



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2021–0011; FF09E21000 FXES11110900000 212]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to Revise Critical Habitat for the Jaguar

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notification of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce our 90-day finding in response to a petition to revise critical habitat for the jaguar (*Panthera onca*) pursuant to the Endangered Species Act of 1973, as amended (Act). The petition requests the Service to revise the existing critical habitat designation by removing approximately 20,234 hectares (50,000 acres) of land in the northern Santa Rita Mountains in Arizona and an adjoining critical habitat subunit, including land containing the proposed Rosemont Mine. Our 90-day finding is that the petition does not present substantial scientific information indicating that the requested revision to the critical habitat designation may be warranted.

DATES: The finding announced in this document was made on [INSERT DATE OF FEDERAL REGISTER PUBLICATION].

ADDRESSES: This finding is available on the Internet at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2021–0011. Information and supporting documentation that we received and used in preparing this finding is available for public inspection pursuant to current COVID-19 restrictions. You may contact the Arizona Ecological Services Field Office at 9828 North 31st Ave. C3, Phoenix, AZ 85051–2517 (telephone 602–242–0210) for further information about these restrictions. Please submit any new

information, materials, comments, or questions concerning this finding to the above mailing address.

FOR FURTHER INFORMATION CONTACT: Jeff Humphrey, Arizona Ecological Services Field Office (see **ADDRESSES**); telephone 602–242–0210. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 3(5)(A) of the Act (16 U.S.C. 1531 et seq.) defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Our implementing regulations at 50 CFR 424.12 describe our criteria for designating critical habitat. We are to consider physical and biological features essential to the conservation of the species. Our implementing regulations at 50 CFR 424.02 define the “physical or biological features essential to the conservation of the species” as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and

connectivity. In addition, our implementing regulations at 50 CFR 424.02 define “special management considerations or protection” as methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species.

Section 4(b)(2) of the Act requires us to designate and make revisions to critical habitat for listed species on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any particular area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

5 U.S.C. 553(e) gives interested persons the right to petition for the issuance, amendment, or repeal of a Federal rule. Section 4(b)(3)(D) of the Act (16 U.S.C. 1531 et seq.) requires that we make a finding on whether a petition to revise critical habitat for a species presents substantial scientific information indicating that the revision may be warranted. Our regulations at 50 CFR 424.14(i)(1)(i) state that “‘substantial scientific information’ refers to credible scientific information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the revision proposed in the petition may be warranted. Conclusions drawn in the petition without the support of credible scientific information will not be considered ‘substantial information.’”

In determining whether substantial scientific information exists, we consider several factors, including information submitted with, and referenced in, the petition and all other information readily available in our files. Our regulations at 50 CFR 424.14(e)(4) require that when the petitioner requests removal of areas from currently designated critical habitat within the geographical area occupied by the species at the

time it was listed, we consider whether the petition contains information indicating that areas petitioned to be removed from currently designated critical habitat do not contain the physical or biological features that are essential to the conservation of the species, or that these features do not require special management considerations or protection. Our regulations at 50 CFR 424.14(e)(5) require that, for areas petitioned to be added to or removed from designated critical habitat that were outside the geographical area occupied by the species at the time it was listed, the petitioner must present information indicating why the petitioned areas are essential (if areas are being added) or are not essential (if areas are being removed) for the conservation of the species.

To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notification of the finding promptly in the *Federal Register*. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. If we find that a petition presents substantial scientific information indicating that the revision may be warranted, we are required to determine how we intend to proceed with the requested revision within 12 months after receiving the petition and promptly publish notification of such intention in the *Federal Register*.

Previous Federal Actions

In 1972, the jaguar was listed as endangered (37 FR 6476; March 30, 1972) in accordance with the Endangered Species Conservation Act of 1969 (ESCA), a precursor to the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 et seq.). Under the ESCA, the Service maintained separate listings for foreign species and species native to the United States. At that time, the jaguar was believed to be extinct in the United States; thus, the jaguar was included only on the foreign species list. The jaguar's range was described as extending from the international boundary of the United States and Mexico southward to include Central and South America (37 FR 6476; March 30, 1972).

In 1973, the Act superseded the ESCA. The foreign and native lists were replaced by a single “List of Endangered and Threatened Wildlife” (List), which was first published in the *Federal Register* on September 26, 1975 (40 FR 44412). In the 1975 List, the jaguar’s range again was described as including Central and South America (40 FR 44412, September 26, 1975, p. 40 FR 44418), but not the United States. On July 22, 1997, we published a final rule clarifying that endangered status for the jaguar extended into the United States (62 FR 39147).

