



CENTER for BIOLOGICAL DIVERSITY

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## FACSIMILE TRANSMITTAL SHEET

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TO:

Larry D. Voyles, Director  
Arizona Game and Fish Department  
5000 W. Carefree Highway  
Phoenix, AZ 85086-5000  
Fax: 623) 236-7299

Ken Salazar  
Secretary of the Interior  
1849 C Street N.W.  
Washington, D.C. 20240  
Fax: (202) 208-6950

FROM: John Buse

DATE: May 12, 2009

PAGES (INCLUDING COVER): 7

RE: *Notice of Intent to Sue for Violations of Section 9 of the Federal  
Endangered Species Act for Taking Jaguar*

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NOTES/COMMENTS:

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John Buse, Senior Attorney • 351 California St., Suite 600 • San Francisco, CA 94104  
Phone: 323-533-4416 • Fax: 415-436-9683 • [jbuse@biologicaldiversity.org](mailto:jbuse@biologicaldiversity.org)



CENTER for BIOLOGICAL DIVERSITY

**VIA FACSIMILE TRANSMISSION AND CERTIFIED MAIL, RETURN RECEIPT  
REQUESTED**

May 12, 2009

Larry D. Voyles, Director  
Arizona Game and Fish Department  
5000 W. Carefree Highway  
Phoenix, AZ 85086-5000  
Fax: 623) 236-7299

Ken Salazar  
Secretary of the Interior  
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**Re: Notice of Intent to Sue for Violations of Section 9 of the Federal Endangered Species  
Act for Taking Jaguar**

Dear Director Voyles:

I am writing on behalf of the Center for Biological Diversity (the "Center") to inform you of violations of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* ("ESA") arising from jaguar capture activities authorized by the Arizona Game and Fish Department ("AZGFD"), and to request that you take immediate action to remedy these violations. This letter is provided to you pursuant to the 60-day notice requirement of the ESA's citizen suit provision, to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g)(2). The activities described in this notice violate the take provisions of the ESA and, if they are not curtailed, the Center intends to commence a civil action against you and other responsible state employees, acting in their official capacity, for violations of section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

1. Noticing Party

The Center is a non-profit corporation with approximately 60,000 members, and with offices in Arizona, New Mexico, California, Oregon, and Washington, D.C. The Center is dedicated to the preservation, protection, and restoration of biological diversity, native species and ecosystems through science, policy, education, and environmental law. The Center's mailing address is P.O. Box 710, Tucson, Arizona 85702-0710.

2. Statutory Framework

Section 9 of the ESA specifically prohibits the "take" of an endangered species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to include harassing, harming, pursuing, wounding or killing such species, 16 U.S.C. § 1532(19). The term "harm" is further defined to include

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John Buse, Senior Attorney • 951 California St., Suite 600 • San Francisco, CA 94104  
Phone: 415-333-4416 • Fax: 415-436-9683 • [jbuse@biologicaldiversity.org](mailto:jbuse@biologicaldiversity.org)

“significant habitat modification or degradation where it ... injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. §17.3 “Harass” includes any “act or omission which creates the likelihood of injury to wildlife by annoying it to such and extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of “take.” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; see also *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994). The ESA’s prohibition on take applies equally to threatened species, unless a species-specific rule promulgated by the FWS pursuant to ESA section 4(d) provides otherwise. 50 C.F.R. § 17.31(a).

The take prohibition applies to any “person,” 16 U.S.C. § 1538(a)(1), including state agencies, 16 U.S.C. § 1532(13). The ESA further makes it unlawful for any person, including state agencies, to “cause to be committed” the take of a species. 16 U.S.C. § 1538(g). Violations of Section 9 are enforceable under the ESA’s citizen-suit provision. 16 U.S.C. § 1540(g).

Courts have repeatedly held that government regulations authorizing third parties to engage in harmful actions can constitute an illegal taking under Section 9 of the ESA. See *Strahan v. Cox*, 127 F.3d 155, 158, 163-64 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998) (state agency caused takings of the endangered right whale because it “licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]”); *Defenders of Wildlife v. Administrator, Env’tl. Protection Agency*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency caused takings of endangered black-footed ferret through its “decision to register pesticides” even though other persons actually distributed or used the pesticides); *Loggerhead Turtle v. City Council of Volusia County*, 148 F.3d 1231, 1253 (11th Cir. 1998) (county’s inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA).

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including ... any ... governmental instrumentality or agency ... who is alleged to be in violation of any provision of [the ESA]. U.S.C. § 1540(g). A plaintiff can seek to enjoin both present activities that constitute and ongoing take and future activities that are reasonably likely to result in take. See *Burlington Northern Railroad*, 23 F.3d 1508 at 1511.

