

May11, 2011

To:

Attn: Docket No. FWS-R2-ES-2010-0085
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Subject: Public Comments Processing, Attn: [Docket Number FWS-R2-ES-2010-0085]

Concerning the Proposed Rule, Listing and Designation of Critical Habitat Designation for the Chiricahua Leopard Frog (*Lithobates chiricahuensis*)

The Apache County Board of Supervisors appreciates the opportunity to submit comments and information concerning the proposed rule to update the listing for the Chiricahua Leopard Frog (CLF), and to designate critical habitat for the species. While the public has a responsibility to review proposed rules for compliance with the Endangered Species Act, County governments have the additional responsibility for protecting the health, safety and welfare of their citizens, including but not limited to protecting the societal and economic impacts of federal actions. We recognize this responsibility with the utmost of seriousness and feel we need to deal with proposed federal actions that effect local citizen in a thorough and serious manner.

In the "Proposed Rule" to list and designate critical habitat for the CLF, published in the Federal Register / Vol. 76, No. 50 / Tuesday, March 15, 2011(proposed rule), on page 14126 and page 14127 it is stated that the Fish and Wildlife Service's (FWS) intention is that any final action resulting from the proposed rule will be based on the best available science and be as accurate and as effective as possible. Also included is a list of concerns where the FWS is particularly seeking comments. The comments that Apache County are offering will address some of the concerns the FWS are seeking comments on, but will also address concerns where this federal action adversely impacts the ability of local government to carry out its responsibility to the local citizens.

The Apache County Board of Supervisors is offering comments on the impacts of this proposed rule to local citizen because it feels it is important for the FWS to recognize and openly disclose the impacts on the health, safety and welfare of local citizens that result from their actions. While the Endangered Species Act directs the FWS and other federal agencies to conserve endangered and threatened species and the habitats they depend upon, the National Environment Policy Act (NEPA) also requires the agencies to **honestly and openly** disclose both the adverse and beneficial effect of the actions.

A. Comments: Species Listing

1. On page 14129 of the proposed rule, in the first paragraph under (A. *The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*), the FWS has publicly recognizes that “chytridiomycosis and predation by nonnative species as consistently more important threats than these habitat-based factors”. The FWS needs to be applauded for making such a public statement in the proposed rule and to recognize that the leading cause for decline in CLF’s is not due to the actions of local citizens who make their living engaged in commodity production.

For years the listing and conservation of species under the Endangered Species Act has been the tool to stop the production and use of natural resources; as well as a means to replace the use of the best science with the emotional driven agendas of a select few who stood to profit from the controversy and resulting litigation. Hopefully the recovery of the CLF will be based upon good science and common sense solutions that come from honest and well thought out analysis.

The Apache County Board of Supervisors is concerned that the conservation efforts for the CLF does not become another FWS action where new rules are put in place that limit or restrict “multiple use” of land and resources. Throughout Apache County, once productive private, state, or federal land has become so encumbered with use restrictions, requirements and liabilities that the natural resources they once provided are no longer economically available or contributing to the local economy.

2. The FWS has been attempting to protect and preserve the CLF since 2000 and has only been able to document modest population gains in Arizona (page 14129, Summary of Factor C), where an active rearing and reintroduction program that involves the local citizens is taking place.

The Apache County Board of Supervisors is concerned that the conservation efforts for the CLF in Apache County, Arizona does not become another FWS action where federal edicts are handed down from-on-high with the only attempt by the FWS to involve the local citizen is through news releases to the major media and publishing the proposed rule in the Federal Register. It is hoped the efforts to conserve the CLF involves something besides use restrictions, compliances actions or the consumption of private property by the endangered species. A recovery effort that involves more than just federal and/or state employees could be welcomed in Apache County. This program would need to involve and recognize the needs of local citizens and return a value for the conservation effort to the people.

3. The FWS through the implementation of the Endangered Species Act (ESA) has severely impacted the economy of Apache County. The FWS has enacted multiple species listings and the designations of critical habitat that directly impact the ability of the citizens of the county to earn a living. (The local sawmill closed down, many ranching operations have sold out and no longer support local businesses, and local

guide and outfitters are having a hard time booking clients due to declining elk and deer herds.) The current proposed rule to relist the CLF and the designate “Critical Habitat” for this species is just one more set of requirements piled upon the citizen of Apache County.

