of Arizona and New Mexico where jaguars have been documented since 1996 (75 FR 1741 et seq.).

However, the revised proposed rule, like its 2012 predecessor, remains in departure from the FWS's 1996 standard noticed in 2010 by using information from 1982 through 2013, and from 1962 through 2013, or from contorted time periods of 30 + years and 50+ years respectively (FWS *Questions and Answers: Jaguar Critical Habitat Proposal (Revisions and Supporting Analyses)*, July, 2013 at p. 1), to establish occupancy of Arizona and New Mexico by jaguars at the time of this species' listing in the United States in 1997.

Regardless of the FWS's improper use of contorted time periods here, whether occupancy is examined over the course of 50+ years, 30+ years, or in 1997 as the ESA plainly requires, the ultimate result remains the same: Arizona and New Mexico do not provide critical habitat essential to the jaguar's conservation or existence as a species under any scientifically credible definition of that term.

Again, according to AGFD in October 19, 2012, comments (at p. 3):

Thus, between 1962 and 2011, only 10 (possibly 12) different individuals (10 or 11 males; sex unknown for one animal) were documented in AZ and/or NM. Assuming a rangewide population of about 30,000 jaguars, 35 of the 50 years since 1962 the U.S. has had 0 percent of the population and in 15 years from 0.003 to 0.01 percent. . . . At this time, it is not biologically sound or justifiable to designate less than 1% of habitat that accounts for less than 0.003 to 0.01% of the population. Moreover, AZ-NM has never been documented to hold a breeding pair of jaguars. There is no evidence that jaguars in AZ-NM contribute offspring to the rangewide population in a manner that outweighs mortality in the area of dispersal or that they provide some other biological benefit (e.g. novel genetic traits) for the population."

In fact, there is no post-Pleistocene evidence that jaguars in Arizona and New Mexico have ever contributed any offspring whatsoever to the range-wide population of jaguars. This is because no naturally-occurring female jaguar has ever been documented in New Mexico, and few have ever been documented in Arizona (the last of which was possibly in 1949; but see, however, 2012 Discrepancies treatment raising question about this animal's origin, incorporated herein by reference thereto).

Moreover, since AGFD wrote its 2012 comments, the revised proposed rule has effectively removed two highly-suspect, post-1962 records of high elevation jaguars (the Penrod and Culbreath jaguars), de facto, by eliminating elevations above 6562 feet from critical habitat inclusion. Thus, between 1962 and 2011, even fewer possibly naturally-occurring jaguars than thought by AGFD in 2012 were actually documented in Arizona and New Mexico. Not one, documented female was among the aggregate.

The recent, and perhaps current, presence of a lone, transient male jaguar photographed in the Whetstone and Santa Rita Mountains, does not change this equation in the least. Instead, the presence of this transient male is consistent with the historical record of only rare, transient presence of lone-male jaguars in Arizona and New Mexico over time.

III. The Proposed Rule and Its Maps Fail to Specifically Define the Boundaries of the Areas Proposed for Critical Habitat Designation as Required by Law

50 CFR 424.12(c) requires the FWS to define critical habitat “by specific limits using reference points and lines as found on standard topographical maps of the area.” This, the FWS does not do. Instead, the FWS proffers vague and non-detailed maps on its maps link from which little of value can be ascertained because they depict few roads, no boundaries, no reference points, or even the locations of some towns and streams. The FWS also proffers critical habitat maps in the form of GIS files which are inaccessible, however, unless one has some kind of software and user training that is not specified in the revised proposed rule. As a result, the revised proposed rule must be immediately withdrawn because it is in fundamental noncompliance with 50 CFR 424.12(c).

The adverse effects of this revised proposed rule’s use of less than definitive maps are two-fold. First, landowners are left in a precarious position because they have no certain idea of what portions of their properties would be designated as critical habitat and what portions would not. Second, should the FWS give more shrift to its vague and inadequate maps than its printed word in the text of this proposed rule, as appears to be a foregone conclusion here, the proposed critical habitat designation would adversely affect a much broader area and therefore would have far greater adverse economic and private property impacts than could be reasonably or rationally understood or anticipated based on the claims made by the FWS in the text of this proposed rule.

Such is precisely the case presented here by the Town of Patagonia. Here, although unmentioned by the FWS in the text of this revised proposed rule or depicted on its maps of critical habitat, at least one residential neighborhood located within the municipal limits of the Town of Patagonia, along with its Women’s club and Town library, are improperly included within the Unit 3 area proposed for jaguar critical habitat designation. Were it not for very sparing mention in the draft EA (at p. 12) and draft Economic Analysis (at p. 7-3, para. 181), no one could reasonably know about, let alone rationally or reasonably comment on, the revised proposed rule’s inclusion of part of the Town of Patagonia, its Women’s club, and its library as critical habitat for jaguars. Nor could anyone reasonably be aware of the further fact that not even one of the “Primary Constituent Elements” (PCEs) identified by the FWS as “essential” to the existence of jaguars actually exists in the Patagonia neighborhood the FWS nonetheless seeks to designate as critical habitat for jaguars by use of this revised proposed rule.