The ESA provides that the Secretary of the Interior (“Secretary”) may permit the take of endangered and threatened species under some circumstances. Section 10(a)(1)(A) provides that the Secretary may issue permits “for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) [of the ESA].” 16 U.S.C. § 1539(a)(1)(A). Section 10(a)(1)(B) provides that the Secretary may permit “any taking otherwise prohibited by [section 9(a)(1)(B) of the ESA] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B).

Section 6(c) of the ESA provides that the Secretary may enter into cooperative agreements with any state that “establishes and maintains an adequate and active program for the conservation of endangered species and threatened species.” 16 U.S.C. § 1535(c). The Secretary must make specific findings that the state program is adequate, and reconfirm these findings on an annual basis. *Id.*

### 3. Factual Background

The jaguar (*Panthera onca*) is the largest extant cat native to North America and the third largest cat globally. At the time of the European colonization of North America, jaguars ranged from California to the Carolinas. Primarily as a result of hunting, trapping, and poisoning by humans, jaguars have been almost entirely extirpated from the United States. In the last decade, however, there have been multiple observations of an estimated four to six individual jaguars in Arizona and New Mexico. These individuals are believed to be part of a larger population of jaguars that ranges from Sonora, Mexico into the southwestern United States.

The jaguar has been formally recognized as an endangered species since 1969. However, prior to 1997, the jaguar was protected under the ESA only in Mexico and Central and South America and not in the United States. In 1979, the U.S. Fish and Wildlife Service (“FWS”) published a notice stating that it had inadvertently excluded jaguars within the United States from the ESA listing and intended to correct the error as quickly as possible. After numerous delays, FWS listed the jaguar as an endangered species within the United States in July 1997. 62 Fed. Reg. 39147.

Jaguars are extraordinarily cryptic and have been observed recently in the United States primarily by automated photography and sightings by hunters. Previous attempts to capture jaguars in the northern portion of their remaining range for research purposes have not been successful: In two of three reported incidents, jaguars died shortly after capture, and in the third instance the jaguar disappeared and his fate is unknown. At least one of the jaguars observed recently in the United States apparently resided within the United States in southern Arizona. This male jaguar, called “Macho B,” was photographed and observed over 60 times north of the U.S.-Mexico border over a span of almost 13 years, from August 31, 1996 to March 2, 2009.

On or about February 18, 2009, Macho B was discovered by researchers in a snare trap. AZGFD stated that the snare had been set as part of a research project monitoring habitat connectivity for mountain lions and black bears. The mountain lion/black bear study was conducted by employees, agents, and/or contractors of AZGFD. The capture site was located near the international border southwest of Tucson in an area known to have been recently utilized by Macho B. Following his capture, Macho B was anesthetized, fitted with a GPS tracking collar, and released. At the time of his capture, Macho B weighed about 118 pounds and appeared healthy, despite indications that he was over 15 years old – the oldest known jaguar found in the United States.

Following his release, Macho B remained within a few miles of the capture site. Based on

location data showing reduced movement and foraging, however, AZGFD officials concluded that Macho B's health might be in jeopardy, and determined that he should be recaptured for veterinary attention. After at least one unsuccessful capture attempt, he was recaptured on March 2, 2009, sedated, and transported by helicopter to the Phoenix Zoo. AZGFD officials initially stated that a physical assessment showed Macho B had normal vital signs, but subsequent tests suggested that he was suffering from acute kidney failure, and he was euthanized the same day.

One of the zoo veterinarians who performed the necropsy on Macho B concluded that the stress of capture and sedation contributed to the jaguar's declining health. Although AZGFD officials have stated that Macho B was in poor health at the time of his recapture due to kidney failure, this assertion – and the need for euthanization – was disputed by a veterinary pathologist who examined tissue samples from Macho B and suggested that he may have instead been suffering from simple dehydration.

Despite the death of Macho B and evidence suggesting that his capture contributed to his decline and ultimately his death, AZGFD and FWS officials have stated that they plan on capturing a jaguar again if the opportunity arises.

#### 4. Violation of the ESA

##### a. AZGFD Authorized Activities that Resulted in Jaguar Capture Without an Incidental Take Permit

The capture, sedation, and capture-related death of Macho B constitute the "taking" of an endangered wildlife species. This take occurred as the direct and proximate result of AZGFD's authorization and implementation of the black bear/mountain lion study and is thus prohibited by the ESA unless AZGFD has a permit allowing the take.

