

September 3, 2014

*Via Certified Mail, Return Receipt Requested*

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**Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act Including Failure to Initiate Consultation with the U.S. Fish and Wildlife Service regarding Wildlife Services' Operations that May Affect the Ocelot (*Leopardus pardalis*) Population in Southeastern Arizona.**

Dear Sirs/Madam:

On behalf of the Animal Welfare Institute and WildEarth Guardians, I write to notify you of their intent to bring suit against the United States Department of Agriculture's Animal and Plant Health Inspection Service's Wildlife Services program ("Wildlife Services") and its officials for violating the Endangered Species Act's ("ESA") Section 7(a)(2) by authorizing, funding, or carrying out activities that may jeopardize the continued existence of the ocelot population without formally consulting with the U.S. Fish and Wildlife Services ("FWS") pursuant to 50 C.F.R. § 402.14 (2014). *See* 16 U.S.C. § 1536(a)(2) (2012); 47 Fed. Reg. 31670 (July 22, 1982) (listing the Ocelot as endangered under the ESA).

As described in more detail below, Wildlife Services carries out activities in and near known ocelot habitat in southeastern Arizona that "may affect" the species' continued existence.<sup>1</sup> Wildlife Services must consult with FWS because its activities may affect these populations.

We request you take immediate action to remedy the currently ongoing ESA violations stemming from Wildlife Services' actions that may affect the continued existence of ocelot population in southeastern Arizona. This letter constitutes the notice required by Section 11(g) of the ESA prior to commencement of legal action. 16 U.S.C. § 1540(g). If Wildlife Services and its officials do not take action within 60 days to remedy violations of the ESA, the Animal Welfare Institute and WildEarth Guardians will pursue litigation of these claims. *See National Wildlife Federation and Public Employees for Environmental*

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<sup>1</sup> Specific language used in 50 C.F.R. § 402.14(a).

*Responsibility v. Federal Emergency Management Agency*, 345 F. Supp. 2d. 1151, 1172 (W.D. Wash. 2004) (FEMA was required to engage in formal consultation for activities that would impact threatened Puget Sound Chinook Salmon); *Pacific Coast Federation of Fisherman's Associations v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d. 1228, 1243 (N.D. Cal. 2001) (The Bureau violated ESA by failing to formally consult with National Marine Fisheries Service before implementing annual operations plan).

## I. BACKGROUND

### a. Ocelot (*Leopardus pardalis*)

Historically, ocelots occurred in the southern part of the United States including southeastern Arizona and Texas's southern Rio Grande Plain area. 45 Fed. Reg. 49844 (July 25, 1980). There are two identified distinct subspecies of ocelots, the Texas ocelot (*Leopardus pardalis albescens*) and the Sonora ocelot (*Leopardus pardalis sonoriensis*), which are isolated from each other by the Sierra Madre highlands in northeastern Mexico.<sup>2</sup> The Texas ocelot ranged through southern and eastern Texas, possibly into western Louisiana. The Sonora ocelot range previously included southeastern Arizona, with confirmed ocelot occurring as far north as Fort Verde, near Camp Verde in northern Arizona.<sup>3</sup> For decades, the ocelot was thought extirpated in Arizona. In 1964, an ocelot legally shot in the Huachuca Mountains of Arizona was one of the last recorded ocelot sightings in the state until recently.<sup>4</sup>