In short, because this approach not only violates 50 CFR 424.12(c), but is also arbitrary and capricious by definition and specifically non-compliant with the requirements of Section 4 of the ESA, the revised proposed rule must be immediately withdrawn for these additional reasons as well.

IV. The Theory That A Peripheral Population of Jaguars North of the Mexican Border Is Essential to the Conservation of Jaguars Range-Wide Is Sheer Speculation Refuted by the Best Scientific Information Available

The FWS speculates that a single, transient-male jaguar's recent presence, a handful of other records of singular transient male occurrence (8-10 over 50+ years), and other unreliable "jaguar events" the FWS refused to provide in response to FOIA request but has now newly polished and re-posed as "class I records" (March 2013 Jaguar Habitat Modeling Update Report), justify designation of critical habitat for jaguars in Arizona and New Mexico as part of the secondary area of the northwestern recovery unit it identifies. The FWS also speculates, in direct contradiction of the best scientific data available, that peripheral population contributions from Arizona and New Mexico are essential to the conservation or existence of the jaguar range-wide.

Combining that speculation with the equally speculative and unreliable thirteenth iteration of its habitat model, minus high elevation country but arbitrarily adding lower elevation country based on unidentified (and therefore unverifiable), newly-defined, so-called "jaguar events" (see March 2013 Jaguar Habitat Modeling Database Report) caused the FWS to increase its proposal of critical habitat designation in the revised proposed rule by 19,905 acres, including, as mentioned above, even part of the Town of Patagonia, Arizona, as critical habitat for jaguars (see draft Economic Analysis 2013, p. 7-3, para. 181). That approach passes neither scientific nor legal muster under the ESA.

Nonetheless, the FWS now claims that it has "scientifically" identified 858,137 acres in Arizona and New Mexico that are essential to the jaguar's range-wide conservation or existence as a species -- all for a maximum theoretical, "potential" carrying capacity value of just 6 jaguars (March 2013 Jaguar Habitat Modeling Database Update at p. 42) representing a mere two ten-thousandths of the overall range-wide population of jaguars (AGFD 2012 comments estimating the range-wide population of jaguars at about 30,000). Contrary to the claim of the FWS, such miniscule potential for contribution means that the designation of critical habitat in the U.S. is certainly neither essential nor in any way significant to the conservation or existence of the jaguar as a species.

Moreover, because this change in the revised proposed rule amounts to about a 2% increase in critical habitat area for jaguars over that proposed by the FWS in August, 2012, for Arizona and New Mexico, AGFD's 2012 comments on this subject matter are even more relevant and important today than they were when submitted in 2012. According to AGFD (October 19, 2012 comments at p. 4):

"The notice also states that although the U.S. and northwestern Mexico represent the northernmost extent of the jaguar's range, "peripheral populations" generate future evolutionary diversity, as well as maintaining "connectivity with Mexico". (77 FR 50222). The closest known breeding population in northern Mexico is about 140 miles south of the international border. There is little evidence supporting movements back-and-forth to the suspected core breeding

population within northern Mexico, and then only at the periphery of that core. Recently observed AZ-NM jaguars are most likely dispersing members, possibly inter-acting members, of this population (Johnson et al. 2011; Johnson and Van Pelt *in press*). Warshall (2012 Biodiversity & Management of the Madrean Archipelago III conference) presents a simple model of the likelihood of naturally dispersing female jaguars into the U.S. (AZ) at greater than 40 years, based on productivity, known dispersal distances of males versus females, and the currently known breeding population, which suggests that a breeding population is not likely to occur in the near future based on dispersal from the currently Mexico population. If the individual (male) jaguars occurring occasionally in the U.S. do not interact with breeding females from the Northwestern Recovery Unit, then they do not contribute to the population and recovery as a whole. If their genetic stock remains lost because of a lack of movement back to the breeding area or dispersal of breeding females to them, then they are not essential for persistence. Maintaining potential for dispersing females and movement of individual males back to the core area is more important for jaguar conservation than identifying and designating critical habitat in the U.S.”

In short, because there is no evidence that transient, individual male jaguars occurring occasionally in Arizona and New Mexico interact with females from the Northwestern Recovery Unit, or interact with the core breeding population at all for that matter, there is no evidence that designation of critical habitat for jaguars in Arizona and New Mexico, including that identified as occurring within the Town of Patagonia, is “essential” to the conservation or existence of jaguars on a range-wide basis as the FWS nevertheless arbitrarily, capriciously and oppositely speculates.

