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Restraining ESA Critical Habitat: Ninth Circuit Overturns FWS's Jaguar Critical Habitat Designation

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On May 17, 2023, in *Center for Biological Diversity v. U.S. Fish & Wildlife Service* (*CBD v. FWS*),[1] the Ninth Circuit Court of Appeals set aside parts of the U.S. Fish and Wildlife Service's (FWS) designation of critical habitat, under Section 4 of the Endangered Species Act (ESA), for the jaguar in southeastern Arizona. That decision may have important implications for the application of the ESA's critical habitat designation provisions—especially for unoccupied habitat—in other situations.

This case arose out of a challenge by Rosemont Copper Company to portions of the jaguar critical habitat designation. That challenge was in response to the Center for Biological Diversity's challenge to the Biological Opinion for the Rosemont Mine, located in the Santa Rita Mountains, as concerned potential effects on jaguar critical habitat.

The Ninth Circuit held that the district court had properly vacated FWS's prior designation of Unit 3 as occupied critical habitat, and it also set aside the FWS's designation of the same area and Subunit 4b as "unoccupied" critical habitat, which the district court had upheld.[2] The net result was a remand to the agency "for further proceedings consistent with this opinion,"[3] which likely will be another effort by FWS to designate jaguar critical habitat for these areas, this time in compliance with the statutory and regulatory guidance and standards clarified by the court's decision.

Legal Background, FWS's Designation of Jaguar Critical Habitat, and the Biological Opinion for the Rosemont Mine

ESA Section 4 generally requires the designation of critical habitat for listed species. The jaguar (*Panthera onca*) has been listed (under a precursor to the present ESA) since 1972 and was formally listed as a domestic (U.S.) endangered species in 1997. FWS, for its own reasons, treats 1972 as the species' listing date for the U.S. population, which is relevant to the critical habitat designation.

The jaguar is a large felid found in South America, Central America, Mexico, and the southwestern United States. The species' total range is over 3,000,000 square miles. But the portion in the United States is less than one percent of that. Generally, jaguars occurring in the United States are understood to be individuals dispersing north from Mexico, and the closest breeding population is about 130 miles south of the United States-

Mexico border.[4]

In the challenged 2014 designation, FWS designated over 764,000 acres in southern Arizona and southwestern New Mexico as jaguar critical habitat. This case concerns Unit 3 (351,000 acres including areas in the Santa Rita Mountains) and Subunit 4b (12,710 acres connecting the Whetstone Mountains and the Santa Rita Mountains).

Under the ESA, habitat may be designated as critical for listed species if it is "essential" to the "conservation of the "species."[5] The ESA identifies two types of critical habitat: occupied and unoccupied. For an "occupied" designation, the species must be present in the area at the time the species is listed, and the area must have the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. The species must use the area with sufficient regularity that it is likely to be present during any reasonable span of time.[6]

For unoccupied areas (where the species is not present at the time of the listing), the specific areas themselves must be essential to the species' conservation.[7] At the time of the FWS designations here, the agency's regulations instructed that designation outside the geographical area presently occupied by a species could only occur when a designation limited to the occupied area would be inadequate to ensure the conservation of the species.[8] Supreme Court precedent indicates that areas can only be designated as "critical habitat" (whether occupied or unoccupied) when those areas are "indispensable" to the conservation of the species.[9] The standard for designating unoccupied critical habitat is "more demanding" than the standard for designating occupied crucial habitat.[10]

For an area to be "essential" for conservation of a species, it must be more than beneficial. The agency must determine that the species cannot be brought "to the point at which the measures provided pursuant to [the ESA] are no longer necessary" without the critical habitat designation.[11]

The ESA requires the consideration of the economic impact of designating a particular area as critical habitat. Where the FWS concludes that the harms of a particular designation outweigh the benefits, the area may be excluded from a critical habitat designation.[12]

FWS determined that Unit 3 was "occupied" by the jaguar in 1972 and designated the area as occupied critical habitat based on a record of a jaguar in 1965 in the portion of the unit in the Patagonia Mountains, photos of a male jaguar in the Santa Rita Mountains in 2012 and 2013, and its finding that the mountain ranges within Unit 3 contained all the "primary constituent elements for jaguars."[13] But the ESA requires occupancy at the time of the listing.