Since 2009, numerous ocelot sightings have occurred in southeastern Arizona. These sightings confirm the existence of at least two ocelots in the area in recent years, but could indicate a larger population presence. In 2009, a remote camera placed by the Sky Island Alliance captured the first photograph of an ocelot in the Whetstone Mountains of Arizona since the 1960s. The Arizona Game and Fish Department ("AGFD") later confirmed the photograph was of an ocelot.<sup>5</sup> In April 2010, the AGFD confirmed that a cat hit by a car and collected off Highway 60 in Arizona, between the towns of Superior and Globe, was an ocelot.<sup>6</sup> In February 2011, a resident of the Huachuca Mountains area of southern Arizona called AGFD when his dogs began barking at a catlike animal that had run up a tree. AGFD confirmed, through photographs and video, the animal was an ocelot and appeared healthy and unharmed.<sup>7</sup> AGFD's website identifies multiple additional ocelot sightings throughout 2011 and 2012, including the February and November 2012 sightings of the same male ocelot AGFD officers observed in the residential area of the Huachuca Mountains the previous year.<sup>8</sup> Multiple sightings of the same male ocelot confirm the animal remained in the area and is able to sustain itself in the northernmost part of its range.

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<sup>2</sup> U.S. Fish and Wildlife Service. 1990. Listed Cats of Texas and Arizona Recovery Plan (With Emphasis on the Ocelot). U.S. Fish and Wildlife Service, Albuquerque, New Mexico. 131 pp, p.3-4.

<sup>3</sup> *Id.*

<sup>4</sup> High Country News, *Ocelots in Arizona? Recent appearance of the tropical cats spurs update of federal recovery plan*, December 6, 2010, available at: [http://www.hcn.org/issues/42.21/ocelots-in-arizona?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+hc%2Fmost-recent+%28High+Country+News+-+Most+Recent%29](http://www.hcn.org/issues/42.21/ocelots-in-arizona?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+hc%2Fmost-recent+%28High+Country+News+-+Most+Recent%29).

<sup>5</sup> Arizona Daily Star, *Conservation group photo "most likely" of an ocelot, Game and Fish now says*, February 10, 2011, available at: [http://azstarnet.com/news/blogs/desertblog/conservation-group-photo-most-likely-of-an-ocelot-game-and/article\\_ff35d4c4-3565-11e0-8a8d-001cc4c002e0.html](http://azstarnet.com/news/blogs/desertblog/conservation-group-photo-most-likely-of-an-ocelot-game-and/article_ff35d4c4-3565-11e0-8a8d-001cc4c002e0.html); 75 Fed. Reg. 52547 (August 26, 2010).

<sup>6</sup> Arizona Game and Fish Department, *Arizona Game and Fish collects ocelot found dead near Globe*, April 23, 2010, available at: <http://azgfd.net/artman/publish/NewsMedia/Arizona-Game-and-Fish-collects-ocelot-found-dead-near-Globe.shtml>; Arizona Game and Fish Department, *Rare ocelot observed in Southern Arizona*, available at: [http://www.azgfd.gov/w\\_c/es/ocelot2.shtml](http://www.azgfd.gov/w_c/es/ocelot2.shtml).

<sup>7</sup> Arizona Game and Fish Department, *Rare Ocelot Observed in Southern Arizona*, February 8, 2011, available at: [http://www.azgfd.gov/w\\_c/es/ocelot2.shtml](http://www.azgfd.gov/w_c/es/ocelot2.shtml).

<sup>8</sup> Arizona Daily Star, *5<sup>th</sup> ocelot sighting confirmed*, December 3, 2011, available at: [http://tucson.com/news/science/environment/th-ocelot-sighting-confirmed/article\\_bd63c811-1745-50f5-9786-](http://tucson.com/news/science/environment/th-ocelot-sighting-confirmed/article_bd63c811-1745-50f5-9786-)

In November 2012, a remote camera set up in the Huachuca Mountains by the University of Arizona's Jaguar Survey and Monitoring Project photographed a male ocelot believed to be the same one previously photographed. This picture was taken four miles from the site of the previous photographs, indicating the ocelot was moving within the southern Arizona mountain range.<sup>9</sup> Most recently, a letter sent from FWS to the Forest Supervisor at Coronado National Forest regarding reinitiating formal consultation for the Rosemont Copper Company Project Mine Plan of Operations identified an April 2014 photograph confirming a lone male ocelot in the Santa Rita Mountains.<sup>10</sup>