Instead, that arbitrary and capricious claim, as previously discussed by PNRCD et al. in October 8, 2012, comments, emanates from the Service’s and its recovery team’s improper importation and use of speculation that is either contradicted or unsupported by the scientific record of jaguar occurrence in Arizona and New Mexico, the philosophy / theology of conservation biology, opinion, consensus building, and fatally flawed models (that improperly use unreliable “jaguar events” and other unreliable, unpublished data obtained from McCain and Childs). Use of such speculation by the FWS, as stated by the Supreme Court of the United States in *Bennett v. Spear*, is clearly insufficient to trigger the protections of the ESA.

IV. The Revised Proposed Rule Must Be Withdrawn Because the FWS Did Not Fulfill Its Specifically Affirmative and Mandatory Duty Under Section 2 of the ESA to Cooperate With the PNRCD to Resolve Water Issues in Concert With Developing Critical Habitat for the Jaguar

Section 2(c)(2) of the Endangered species Act states:

“It is further declared to be the policy of Congress that all Federal departments and agencies shall cooperate with State and local agencies to resolve water issues in concert with the conservation of endangered species.”

As stated by PNRCD et al. in previous October 8, 2012 comments (incorporated herein by reference thereto), the FWS is required to cooperate with the PNRCD, an Arizona State agency of watershed management and resource management plan jurisdiction, to resolve water issues in concert with designating critical habitat for the jaguar within the PNRCD’s geographical boundaries. That duty is made mandatory by Congress’s specific use of the word “shall.”

Here, the FWS refused to cooperate with PNRCD to resolve water issues in concert with proposing the designation of critical habitat for jaguars within the PNRCD’s jurisdictional boundaries. Instead, as shown by PNRCD et al. in previous October 8, 2012 comments, the FWS refused to do so, without explanation, under ludicrous claim of absolute attorney / client privilege.

Similarly, in the revised proposed rule, the FWS has once again unilaterally determined in the absence of necessary cooperation with the PNRCD, that permanent surface waters for jaguars must be allocated every 12.4 miles within the PNRCD’s jurisdiction and throughout the areas of critical habitat it now proposes to designate for jaguars in Arizona and New Mexico. Because that approach once again specifically offends Section 2(c)(2) of the ESA, the revised proposed rule must be immediately withdrawn.

PNRCD et al. also note that this newest iteration of “water for jaguars” is apparently based on the FWS’s further revision of the “jaguar event” database it has yet to make available despite previous, point-blank FOIA request, and, the addition of 186 re-defined “class I record” “jaguar events” gleaned from data unpublished by McCain and Childs.

All of these “new” “class I” records, however, pertain to a single male jaguar, Macho B (see March 2013 Jaguar Habitat and Modeling Database Update at p. 3), whose presence and movements were artificially induced by McCain’s and Childs’ improper use of jaguar specific, sexual-scent baiting (using scat of a captive female jaguar in heat). As a result, any and all data obtained by use of this methodology is at best artificial and unreliable per se.

Moreover, as stated previously in October 8, 2012, comment by PNRCD et al. and reiterated once again here, the Service cannot rely on McCain and Childs (2008) for support of its speculations about jaguar occupancy of the United States, allocations of surface waters for jaguars, or as the source of jaguar densities it is currently using in its so-called “scientific” habitat models, as it attempts to do once again by use of the revised proposed rule here. Although the title of McCain’s and Childs’ 2008 work – *Evidence Of Resident Jaguars (Panthera onca) In The Southwestern United States And The Implications For Conservation* – suggests otherwise, as the Service acknowledges in recovery outline, but not in this proposed

rule, the artificial baiting methodology employed by McCain and Childs (2008) fatally compromises both the relevance and reliability, or scientific credibility, of that residency 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). The Service, however, fails to divulge 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 of which it has been long aware, a fact that is subject to the taking of judicial notice, a fact that clearly explains how this jaguar-specific sexual scent baiting could have easily artificially influenced the observed range of that lone, male jaguar, and a fact which ultimately precludes the extension of scientific validity by the FWS to any conclusion reached by McCain and Childs (2008) relative to the jaguar’s naturally-occurring residency, habitat use, water needs, or densities of occurrence 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, scat of female-in-heat, sexual scent baiting, the Service, cannot claim, as it attempts to do in April 16 recovery outline, 2012 proposed rule, and again in this revised proposed rule, that McCain and Childs (2008) nonetheless provides reliable scientific evidence of “naturally occurring” resident jaguars in the United States from which distances between waters, habitat use, and estimations of densities can be determined. (See PNRCD et al. October 8, 2012, comments). As shown clearly in previous comments, attachments and herein, that approach is contrary to the best scientific information requirement of Section 4 of the ESA as well.