Acknowledging uncertainty about occupancy at listing, FWS then also considered whether Unit 3 and Subunit 4b could be designated as "unoccupied" habitat. FWS concluded that the areas also should be designated as unoccupied habitat because there was evidence of recent

occupancy in Unit 3, the area contained features that constitute jaguar habitat, and the area contributed to the jaguar's presence. FWS designated Subunit 4b as unoccupied critical habitat concluding it was essential to the conservation of the species because it connected the Whetstone and Santa Ria Mountain ranges and represented areas through which a jaguar may travel between Subunit 4a and Mexico.[14]

With respect to the Rosemont Mine, FWS's ESA Section 7 biological opinion concluded the Mine was not likely to destroy or adversely modify critical habitat for the jaguar. The Center for Biological Diversity sued on the Biological Opinion for the mine. Rosemont intervened and cross claimed arguing FWS improperly designated Unit 3 and Subunit 4b as critical habitat.

Ninth Circuit Finds Error in FWS's Designation of Unit 3 and Subunit 4a

Before the Ninth Circuit, FWS argued that the designated areas were “essential” to conservation because they would promote jaguar “recovery.” The Ninth Circuit rejected that argument because the designation of critical habitat requires the area be “necessary” or “indispensable,” not merely “beneficial” or capable of “promoting” survival or recovery.[15]

The Ninth Circuit concluded that FWS improperly designated Unit 3 as “occupied” critical habitat based on irrelevant photographs from decades after the jaguar was listed as endangered and a single timely sighting from a different mountain range than the Santa Rita Mountains where the mine is located. The agency lacked adequate evidence or information to conclude jaguars occupied the Unit 3 area at the time of the listing in 1972.[16]

The court also concluded that the FWS's designation of the areas as “unoccupied” critical habitat was in error. FWS did not make the proper two-step inquiry to designate unoccupied habitat as critical. FWS failed to consider, as it must, whether the designation of areas occupied by jaguars in 1972 would be inadequate to ensure the conservation of the species. FWS also conceded there was nothing in its designation determination establishing that the jaguar will be unable to recover or survive if Unit 3 is not designated as critical habitat. The court concluded that the FWS designation of Subunit 4b as an essential travel corridor was not supported by the record because FWS had designated a separate corridor providing the same connectivity and there was a complete absence of evidence jaguars had ever used Subunit 4b to travel between the U.S. and Mexico or for any other purpose.[17]

Given the Ninth Circuit's conclusion that the critical habitat designations must be vacated, the court held that it was premature to order FWS to reconsider its economic-impact analysis as it relates to Rosemont's interests. The court also then did not reach the question of the appropriateness of the “no adverse modification of critical habitat” determination in the Rosemont Mine Biological Opinion because that critical habitat designation needed to be redone by FWS.[18]

The Ninth Circuit remanded to the agency, thus effectively requiring FWS to redo its jaguar critical habitat designations in these areas.

Implications of the Ninth Circuit's Decision

The Ninth Circuit's decision shows that the court will hold FWS to the limits and requirements of the ESA for critical habitat designations for both occupied and unoccupied areas. The court's decision gives further meaning to some of the limits on the geographic extent or reach of critical habitat designations originally included by Congress. As the ESA's legislative history provides, in the 1978 ESA amendments, Congress was presented with testimony that the "[then-]Office of Endangered Species ha[d] gone too far in designating territory as far as the eyes can see and the mind can conceive" as critical habitat.[19]

The *CBD v. FWS* decision is consistent with prior Ninth Circuit decisions requiring FWS to document the presence of a species in an area before imposing ESA regulatory measures.[20] It is also consistent with the Supreme Court's recent critical habitat decision in the *Weyerhaeuser*/dusky gopher frog case, indicating that the Service must first consider whether an area can even be "habitat" for a species before designating it as "critical" habitat under the ESA.[21]

To be sure, on the question of the propriety of the FWS's designation of unoccupied jaguar habitat in *CBD v. FWS*, it was a split 2-1 panel decision. The partial dissent by Judge Holly Thomas essentially presented a difference of view as to whether FWS had met its burden to show that the unoccupied area itself was essential for the conservation of the species.[22] However, given the reasoned response of the majority to the dissent's points,[23] it appears likely that the majority opinion will prevail as the position of the Ninth Circuit even if there is a rehearing request.