In 1972, FWS first listed ocelot as a foreign endangered species under the Endangered Species Conservation Act, the ESA's predecessor. 37 Fed. Reg. 6476 (March 30, 1972). In 1982, FWS listed the U.S. population of the ocelot as endangered under the ESA, including those found in southern Texas and southeastern Arizona. 47 Fed. Reg. 31670 (July 21, 1982). When it listed the ocelot as an endangered species, FWS did not make a critical habitat determination citing the possibility that doing so could be detrimental to the conservation of the species. *Id.* FWS stated, as one of its reasons for not designating critical habitat, that because the ocelot is extremely commercially valuable—selling for as much as \$400 in 1982—identifying critical habitat would draw attention to the U.S. population's location, possibly encouraging illegal capture. *Id.* In addition, some of the U.S. ocelot population's Texas habitat was already protected through the Laguna Atascosa Nation Wildlife Refuge. *Id.*

In October 2006, FWS signed a safe harbor agreement<sup>11</sup> with Environmental Defense that protects private land owners in Texas for the counties of Cameron, Hidalgo, Kenedy, Star and Willacy. The safe harbor agreement covers the habitats of ocelots for 30 years.<sup>12</sup> In 1990, FWS developed a recovery plan for the ocelot pursuant to ESA Section 4(f).<sup>13</sup> 16 U.S.C. § 1533(f). In 2010, FWS developed and solicited public comment on a Draft Ocelot Recovery Plan, First Revision.<sup>14</sup> 75 Fed. Reg. 52547 (August 26, 2010). Most recently, in 2013, FWS published a notice of initiation of review and a request for information on the ocelot pursuant to its 5-year status review. 78 Fed. Reg. 8576; 16 U.S.C. § 1533(c)(2).

## II. STATUTORY FRAMEWORK

### a. ESA Section 7

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98afc850c5a1.html; Arizona Game and Fish Department, *Game and Fish gets another photo of rare ocelot*, July 6, 2011, available at: <http://azgfd.net/artman/publish/NewsMedia/Game-and-Fish-gets-another-photo-of-rare-ocelot.shtml>; Arizona Game and Fish Department, *Probable Ocelot Sighting in Arizona on Feb. 5*, March 9, 2012, available at: <http://azgfd.net/artman/publish/NewsMedia/Probable-ocelot-sighting-in-Arizona-on-Feb-5.shtml>; Arizona Game and Fish Department, *Game and Fish obtains new photos of ocelot in the Huachuca Mountains*, November 20, 2012, available at: <http://azgfd.net/artman/publish/NewsMedia/Game-and-Fish-obtains-new-photos-of-ocelot-in-the-Huachuca-Mountains.shtml>  
<sup>9</sup> University of Arizona, *Wildlife Monitoring Cameras Click Jaguar and Ocelot Photos*, December 20, 2012, available at: <http://uanews.org/story/wildlife-monitoring-cameras-click-jaguar-and-ocelot-photos>.

<sup>10</sup> United States Department of the Interior U.S. Fish and Wildlife Service letter, May 16, 2014, obtained through FOIA request regarding APHIS operations in Arizona and New Mexico.

<sup>11</sup> Under Section 10 of the ESA, FWS may grant an incidental take permit to a private landowner if she agrees to maintain, create, restore, or improve habitat for threatened and endangered species on her land. 16 U.S.C. 1539(a)(1)(A). If a private landowner enters into a safe harbor agreement, in exchange for the habitat maintenance or modifications, the landowner is assured that FWS will not require additional measures from her in the future to continue to be protected from take liability under the ESA.

<sup>12</sup> Environmental Defense SHA for Ocelot, October 17, 2006, available at: [http://ecos.fws.gov/conserv\\_plans/PlanReport?plan\\_id=4130&region=2&type=SHA&rtype=1](http://ecos.fws.gov/conserv_plans/PlanReport?plan_id=4130&region=2&type=SHA&rtype=1).