V. The Revised Proposed Rule Must Be Immediately Withdrawn Because It is in Fundamental Noncompliance With NEPA

According to FWS’s voluminous 122-page draft EA, designation of the 858,137 acres of critical habitat it now proposes for jaguars in Arizona and New Mexico will have no significant effects on the human environment and therefore requires the preparation of only a mere EA under NEPA. The FWS is wrong. An EIS, rather than a mere EA is clearly required where, as here, the action proposed is unprecedented, highly publicly and scientifically controversial, includes a portion of a municipality within its ambit, has no conservation value for jaguars as a species, and its impacts on the human environment are indeed quite substantial (40 CFR 1508.9; see also: AGFD October 19, 2012 comments, pp. 1-12; Chilton 2012 comments; New Mexico Department of Agriculture October 17, 2012 comments; all incorporated herein by reference thereto).

Moreover, according to the Council on Environmental Quality, “the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. Some agencies expressly provide page guidelines (e.g., 10-15 pages in the case of the Army Corps). . . . Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 and where it is extremely difficult to determine whether the proposal could have significant

environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.” (CEQ 40 FAQs Answers to 30-40, at p. 5).

Such is clearly the case here. Here, the proposal is simple, not complex – designation of critical habitat for jaguars in Arizona and New Mexico. That such is the case, is shown by the fact that the FWS has already reached a preliminary determination that the revised proposed rule will have no significant effects on the environment before receiving even a single comment on that issue (78 FR 39244), and, the further fact that the FWS has already certified that this rule will have no significant economic impact on small business entities under the SBREFA (*Id.* at p. 39244-45). Therefore, a concise 10-15 page draft EA, rather than the voluminous 122-page draft EA the FWS offers, would have met the goals of Section 1508.9.

Moreover, neither is it difficult to determine that the revised proposed rule would have significant impacts on the human environment, including those involving designating a portion of a municipality as critical habitat for jaguars, impacts involving water rights takings and subordination of those water rights to federal primacy, water use, maintenance of surface waters allocated for jaguars every 12.4 miles across 858, 137 acres of Arizona and New Mexico, likely restrictions on grazing, farming, mining, hunting, fishing, other forms of recreation, night-time lighting, human presence, border security, road building and maintenance of existing roads, pipeline building (such as the currently proposed Sierrita natural gas pipeline) and maintenance, and military ground maneuvers. Accordingly, in this case, the FWS’s 122-page draft EA clearly indicates that an EIS is needed here. As a result, the FWS must immediately withdraw this revised proposed rule until it has properly prepared a draft EIS for it and subjected that draft EIS to public review.

VI. The Revised Proposed Rule Must Be Immediately Withdrawn Because the Draft Economic Analysis Under-Includes and Under-Estimates the Rule’s Actual Economic Impacts, Misstates the Rule’s Purpose, and Fails to Consider the Effects It Does Consider in the Context of Current Overall Economic Conditions

The revised proposed rule must also be immediately withdrawn because the draft Economic Analysis of its alleged economic effects under-includes and under-estimates the rule’s actual extent of economic impacts, misstates the rule’s actual purpose, and fails to consider the effects it does address in the overall context of current economic conditions.

Here, the draft Economic Analysis under-includes the actual economic effects of this rule because it does not address whose or what surface waters are to be allocated for jaguar use every 12.4 miles apart (so that a jaguar will never be more than 6.2 miles away from a surface water source), and at what costs, across the 858,137 acres of Arizona and New Mexico now proposed for jaguar critical habitat designation by use of this revised proposed rule. The importance of this issue in the economic context was specifically addressed by the New Mexico Department of Agriculture in October 17, 2012 comments as follows:

“The impacts to agriculture as related to the declaration of critical habitat in New Mexico would be significant.

There would be economic effects to many small agricultural entities and the families of agricultural producers. Small family ranches and farms comprise the bulk of the agricultural community within and surrounding the area proposed as critical habitat. Water related resources make agriculture possible and protection of the quality and quantity of New Mexico's water resources is crucial to agriculture. The designation of critical habitat for endangered species must consider agriculture and its positive economic impact to our state's economy. The jaguar's dependence on year-round water availability within 10 kilometers (6.2 miles) could have severe impacts on agriculture. Livestock watering facilities currently supply year-round water sources in the proposed critical habitat. These manmade watering facilities make it possible for ranchers to graze livestock on federal, state, and private property within the proposed habitat. If this rule is adopted, conflicts related to livestock and wildlife use are a likely outcome. The majority of year-round water in the proposed habitat is manmade and, therefore, man maintained. Who will maintain the watering facilities that create the habitat for the jaguar? Will livestock producers be able to freely use the watering facility they created, or will access be restricted to reduce human impacts within the proposed habitat? Who will be responsible for maintaining watering facilities in the area if ranchers are not using a particular pasture? These questions illustrate the potential conflicts that will occur if this critical habitat designation stands. Any scenario imagined surrounding these questions will have negative impacts on local livestock producers."