There are likely to be more judicial developments in this area, perhaps even before the FWS's jaguar critical habitat redesignation process is complete on remand. For instance, this past February, the State of Alaska challenged the National Marine Fisheries Service's (the FWS's sister ESA-implementing agency)[24] designations of vast areas of critical habitat for two ice seal species—the ringed seal and the bearded seal.[25] That case, and others like it, may help further test and refine the limits of the Services' critical habitat designation authority and the required documentation and information needed to support such designations.

Conclusion

The Services' approach to critical habitat designation has come in three waves. [26] During the first wave, the Services were largely disinterested in critical habitat, declaring that, "in most circumstances," designating critical habitat is of "little additional value for most listed species, yet it consumes large amounts of conservation resources."[27]

The second wave followed a series of lawsuits that enforced the Services' duty to designate critical habitat and overturned their interpretation of the jeopardy and adverse modification standards. The Services then started

designating critical habitat regularly and more expansively. These broad designations reached their zenith for the polar bear[28] and ringed seal designations;[29] the designated habitat for the former being larger than any single state except Alaska or Texas and the latter larger than Texas and New York combined.

The Ninth Circuit's jaguar critical habitat decision falls within the third wave paradigm. Like the *Weyerhaeuser* Supreme Court decision, the Ninth Circuit restrained agency overreach in designating unoccupied critical habitat. While the Services may continue to attempt broad critical habitat designations, the gradual accretion of third-wave cases like *Weyerhaeuser* and *CBD v. FWS* serves as a powerful check to ensure that such agency decisions are properly documented and supported. These decisions also fulfill the ESA's purpose—as stated by Justice Scalia 26 years ago—that the statute "not be implemented haphazardly, on the basis of speculation or surmise."[30] The Ninth Circuit's recent *CBD v. FWS* decision reinforces this "obvious purpose" of the ESA.[31]

[1] 2023 U.S. App. LEXIS 12086 (9th Cir. May 17, 2023).

[2] *Id.*, *31-32, 53-55.

[3] *Id.*, *58.

[4] *Id.*, *10-11.

[5] 16 U.S.C. § 1532(5)(A)(i).

[6] 2023 U.S. App. LEXIS 12086, *28.

[7] *Id.*, *44; 16 U.S.C. § 1532(5)(A)(ii); 50 C.F.R. § 424.12(b)(2) (2021).

[8] *See* 2023 U.S. App. LEXIS 12086, *22. The critical habitat designation regulations have been amended twice—once each by the two prior administrations in 2016 and 2019. The result is that the present critical habitat designation rules largely mirror those at issue in *CBD v. FWS*. *See id.*, *32-33; 50 C.F.R. § 424.12(b)(2) (2021) (current regulation).

[9] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368-69 (2018).

[10] 2023 U.S. App. LEXIS 12086, *21.

[11] *Id*. at *24-25 (citing 16 U.S.C. § 1532(3)).

[12] 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19(c) (2021).

[13] 2023 U.S. App. LEXIS 12086, *28-30.

[14] *Id.* at *41-43.

[15] *Id*. at *27-28.

[16] *Id*. at *28-32.

[17] *Id*. at *48-54.

[18] *Id.* at *55-58.

[19] Staff of S. Comm. on Environment and Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980 (Comm. Print 1982), at 817; *see also* 16 U.S.C. § 1532 (5)(C) (except in those circumstances determined by FWS, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species").

[20] *Arizona Cattle Growers Ass'n v. FWS*, 273 F.3d 1229, 1244-45 (9th Cir. 2001).

[21] 139 S. Ct. at 369.

[22] 2023 U.S. App. LEXIS 12086, *58-74.

[23] *Id.*, *38-54.

[24] Together referred to as the "Services."

[25] *Alaska v. NMFS*, No. 3:23-cv-00032-SLG (D. Alaska filed Feb. 15, 2023).

[26] Murray Feldman & Bailey K. Schreiber, *Critical thinking: ESA critical habitat's ongoing redefinition*, Trends, Vol. 49, No. 2 (Nov./Dec. 2017).

[27] 64 Fed. Reg. 31,871, 31,872 (June 14, 1999).

[28] *See Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544 (9th Cir. 2016).

[29] *See* 87 Fed. Reg. 19,232 (Apr. 1, 2022).

[30] *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

[31] *Id*.

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