<sup>13</sup> U.S. Fish and Wildlife Service. 1990. Listed Cats of Texas and Arizona Recovery Plan (With Emphasis on the Ocelot). U.S. Fish and Wildlife Service, Albuquerque, New Mexico. 131 pp.

<sup>14</sup> Ocelot Recovery Plan, Draft First Revision, available at: [http://ecos.fws.gov/docs/recovery\\_plan/100826.pdf](http://ecos.fws.gov/docs/recovery_plan/100826.pdf).

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The ESA's fundamental purpose is to conserve endangered and threatened species, and the ecosystems upon which they depend for survival and recovery. 16 U.S.C. § 1531(b). ESA Section 7 imposes a substantive duty on all federal agencies to ensure their activities do not jeopardize the continued existence of a listed species. 16 U.S.C. § 1536(a)(2). The ESA also establishes consultation processes to facilitate federal agencies' compliance with this duty. *Id.* This process requires initiating formal consultation when an agency determines its actions may affect an endangered species. 50 C.F.R § 402.14.

Under the ESA, "agency action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal Agencies in the United States . . ." 50 C.F.R. § 402.02. An agency must initiate formal consultation once it determines its actions may affect a listed species. 50 C.F.R. § 402.14.

### **b. Formal Consultation**

Wildlife Services requested initiation of formal consultation with FWS in 1995 for its nationwide program's effects on jaguar. That formal consultation resulted in a 1999 Biological Opinion and a determination that the level of take<sup>15</sup> expected from Wildlife Services' activities was "not likely to jeopardize the continued existence of the jaguar through its range." 1999 Biological Opinion at 13. That 1999 Biological Opinion indicates FWS completed a Biological Opinion on August 15, 1997 for the south Texas ocelot and jaguarundi populations, but does not indicate FWS completed a Biological Opinion for the southeastern Arizona ocelot population. *Id.* at 1.

However, in recent years, FWS completed two biological opinions for activities that may affect the ocelot: one the U.S. Army related to the Ongoing and Future Military Operations and Activities at Fort Huachuca, and another for the Coronado National Forest related to the Rosemont Copper Mine project in Pima County.<sup>16</sup> Both Biological Opinions indicate that the respective agencies' preliminary biological assessments concluded their activities may affect the endangered ocelot, therefore triggering formal consultation with FWS. *See* 16 U.S.C § 1536(a)(2); 50 C.F.R. § 402.14.

In addition, a November 1998 Environmental Assessment for Wildlife Services' Predator Damage Management on Federal Public Lands in Arizona indicates the continuation of the current predator damage management program's use of trail dogs may affect jaguar, ocelot, and jaguarundi. 1998 Environmental Assessment at 4-13. The 1998 Environmental Assessment admits that formal consultation with FWS is required for ocelot. *Id.*

### **c. Wildlife Services' Activities May Affect Continued Existence of Ocelot**

Because evidence indicates Wildlife Services' activities may adversely affect jaguar populations in southeastern Arizona, and ocelot are known to inhabit the same and similar areas as jaguar and are prone to similar risks as the jaguar, Wildlife Services' activities may adversely affect and jeopardize the continued existence of the ocelot population in that same area. There is ample evidence that Wildlife Services' activities substantially and adversely affect the jaguar population, as acknowledged by FWS itself in the 1999 Biological Opinion. That Biological Opinion implemented five mandatory reasonable

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<sup>15</sup> Under the ESA, take means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

<sup>16</sup> U.S. Fish and Wildlife, Arizona Ecological Services, Biological Opinions, available at: <http://www.fws.gov/southwest/es/arizona/Biological.htm>

and prudent measures to address Wildlife Services' activities precisely because such activities "may adversely affect the jaguar." The 1999 Biological Opinion described some of the effects of the Wildlife Services program:

Actions that may affect the jaguar include clearing of habitat, destruction of riparian areas, fragmentation or blocking of corridors that jaguars may use, and any trapping or animal control activities designed to target the jaguar or other large predators. Such activities may also prevent jaguars from re-colonizing previously inhabited, or otherwise suitable areas. M-44 ejector devices with cyanide capsules used by [Wildlife Services] to accommodate stockmen concerns over predator losses may be of threat to the jaguar (Terry B. Johnson, AGFD, *in litt.*, 1993). The jaguar may also be victims of traps targeted for other predators such as bears and mountain lions.