The same holds true for Arizona. Yet, based solely on assurances of the opposite from biased federal bureaucrats, these important water issues and the potential economic impacts of restricted use (if not outright takings) are not even addressed in the draft Economic Analysis (i.e., no further restrictions on water use, ranching, and farming are "anticipated" as the result of adoption of this revised proposed rule). Such "anticipation," however, contradicts the FWS's statement made in previous Federal Register notice, as quoted by the court in *Center for Biological Diversity v. Kempthorne* (D. Ariz. 2009), that "[t]he range and numbers of jaguars in the United States has declined due to habitat loss and fragmentation, direct persecution (including through predator control), destruction of riparian corridors and other areas used as movement corridors, and the introduction of livestock in historic jaguar range. 62 Fed. Reg. 39154-55." Nonetheless, the FWS and its economic analysts arbitrarily, capriciously and incredibly conclude, in the absence of competent analysis, that there will no significant effects on water rights, water use, water maintenance, ranching, farming and small business entities brought about by designation of critical habitat for jaguars in Arizona and New Mexico.

Additionally, the draft Economic Analysis fails to adequately examine the economic costs of this revised proposed rule to ranching, farming, and small businesses in terms of “adverse modification” of primary constituent elements (PCEs), Section 7(a)(2) consultations for jaguars. Contrary to the approach taken by the draft Economic Analysis, those economic costs must be examined in conjunction with the “threats” to jaguars, identified by the FWS as requiring “special management,” in order to rationally estimate the actual economic costs of those consultations directly resulting from this revised proposed rule.

According to the FWS (78 FR 39239) the primary constituent elements specific to jaguars, that are “vital” to sustaining the jaguar’s life-history functions in the Northwestern Recovery Unit and the United States, are expansive open spaces in the southwestern United States of at least 100 square kilometers (38.6 square miles) in size which (1) provide connectivity to Mexico; 2) contain “adequate” (but undefined) levels of native prey species, including deer and javelina, as well as medium-sized prey such as coatis, skunks, raccoons, or jackrabbits; 3) include surface water sources available within 20 kilometers (12.4 miles) of each other; 4) contain from greater than 1 to 50% canopy cover within Madrean evergreen woodland; 5) are characterized by intermediately, moderately, or highly rugged terrain; 6) are characterized by minimal to no human density, no major roads, or no stable nighttime lighting over any 1 square kilometer (0.4 square mile) area; and 7) are below 2,000 meters (6,652 feet) in elevation.

Also, according to the FWS, specific “threats” posed to jaguars within the area proposed for critical habitat designation in Arizona and New Mexico include increased human disturbances “into” “remote locations” (which are not defined) through construction of impermeable fences and widening or construction of roadways, power lines and pipelines; mining and development activities, increased human presence as the result of other “development activities” (which are also not defined), and military ground maneuvers.

Further, throughout this revised proposed rule, the FWS states that while grazing, hunting and other recreational activities are predominant activities within the area it would designate as critical habitat for jaguars, they are not activities “anticipated” to require special management and therefore will be insignificantly economically impacted by its finalization. As shown clearly above, such anticipation is unwarranted.

While the draft EA does recognize that the finalization of this rule would usher in a new era of Section 7(a)(2), ESA “adverse modification” of habitat consultations for the jaguar, it grossly underestimates both the numbers and costs of the Section 7 “adverse modification” consultations that will surely arise regarding all of these activities as the direct result of designation of critical habitat for jaguars in Arizona and New Mexico.

This is because, according to the FWS in revised proposed rule (78 FR 39239),

“If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any federal agency. Federal agencies proposing actions affecting critical habitat must consult

with us on the effects of their proposed actions, under Section 7(a)(2) of the Act.

Thus, relative to livestock grazing, if this rule is finalized, every federal grazing permittee within the area of critical habitat for jaguars will be immediately subject to reinitiated Section 7(a)(2) “adverse modification” consultations involving threat analyses relative to the jaguar and their current grazing permits. Moreover, because every grazing permit within the area of critical habitat will also come up for reauthorization twice over the 20 year period covered by the draft EA, that process will be specifically repeated three times.

Yet, the draft Economic Analysis considers only a handful of previous jaguar consultations as its baseline to grossly under-estimate the number of 7(a)(2) consultations that will be triggered by the designation of critical habitat for jaguars and to predict that such designation will result in no significant economic effects to livestock grazing and ranching.

Moreover, in arriving at that conclusion, the draft Economic Analysis entirely ignores the very real, directly associated economic costs to ranchers of these Section 7 consultations in hiring consultants, attending consultations, reviewing biological opinions, participating in NEPA, filing appeals of other federal agency findings if necessary, modifying ranching operations, modifying use of waters, and implementing mitigation measures for jaguars. Those costs, relative to the designation of critical habitat for the jaguar alone, will conservatively exceed \$20,000 - \$25,000 per consultation, or possibly more per consultation than that estimated by the draft Economic Analysis for all consultations over the entire 20 year time period it covers (i.e., \$24,000 for all consultations regarding the jaguar over 20 years posited at page 9.7 in the draft Economic Analysis).