Following the capture of Macho B, AZGFD officials denied that there was any intentional effort to capture a jaguar, but asserted that the capture was covered by an incidental take permit issued by FWS for the black bear/mountain lion study. To date, however, the Center's repeated requests to AZGFD have not yielded any documents or other evidence that incidental taking of jaguars in connection with the black bear/mountain lion study was in fact authorized. Unless and until such documents are produced, the Center must conclude that AZGFD was not permitted to incidentally take jaguars in connection with the black bear/mountain lion study. Moreover, there is no evidence that AZGFD has been authorized to incidentally take jaguars in connection with any other activity. Accordingly, if the taking was indeed incidental to an otherwise lawful activity such as the black bear/mountain lion study as AZGFD asserts, the taking is prohibited because no applicable incidental take permit exists.

Even if AZGFD is able to produce an incidental take permit authorizing jaguar capture as part of the black bear/mountain lion study, there is evidence that the capture of Macho B was not incidental to the study but was a *purposeful* objective of the study. The researchers conducting

the study had previously expressed an intent to capture a jaguar, set traps in an area of known jaguar activity, and carefully prepared for the capture of a jaguar when it became known that Macho B was in the vicinity. This degree of intent and direction exceeds any conceivable incidental take authorization for the capture of jaguars.

b. AZGFD Authorized Activities that Resulted in Jaguar Capture Without a Purposeful Take Permit

There is likewise no legal authority for the capture of jaguars as a purposeful objective of the black bear/mountain lion study or any other activity.

FWS has entered into a cooperative endangered species conservation agreement with AZGFD pursuant to section 6 of the ESA. In connection with this agreement, AZGFD has been authorized to purposefully take certain endangered and threatened species for scientific purposes or to enhance the propagation or survival of affected species under section 10(a)(1)(A) of the ESA. For several reasons, however, this authority does not permit the taking of jaguars.

First, the black bear/mountain lion study is not an activity covered by AZGFD's ESA section 6 cooperative agreement. FWS's take authorization under ESA section 10(a)(1)(A) extends only to specific activities performed by the AZGFD's director, employees, and agents. The authorized activities do not include the black bear/mountain lion study.

Second, there is no authority in AZGFD's ESA section 6 cooperative agreement for AZGFD to capture jaguars in connection with the black bear/mountain lion study or any other activity. To the extent that the cooperative agreement could be construed to authorize purposeful take of jaguars, it further provides no quantification of allowable take of jaguars and no terms or conditions governing such take, contrary to the requirements of the ESA.

Third, AZGFD's ESA section 6 cooperative agreement authorizes the take of endangered or threatened species for conservation purposes in connection with specific activities only if the taking is "not reasonably anticipated to result in ... the death or permanent disabling of the specimen ..." In two of three previous incidents involving attempts to capture and collar northern jaguars, the jaguars in question have died within days or weeks. Accordingly, even if the cooperative agreement could somehow be interpreted to cover the black bear/mountain lion study and to authorize taking of jaguars, it does not permit the capturing and collaring of jaguars given the reasonably foreseeable and unacceptably high risk that this activity would result in death.

c. Future Take of Jaguars is Reasonably Foreseeable and May be Enjoined Under the ESA

Both AZGFD and FWS have announced that they intend to capture jaguars in the United States if the opportunity arises. It is reasonably foreseeable that future activities permitted by AZGFD will result in additional prohibited take of jaguars unless and until such activities are enjoined.

Notice of Intent to Sue for Violations of Section 9 of the Federal Endangered Species

May 12, 2009

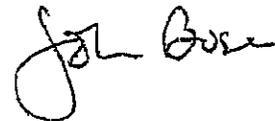
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Activities authorized by AZGFD that are reasonably likely to result in prohibited take of jaguars may be enjoined under the ESA. See *United States v. Town of Plymouth*, 6 F.Supp.2d 81, 91 (D.Mass. 1998) (preliminary injunction issued against township which authorized off-road vehicles on a beach that was habitat for threatened piping plovers); *Defenders of Wildlife v. Administrator, Env'tl. Protection Agency*, 668 F.Supp. at 1356-1357, *aff'd* 882 F.3d 1294 (enjoining the EPA from continuing its registration of strychnine until it could do so without illegally taking protected species of wildlife).

Accordingly, AZGFD has violated and continues to violate section 9 of the ESA. Pursuant to the citizen suit provision of the ESA, 16 U.S.C. sections 1540(g)(1)(A) and (2)(A), the Center is providing you with sixty days' notice of our intention to commence a civil action to challenge the foregoing violations of law and any violations that may occur after service of this notice letter, and to seek their remediation in a court of law.

We are hopeful that AZGFD will take all necessary measures to avoid the unauthorized future taking of jaguars, and that its representatives will contact us prior to the commencement of legal action to discuss its obligations under the ESA. If you have any questions about the issues raised in this letter, please feel free to contact me at any time.

Sincerely,



John Buse  
Senior Staff Attorney  
Center for Biological Diversity