The 1997 clarifying rule included a determination that designation of critical habitat for the jaguar was not prudent (62 FR 39147, July 22, 1997, p. 62 FR 39155). However, after several petitions and legal actions, on August 20, 2012, we published in the *Federal Register* (77 FR 50214) a proposed rule to designate critical habitat for the jaguar. In that proposed rule, we proposed to designate approximately 339,220 hectares (838,232 acres) as critical habitat in six units located in Pima, Santa Cruz, and Cochise Counties, Arizona, and Hidalgo County, New Mexico. The comment period opened August 20, 2012, and closed October 19, 2012.

On March 12, 2013, we received a report from the bi-national Jaguar Recovery Team entitled Jaguar Habitat Modeling and Database Update (Sanderson and Fisher 2013, entire) that included a revised habitat model for the jaguar in the proposed Northwestern Recovery Unit. This report recommended defining habitat patches of less than 100 square kilometers (km²) (38.6 square miles (mi²)) in size as unsuitable for jaguars, as well as slight changes to some of the features comprising jaguar habitat. Therefore, we incorporated this information into the physical and biological features for the jaguar, resulting in changes to the boundaries as described in our August 20, 2012, proposed critical habitat rule.

On July 1, 2013, we published in the *Federal Register* (78 FR 39237) a revised proposed rule that described the revisions explained above to our proposed designation of

critical habitat for the jaguar; with those revisions, the proposed critical habitat for the jaguar totaled approximately 347,277 hectares (858,137 acres) in six units located in Pima, Santa Cruz, and Cochise Counties, Arizona, and Hidalgo County, New Mexico. We also announced the availability of a draft economic analysis and draft environmental assessment of the revised proposed designation of critical habitat for jaguar and an amended required determinations section of the proposal. Additionally, we announced the reopening of the comment period. The comment period opened July 1, 2013, and closed August 9, 2013.

On August 15, 2013, the U.S. District Court for the District of Columbia granted the Service's motion to extend the deadline for publishing a final critical habitat designation for the jaguar to December 16, 2013. This rescheduled final rulemaking date allowed us to reopen the public comment period again, because we had received multiple requests to do so. On August 29, 2013, we announced the reopening of the comment period for an additional 15 days (78 FR 53390). The comment period opened August 29, 2013, and closed September 13, 2013.

From October 1 to October 17, 2013, the U.S. Federal Government entered a shutdown and curtailed most routine operations due to a lapse in appropriations. Due to this delay, the U.S. District Court for the District of Columbia granted the Service's motion to extend the deadline for submitting a final critical habitat designation for the jaguar to the *Federal Register* to no later than February 14, 2014. On February 12, 2014, we submitted the final rule to the *Federal Register*, and on March 5, 2014, the final rule to designate critical habitat for the jaguar published in the *Federal Register* (79 FR 12572). In that final rule, we designated approximately 309,263 hectares (764,207 acres) in Pima, Santa Cruz, and Cochise Counties, Arizona, and Hidalgo County, New Mexico. The rule went into effect on April 4, 2014.

On February 10, 2020, the U.S. District Court for the District of Arizona ruled on a crossclaim filed by Rosemont Copper Company in a lawsuit challenging the critical habitat designation for the jaguar *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 441 F. Supp. 3d 843 (D. Ariz. 2020) (*Ctr. for Biological Diversity*). The court upheld the Service's critical habitat designation, but found that critical habitat Unit 3 was unoccupied at the time of listing. This decision was appealed to the 9th Circuit Court of Appeals by Rosemont Copper Company. The case is currently stayed, and no final judgment on the matter has been entered.

Petition History

On November 11, 2020, we received a petition from the petitioner (Rosemont Copper Company) requesting that critical habitat for the jaguar be revised under the Act, pursuant to section 4 of the Act (16 U.S.C. 1533) and 50 CFR 424.10 and 424.14. The petition requested approximately 20,234 hectares (50,000 acres) of land in the northern Santa Rita Mountains and an adjoining critical habitat subunit, including land containing the proposed Rosemont Copper Mine, be removed from the critical habitat designation for the jaguar. In particular, the petition seeks the removal of a portion of critical habitat Unit 3 and Subunit 4b. The Service found that Unit 3 was occupied by the jaguar at the time of listing, but, due to uncertainty regarding occupation at the time of listing, we also determined that Unit 3 was essential to the conservation of the species. We also found Subunit 4b was unoccupied at the time of listing but essential to the conservation of the species.