1999 Biological Opinion at 5. The 1999 Biological Opinion further found Wildlife Services' "animal damage control activities . . . could result in the direct take of jaguars." *Id* at 6.

Like the jaguar, ocelot have a historic range from Central and South America into southern North America, including the United States. 37 Fed. Reg. 6476 (March 30, 1972). The ocelot also prefers dense cover and warm tropical climates, but can occupy a variety of habitats.<sup>17</sup> Ocelot prey includes rabbits, birds, fish, rodents and lizards. Although jaguar and ocelot prey differs, mainly due to their size difference, their preferred range and habitat are similar, as are the threats and risks to ocelot individually and to ocelot habitat. Given the similarities between ocelot and jaguar, both in terms of habitat, range, threats, and risks, Wildlife Services has an obligation to consult with FWS over the affects of its actions on ocelot in southeastern Arizona.

Without formal consultation pursuant to 16 U.S.C. § 1536(a) and 50 C.F.R. § 402.14, Wildlife Services cannot conclude its activities do not adversely affect ocelot populations or jeopardize the species' continued existence. Therefore, Wildlife Services must initiate formal consultation with FWS under ESA Section 7 regarding its activities' effects on the ocelot population in southeastern Arizona.

### **III. NOTICE OF VIOLATION**

Wildlife Services and its officials are violating, and will continue to violate, ESA Section 7, by failing to initiate formal consultation with FWS for activities that may affect the continued existence of the ocelot population in southeastern Arizona as required by 50 C.F.R. § 402.14. *See also* 16 U.S.C. § 1536(a)(2). Wildlife Services must initiate formal consultation with FWS to determine whether its actions, and their effects on the continued existence of the ocelot population in southeastern Arizona, appreciably reduce the likelihood of survival and/or inhibit the recovery of the ocelot.

### **IV. CONCLUSION**

We request Wildlife Services take immediate action to remedy ongoing violations of the ESA that may affect the southeastern Arizona ocelot population. Wildlife Services should implement all available measures to avoid continued violation of ESA Section 7. If, during the pendency of this 60-day notice period, Wildlife Services wishes to meet with the Animal Welfare Institute and WildEarth Guardians to discuss the program's potential effects on the continued existence and recovery of the ocelot population,

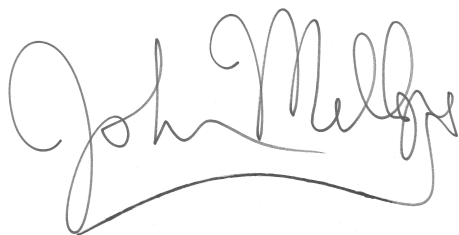
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<sup>17</sup> U.S. Fish and Wildlife, Ocelot, January 2010, available at: <http://www.fws.gov/endangered/esa-library/pdf/ocelot.pdf>.  
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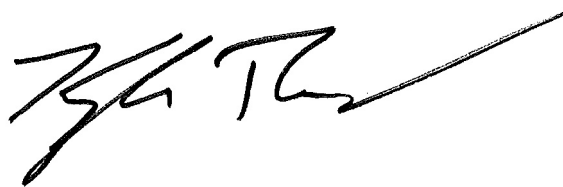
or the program's duties under the ESA to initiate formal consultation with FWS, both organizations welcome such engagement.

Please feel free to contact me if Wildlife Services is interested in meeting, or if you have any questions or concerns regarding this notice of intent to sue.

Sincerely,



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