Further, the draft Economic Analysis fails to consider the economic impacts this revised proposed rule would have on the maintenance and development of mining claims (patented and otherwise) that many small ranchers and other small business entities also hold. Those impacts directly resulting from finalization of this proposed rule could conservatively result in millions of dollars of lost income.

Similarly, the draft Economic Analysis fails to consider the millions of dollars in economic impacts due to devaluation of ranches along the border resulting directly from this revised proposed rule.

Finally, the draft Economic Analysis also fails to consider the economic impacts to small ranchers of third-party litigation arising from the finalization of this revised proposed rule. Past experience has shown, and current experience indicates (see Center for Biological Diversity July 2, 2013, press release, attached), that dispute and subsequent litigation brought by environmental advocacy corporations over what constitutes “adverse modification” of jaguar critical habitat relative to grazing use, permit authorizations and renewals will likely occur and that necessary participation in such by small, family ranchers will cost each as much as \$250,000 per case. This same situation also applies to the issuance and/or reauthorization of all federal permits involving federal land use (i.e., mining, etc.). Yet, despite the fact that this revised proposed rule is itself

the product of litigation, the draft Economic Analysis fails to mention or consider the costs of litigation to small business entities that will very likely directly result from its finalization.

As a result, the FWS's certification that the revised proposed rule will not have a significant impact on a substantial number of small entities under SBREFA based on this draft Economic Analysis (78 FR 39244-45) is arbitrary and capricious and therefore must be withdrawn.

While the draft Economic Analysis does at least inadequately attempt to address economic impacts to livestock grazing and ranching, it doesn't attempt to address such impacts to hunting, fishing, or other forms of recreational activities at all. This is a fatal omission because, contrary to the unfounded opinion expressed in the draft Economic Analysis, hunting, fishing, and recreational uses which are funded in whole or in part, are authorized by, or carried out by any federal agency are subject to Section 7(a)(2) "adverse modification" of jaguar habitat consultations as well.

According to AGFD in its October 19, 2012 comments:

"AGFD is also concerned that designation of critical habitat could be used to limit some traditional game management and recreational activities, such as hunting and our ability to manage wildlife, including mountain lions. While we are not aware of any legal means for this to occur directly, we are uncertain if designation would be used in any type of litigation leading to USFWS settlements or court orders that could impact game management activities. Impacts to hunting would have a direct financial impact to the agency and an economic impact to local communities.

AGFD has good reason to be concerned. This is because the "adverse modification" arena of jaguar critical habitat designation will also very likely be used by environmental advocacy corporations in litigation to also attempt to severely restrict hunting under the undefined "adequate prey" (i.e., deer, javelina, etc.) PCE standard stated in this revised proposed rule. Moreover, unmentioned by AGFD, is the fact that the USFWS isn't the only federal agency from which settlements or court orders could emanate from litigation brought by third parties that would impact AGFD's game management activities (i.e., those involving the U.S. Forest Service and the BLM, for example).

Further, these settlements and court orders could also result in dramatic restriction of sport fishing and recreation at the four lakes – Arivaca, Pena Blanca, Parker Canyon, and Patagonia – currently included within the area of critical habitat for jaguars identified in the revised proposed rule. This is because the PCEs of "water for jaguars every 12.4 miles" (of which these currently-recreationally purposed lakes are contributory to) and "minimal to no human population densities" could also be easily used by third party litigants to attempt to dramatically restrict recreational use of these lakes if the critical habitat as proposed is finalized.

As shown in attachment, hunting and fishing revenues from each of the Arizona counties proposed in part as critical habitat for jaguars – Pima County, Cochise County, and Santa Cruz County -- are substantial. In regard to Santa Cruz County, the area proposed as critical habitat for jaguars is particularly substantial, including, as stated previously, even part of the Town of Patagonia.

Economic impacts of hunting and fishing in these three counties together amount to \$111.1 million in fishing and hunting expenditures, \$136.9 million in multiplier effect, \$23.4 million in salaries and wages, 1,597 full-time and part-time jobs, and \$3,984,000 in State tax revenues per year. Hunting and fishing economic impacts are provided separately in attachment for each of these counties.

Similarly, the draft Economic Analysis does not begin to address the actual economic effects of precluding, delaying, or requiring mitigation for the construction of the previously-proposed Sierrita natural gas pipeline which crosses part of the area later proposed by the FWS for critical habitat inclusion by use of this revised proposed rule. As shown clearly in attachment, those costs alone could run into the billions of dollars as is revealed by recent developments relative to both the Sierrita (see WWP June 28, 2013, comments to FERC, attached) and Ruby pipelines (see July 19, 2013, article from the *The Westerner*, attached).

Nor does the draft Economic Analysis even address the economic impacts of this revised proposed rule on manganese production from Wildcat Silver's Hermosa mining project in the Patagonia Mountains, despite the fact that the U.S. currently imports 100% of the manganese it uses, and despite the further fact that production of silver and other metals is also projected to be substantial (see Jonathan DuHamel article, July 19, 2013, attached).