In the petition, the petitioner provided the following assertions to support its requested revisions:

1. "The Arizona District Court has subsequently determined that the Santa Rita Mountains were not occupied at the time of listing, and in designating critical habitat, the

Service failed to evaluate areas that are occupied by jaguars in accordance with its own rules” (Rosemont 2020, p. 7).

2. “The northern Santa Rita Mountains provide limited conservation benefits and are not essential to the conservation of the species” (Rosemont 2020, p. 8).

3. “The FWS erroneously relied on the 2013 BiOp [biological opinion for the Rosemont Copper Mine] and did not consider excluding the northern Santa Rita Mountains from the critical habitat” (Rosemont 2020, p. 10).

4. “The critical habitat designation is no longer ‘prudent’” based on the August 27, 2019, final rule (84 FR 45020) that amended the regulations at 50 CFR 424.12 governing the listing of species and designation of critical habitat (Rosemont 2020, p. 12).

5. Subunit 4b (a subunit providing connectivity from Unit 4 to Mexico through Unit 3) is unoccupied; no evidence exists that a jaguar has used the subunit or would need to use it to travel to and from Mexico; more direct routes from Unit 4 to Mexico are available; and, if the northern Santa Rita Mountains are removed from critical habitat, there is no reason to designate Subunit 4b (Rosemont 2020, pp. 12–13).

6. “The removal of the northern Santa Rita Mountains and Subunit 4b will have little impact on the remaining critical habitat” (about 6.5% of the total) (Rosemont 2020, p. 13).

The petition clearly identified itself as such and included the requisite identification information for the petitioner, required at 50 CFR 424.14(c). This finding addresses the petition.

Species Information

The jaguar is the largest species of cat native to the Western Hemisphere. Jaguars are muscular cats with relatively short, massive limbs and a deep-chested body. They are cinnamon–buff in color with many black spots; melanistic forms are also known,

primarily from the southern part of the range (Service 1997, p. 39147). Jaguars historically ranged from the southern United States to central Argentina (Swank and Teer 1989, p. 14; Caso *et al.* 2008, p. 2). Currently, they range from the southwestern United States to northern Argentina, are found in all countries except for El Salvador and Uruguay (Zeller 2007, all maps), and are estimated to occupy 51 percent of their historical range (Quigley *et al.* 2017, p. 3; Jędrzejewski *et al.* 2018, p. 10).

Jaguars breed year-round rangewide, but at the southern and northern ends of their range there is evidence for a spring breeding season. Gestation is about 100 days; litters range from one to four cubs (usually two). Cubs remain with their mother for nearly 2 years. Females begin sexual activity at 3 years of age, males at 4. Studies have documented few wild jaguars more than 11 years old. The list of prey consumed by jaguars rangewide includes more than 85 species (Seymour 1989, p. 340), such as peccaries (javelina), capybaras, pacas, armadillos, caimans, turtles, and various birds and fish. Javelina and deer are presumably mainstays in the diet of jaguars in the United States and Mexico borderlands (Service 1997, p. 39147).

Jaguars are known from a variety of habitats (for example, see Seymour 1989, p. 340). They show a high affinity to lowland wet habitats, typically swampy savannas or tropical rain forests. However, they also occur, or once did, in upland habitats in warmer regions of North and South America. Within the United States, jaguars have been recorded most commonly from Arizona, but there are also records from California, New Mexico, and Texas, and reports from Louisiana (Service 1997, p. 39147).

Evaluation of Information for the 90-Day Finding

Section 4(b)(2) of the Act requires us to designate and revise critical habitat for listed species on the basis of the best scientific data available. Section 4(b)(3)(D)(i) requires us to make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. For the purposes of findings

on petitions to revise critical habitat, we apply the definition of “substantial scientific information” set forth at 50 CFR 424.14(i)(1)(i).

90-Day Finding

As noted earlier, the court in *Ctr. for Biological Diversity* upheld our critical habitat determination for jaguar, but found that critical habitat Unit 3 was unoccupied at the time of listing. That decision has been appealed by the petitioner. The case is currently stayed. In an abundance of caution, we analyzed the petition under both 50 CFR 424.14(e)(4) and (e)(5). That is, we considered the petition as if Unit 3 was occupied at the time of listing and, separately, consistent with the District Court’s judgment, as if Unit 3 was unoccupied at the time of listing. Under either analysis, we do not find that the petition meets the substantial scientific information standard.

In the first analysis, we considered whether the petition, pursuant to 50 CFR 424.14(e)(4), contains substantial scientific information indicating that areas to be removed from currently designated critical habitat within the geographical area occupied by the species at the time it was listed (Unit 3) do not contain the physical or biological features that are essential to the conservation of the species, or that these features do not require special management considerations or protection. The petition did not provide substantial scientific information that Unit 3, including the northern Santa Rita Mountains and the area around the proposed mine, no longer contains the physical or biological features of jaguar critical habitat, nor did the petition provide substantial scientific information that these features no longer require special management considerations or protection.

In the second analysis, we applied the standard set forth at 50 CFR 424.14(e)(5) to both Unit 3 and Subunit 4b. We find the petition does not contain substantial scientific information indicating that areas petitioned to be removed from critical habitat (the northern portion of Unit 3 and all of Subunit 4b) are not essential for the conservation of

the species. Subunit 4b is essential to the conservation of the jaguar because it contributes to the species' persistence by providing connectivity from the Whetstone Mountains (Unit 4) to Mexico via Unit 3 (79 FR 12572, March 5, 2014, p. 79 FR 12589). The ability for jaguars in the Northwestern Recovery Unit (one of two recovery units deemed essential to the jaguar by the Jaguar Recovery Team; U.S. Fish and Wildlife Service 2018, p. 82) to use physical and biological habitat features in the borderlands region is ecologically important to the recovery of the species; therefore, maintaining connectivity to Mexico is essential to the conservation of the jaguar (79 FR 12572, March 5, 2014, p. 79 FR 12574). The petition states that there is no evidence that a jaguar has used Subunit 4b or would need to use the subunit to travel to and from Mexico because jaguars have more direct geographic connections to Mexico via the mountain ranges close to the border (Rosemont 2020, p. 12). However, because Subunit 4b is considered unoccupied, evidence of jaguar use is not a requirement to consider the subunit essential. Additionally, speculation about where a jaguar may or may not travel is not substantial scientific information according to our regulations at 50 CFR 424.14(i)(1)(i). Therefore, the petition does not provide substantial scientific information as to why this subunit is not essential or why it does not contribute to connectivity to Mexico.

Unit 3 was found to be unoccupied by the court, but the court determined that Unit 3 is essential to the recovery of the species (see *Ctr. for Biological Diversity* at 873). When designating critical habitat for the jaguar, we recognized that an argument could be made that no areas in the United States were occupied by the species at the time it was listed, or that only areas containing undisputed Class I records from between 1962 and 1982 were occupied (79 FR 12572, March 5, 2014, p. 79 FR 12582). For this reason, in our final critical habitat rule, we also analyzed whether or not these areas are essential to the conservation of the species. In the final rule, we determined that areas we considered occupied (such as Unit 3) are also essential to the conservation of the species because: (1)

they have demonstrated recent (since 1996) occupancy by jaguars; (2) they contain features that comprise jaguar habitat; and (3) they contribute to the species' persistence in the United States by allowing the normal demographic function and possible range expansion of the Northwestern Recovery Unit, which is essential to the conservation of the species. The petition provides no substantial scientific information indicating why Unit 3 is not essential for the conservation of the species based on these three factors we identified in the critical habitat rule.

First, the petition does not provide information challenging that Unit 3 has demonstrated recent (since 1996) occupancy by jaguars. The petition acknowledges that a single male jaguar was detected in the Santa Rita Mountains from 2012–2015, one that was also detected in the Whetstone Mountains (Unit 4) in 2011. We have information in our files corroborating the presence of this jaguar in the Santa Rita Mountains from 2012–2015. Therefore, the petition does not provide substantial scientific information indicating Unit 3 does not demonstrate recent (since 1996) occupancy by jaguars.