Neither does the draft Economic Analysis adequately address the impacts of this revised proposed rule on national security by including Fort Huachuca as critical habitat for jaguars while omitting rational analysis of border fence construction which also requires the construction of roads, forward observation bases, and communication towers just in the area from west of Nogales to the Buenos Aires National Wildlife Refuge alone. Those costs could run into the billions of dollars as well.

Contrary to the approach taken in the draft Economic Analysis, all of the impacts stated herein must be included in any competent, rational analysis of the revised proposed rule's actual costs and economic impacts in conjunction with its actual purpose – designation of critical habitat “essential” to the jaguar's conservation or existence as a species range-wide. This, however, the draft Economic Analysis also does not do.

Instead, the draft Economic Analysis variously misstates this revised proposed rule's purpose by stating that “the primary purpose of the rulemaking (i.e., the direct benefit) is the potential to enhance conservation of the species” (draft Economic Analysis at p. 2-15, para. 74), and, “to support its [the jaguar's] long-term conservation” (draft Economic Analysis at p. 11-1). Thus, mistaken purpose further fundamentally compromises the credibility of the draft Economic Analysis as well.

Finally, and equally fundamentally damning, is the failure of the draft Economic Analysis to consider economic impacts of this proposed rule in the context of current, overall economic conditions. Here, current overall economic conditions are the worst since the Great Depression of 1929. Nonetheless, the FWS and its Cambridge-based contractors arbitrarily and capriciously treat economic impacts of this revised proposed rule as if they occur solely in an insular vacuum unaffected by the state of the overall economy. Accordingly, for this reason, and all of the others stated herein, the current draft Economic Analysis is both arbitrary and capricious. As a result, it is also both wholly inadequate and entirely unacceptable.

VII. How Congress, the President, the FWS, and the Courts Can Better Improve ESA Implementation to Ensure that the ESA's "Best Scientific Data Available" Requirement is Actually Met

As shown by PNRCD et al. herein and in previous comments, this proposed rule can be best described, in view of the best scientific data available, as "all pain for absolutely no gain." Therefore, how this abusive travesty has occurred, and others like it are occurring, is important to lawmakers, policymakers, the FWS, and the courts if something is to be done to stem this rampant abuse of the ESA and thus restore its integrity.

Travesties such as this one almost invariably begin with 90-day Petition Findings under the ESA where, despite Congress's clearly stated intent that the FWS and NMFS use solely the best scientific information available as the basis of all decision making under the ESA, no procedural safeguard exists to ensure that either agency actually does. As a result, speculation and misrepresentation proffered by biased and self-interested environmental advocacy groups and corporations all too often informs the FWS's and NMFS's finding of substantial "scientific" information at the 90-Day Petition Finding level because neither agency is under any onus of accountability to do otherwise.

Not only does this approach subvert Congress's intent that solely the best scientific data available inform basic threshold implementation of the ESA, it also turns that intent on its head by allowing political policy to drive agency determinations. This is because an affirmative 90-Day Finding on a petition to list establishes a presumption for listing. That presumption consequently biases the one-year review such a finding triggers, where the same speculations and misrepresentations relied on for the 90-Day Finding are also relied on heavily to justify decisions to list. Such is the case of the jaguar.

On August 3, 1992, the FWS received a petition from the instructor and students of the "American Southwest Sierra Institute" and "Life Net" to list the jaguar as endangered in the United States. Among the statements made by the petitioners and accepted carte blanche by the FWS as "scientific," were those that the jaguar should be listed in the United States because a minimum of 64 (presumed to be naturally-occurring jaguars) had been killed in Arizona since 1900, and, that it should also be listed because Brown (1983) presented an analysis suggesting that a resident, breeding population of jaguars existed in the southwestern United States at least into the 20th century. (58 FR 19216, April 13, 1993; 62 FR 39147, July 22, 1997).

As shown clearly in comment herein and previously, both of these claims were then, and are now, actually inaccurate speculations unsupported by the best scientific data available. Nonetheless, these twin speculations formed the “scientific” basis for the FWS’s listing of the jaguar and continue to form the FWS’s basis of justification for designating critical habitat for jaguars by use of this revised proposed rule today.

Deletion of a single word in Section 4 of the ESA could go a long ways towards ensuring that science actually drives policy relative to the ESA, rather than the opposite which is currently the unfortunate case. That one word, “negative,” relative to 90-Day Petition Findings, found in Section 4(b)(3)(C)(ii) of the ESA, currently prevents anyone seeking to hold the FWS accountable for implementing Congress’s intent – that all ESA decisions be based solely on the best scientific data available – from doing so by excluding any judicial challenge of affirmative 90-Day Petition Findings made by the FWS or NMFS on petitions to list.