Second, the petition does not provide information that Unit 3 does not contain features that comprise jaguar habitat. Instead, the petition states the International Union for the Conservation of Nature and Natural Resources rates the type of habitat found in the Santa Rita Mountains as “marginal” habitat for jaguars (Rosemont 2020, pp. 9–10). This information does not indicate that jaguar habitat is no longer present or essential in Unit 3. We acknowledge in the final rule designating jaguar critical habitat that the “more open, dry habitat of the southwestern United States has been characterized as marginal habitat for jaguars in terms of water, cover, and prey densities” (79 FR 12572, March 5, 2014, p. 79 FR 12573). We also acknowledge that “while habitat in the United States can be considered marginal when compared to other areas throughout the species' range, it appears that a few, possibly resident jaguars are able to use the more open, arid habitat found in the southwestern United States” (79 FR 12572, March 5, 2014, p. 79 FR

12573). It is for these reasons that we determined that all of the primary constituent elements discussed in the March 5, 2014, final rule must be present in each specific area to constitute critical jaguar habitat in the United States (79 FR 12572, March 5, 2014, p. 79 FR 12587). The petition does not provide evidence that all of the primary constituent elements are no longer present in Unit 3. Therefore, the petition does not provide substantial scientific information that Unit 3 does not contain features that comprise jaguar habitat.

Third, the petition does not provide information challenging the contribution of critical habitat to the species' persistence in the United States by allowing the normal demographic function and possible range expansion of the Northwestern Recovery Unit, which is essential to the conservation of the species. The petition states that the United States contains, at most, less than 1 percent of the worldwide jaguar habitat, and has no resident population of jaguars (Rosemont 2020, p. 9). This information relates to the status of the species and does not address whether or not Unit 3 allows for the normal demographic function and possible range expansion of the Northwestern Recovery Unit. The petition also states that removal of the northern Santa Rita Mountains and Subunit 4b represents a very small percentage of the total critical habitat—about 6.5 percent—that would be removed by the petitioned action and will not prevent the remaining critical habitat from functioning as intended for the support of the Northwest Recovery Unit (Rosemont 2020, pp. 13–14). The recovery function and value of critical habitat for the jaguar within the United States is to contribute to the species' persistence and, therefore, overall conservation by identifying areas that support some individuals during dispersal movements, that contain small patches of habitat (perhaps in some cases with a few resident jaguars), and that allow for cyclic expansion and contraction of the nearest core area and breeding population in the Northwestern Recovery Unit (79 FR 12572, March 5, 2014, p. 79 FR 12574). Removal of the northern Santa Rita Mountains would withdraw

areas that currently provide the physical and biological features of jaguar critical habitat and in which confirmed jaguar detections occurred between 2012 and 2015 (U.S. Fish and Wildlife Service 2016, p. 295). In addition, removal of Subunit 4b eliminates half of the available connections to Mexico for Unit 4 (specifically to Subunit 4a), which is a unit in which the same jaguar that occupied the Santa Rita Mountains (Unit 3) was detected in 2011. The petition does not explain why these areas are no longer essential other than to assert that most critical habitat units would be unaffected, and that impacts to Unit 3 and Unit 4 would be minor and would not prevent the units from functioning as intended. This assertion does not demonstrate that changes have occurred to these areas such that the function they provide to jaguars, and the reason for which they were designated as critical habitat, is compromised. Therefore, the petition does not provide substantial scientific information that the northern Santa Rita Mountains in Unit 3 and all of Subunit 4b no longer function as critical habitat and are not essential in allowing for the normal demographic function and possible range expansion of the Northwestern Recovery Unit.

The petition discusses the 2013 biological opinion for the Rosemont Copper Mine, which was overturned by a court decision (*Ctr. for Biological Diversity* at 873), and our 2019 amendments to the regulations at 50 CFR 424.12 in its request to revise critical habitat for jaguars. We reviewed the petition's argument and find that these documents are not relevant to the question of whether the petition contained substantial information to support the removal of areas from critical habitat. Neither line of discussion speaks to whether the areas petitioned for removal contain the physical or biological features essential to the conservation of the species or provides information that these features do not require special management considerations or protection (50 CFR 424.14(e)(4)).

Based on our review of the petition and sources cited in the petition, we find that the petition does not present substantial scientific or commercial information indicating the petitioned action may be warranted for the jaguar. Because the petition does not present substantial information indicating that revision of critical habitat for jaguar may be warranted, we do not intend to proceed with any such revision. However, we ask that the public submit to us any new information that becomes available concerning this species' habitat at any time by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**, above.

References Cited

A complete list of references cited in this document is available on the Internet at <http://www.regulations.gov> and upon request from the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

Martha Williams

Principal Deputy Director

Exercising the Delegated Authority of the Director

U.S. Fish and Wildlife Service

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