PNRCD et al. submits that the ESA’s current denial of access to the courts in this manner clearly violates Equal Protection. Where, as here, denial of a fundamental right to some – access to the courts – is involved, further Equal Protection inquiry is triggered, involving as a second step, the question of whether those denied the fundamental right and those allowed to exercise that fundamental right are similarly situated. Here, everyone is similarly situated because they could be from the same family, support the protection of endangered species, and live under the same roof. Thus, those being denied a fundamental right are similarly situated to those who are not.

That brings us to the third and final inquiry: whether the government’s interest is so compelling as to outweigh a similarly situated person’s fundamental right of access to the courts. Here, the government’s interest in excluding judicial challenge of positive 90-Day Petition Findings is not compelling because Congress’s intent that solely the best scientific data available be used as the basis for such a finding can only be ensured through basic, necessary scientific inquiry that weeds out hypotheses and conclusions unsupported by scientific data by disproving them. As a result, the government’s interest in denying the basic and fundamental right of access to the courts for those who would attempt to ensure Congress’s intent through scientific inquiry is neither compelling nor, from a scientific perspective, even remotely rational.

That such is in fact the case is shown by the four steps for testing hypotheses indispensable to scientific validity. As stated succinctly by Kanner and Casey in their 2007 law review article, *Daubert And The Disappearing Jury Trial* (University of Pittsburgh Law Review, Vol. 69:281, at p. 328), incorporated herein by reference thereto, the four steps for testing hypothesis indispensable to scientific validity are:

“1. A hypothesis must be examined for internal consistency. A proposition that is illogical or self-contradictory on its face should be rejected.

2. A hypothesis must be examined to see if it really provides insight and understanding into why observed phenomena occur. Ad hoc hypotheses developed to fit a known set of facts typically have little explanatory power.

3. A new hypothesis must be reviewed for consistency with other hypotheses and theories already accepted as valid to see whether it represents any real improvement over well-established alternatives. Lack of consistency with accepted knowledge does not mandate rejection, but it does call for great caution.

4. The final, and most important step in testing a hypothesis is empirical corroboration. The need for testing hypotheses empirically is best illustrated by examples of what typically happens to ideas that get widely promoted even though they lack empirical support. Some scientists refer to this kind of work as “pathological science,” characterized by a fixation on effects that are difficult to detect, a readiness to disregard prevailing ideas and theories, and an unwillingness to conduct meaningful experimental testing. Cold fusion is a classic example.”

As shown previously, herein and by reference, the revised proposed rule to designate critical habitat of jaguars in Arizona and New Mexico is yet another classic example of the improper use of “pathological science.”

Compounding the improper use of pathological science, is the placement of all ESA judicially challengeable decisions under the umbrella of the Administrative Procedure Act (APA) where, unfortunately, despite Congress’s clear intent that all decisions made under the ESA be based solely on the best scientific data available, the federal rules of evidence do not apply. Thus, scientific challenges of the hypotheses underlying agency decisions are made virtually impossible because *Daubert* scientific evidentiary hearings are not available in actions brought under the APA. Instead, the courts merely defer to the agency (with limited exception) in the absence of any rational scientific inquiry or scrutiny of agency decision making at all.

The paradoxical result of these twin infirmities is that basic scientific inquiry, indispensable to ensuring that Congress’s “solely the best scientific data available” ESA evidentiary standard is met, is rendered virtually irrelevant by both the federal agencies and reviewing courts entrusted with enforcing that intent. As shown previously and herein, this paradoxical result has led and is continuing to lead to ever-greater abuses of citizens, science, the treasury, and the species that the ESA was ostensibly enacted to support.

These abuses can be stopped by adoption of two actions, one of which can be taken by Congress and the other of which can be taken by the President, the FWS, and/or the courts. First, Congress can take a major step in curtailing these abuses by amending the ESA (Section 4(b)(3)(C)(ii)) to allow for judicial challenge of all 90-Day Petition Findings. Such amendment would not only alleviate the very serious Equal Protection defect previously mentioned, but would also embrace necessary scientific inquiry (i.e., hypothesis testing) indispensable to ensuring that Congress’s best scientific data evidentiary standard is actually met.

Secondly, the President (by Executive Order), the FWS (by rule) and/or the courts (by ruling) can also act to stop this pathological science charade by specifically making *Daubert*

rules pertaining to scientific evidence and experts applicable to all ESA actions brought under the umbrella of the APA.

Should these actions be taken, Congress's intent, the interests of the people, and the conservation of endangered and threatened species will be much better served. If not, we can only expect more, all pain for absolutely no gain, incredibly wasteful, and ESA-abusive pathological science charades, as is represented once again here by the revised proposed rule to designate critical habitat for jaguars in Arizona and New Mexico where habitat essential to their conservation or existence as a species does not exist under any scientifically credible definition of that term.

For further information on this important subject matter, please see J. Tavener Holland, *Regulatory Daubert: A Panacea for the Endangered Species Act's "Best Available Science" Mandate*, submitted as attachment to PNRCD et al.'s October 8, 2012, comments, and incorporated herein by reference thereto).