While the formal listing and critical habitat designation process is ongoing, the FWS is also using a large portion of Apache County as its experimental dumping grounds for Mexican gray wolves to see if they can exist on their own in the wild under today’s social, economic and environmental conditions. All of these federal actions are supported by playing on the emotions of the American public and leading them to believe that all of this is necessary to save the environment from the people like the citizens of Apache County.

The Apache County Board of Supervisors is concerned that the cumulative impacts of the conservation efforts for the CLF, when added to the conservation efforts for loach minnow, spinedace, Apache trout, black-footed ferret, California condor, willow flycatchers, Mexican spotted owls, Mexican gray wolf, Navajo sedge, Zuni fleabane along with the Forest Service Travel Management Rules and many other federal land management requirements, are not being recognized or disclosed by the federal agencies. Disclosures of cumulative and collective impacts are required under NEPA and ESA.

Currently the Apache County Board of Supervisors is constantly dealing with a new federal actions or proposals and with the very limited finances of the county it can hardly keep up with all of the comment and scoping processes, much less tracking how all of these federal actions when considered together impact the county. The only measure the county can track is the continued reduction in jobs, income and tax returns to the county that is occurring. Each year it is getting harder and harder for the county to maintain its roads, provide for fire protection and provide for law enforcement. The federal agencies proposing the new regulations and requirements should have some responsibility for honestly disclosing the collective and cumulative impacts of their various actions.

B. Comments: Critical habitat designation

1. The FWS is proposing one location for CLF “Critical Habitat” designation in Apache County (Unit 26, Concho Bill and Deer Creek). This proposed “Critical Habitat” is a small area, limited to a spring and reach of ephemeral stream that supports a small number of adult frogs. CLF’s were introduced to this location in 2000 and have been restocked multiple times following the initial release. This proposed “Critical Habitat” has limited pool habitat, which limits the population of CLF that can be supported in this location. (Proposed Rule page 14148, column 3, paragraphs 6 & 7; page 14149, column 1, paragraph 1) On page 14148 column 3 paragraph 6 it is stated that this site is essential for the conservation of the species, but then in the description of this site it is stated that this is a very small population and “*Small populations are subject to extirpation from random*

variations in demographics of age structure and sex ratio, and from disease and natural events (Service 2007, p. 38)." It is hard to believe a very small, isolated and vulnerable location such as Concho Bill Springs is essential for the conservation of the species. As with many of the other areas proposed for "Critical Habitat" the small springs and/or stock tanks are shown to have connection to other occupied or potentially occupied sites. This proposed "Critical Habitat" location is not linked to any other habitat and is not going to provide for the expansion of occupied habitat for the species.

The Apache County Board of Supervisors is concerned that the designation of the Concho Bill Springs "Critical Habitat" (Unit 26) is nothing more than an attempt to make all occupied habitat "Critical Habitat" without any consideration of the site's characteristics or the fact that CLF were introduced into this spring in 2000 and there is no record they historically occupied the site.

On page 14135 of the proposed rule the FWS has listed the "Primary Constituents Elements (PCE's) for the CLF. These PCE's are defined to be the *"physical and biological features essential to the conservation of the CLF in areas occupied at the time of listing..." "We consider PCE's to be the physical and biological features that, when laid out in the appropriate quantity and spatial arrangement (emphasis added) to provide for a species' life-history processes, is essential to the conservation of the species."* It is evident that this location does not meet the requirement of the PCE's since the pool habitat is very limited, there is no link between this location and other potential habitat, and it is not certain a population of CLF can be sustained at this site without continued restocking of adult CLF's.

The Apache County Board of Supervisors is not opposed to the reintroduction of CLF's into suitable habitat within the county as part of the recovery of this species as long as the landowner of the site agree and affected citizens are informed and allowed to provide comments pertaining to potentially adverse impacts from introduction of the CLF's at the selected locations. In the past the FWS and the FS have agreed to and then without any further notification of the public or local government, gone on ahead and introduced CLF's (and other candidate T&E species) into areas just prior to them being listed. The FWS then turns around and proposes (and ultimately designates) these locations as "Critical Habitat" as is occurring at Concho Bill Springs. This behind closed doors way of doing business is not honest or ethical and only leads to contempt from the public.

The Apache County Board of Supervisors is also concerned that the designation of the Concho Bill "Critical Habitat" area will be another federal action that burdens the local citizens with un-necessary regulations and requirements, limits their management options, and sets them up to be the pawns in environmental lawsuits, while little or no evidence is being provided that this area will support CLF's in the future. All indications are that the Concho Bill Spring habitat will

not sustain a population of CLF's; thus is not essential for the conservation of the species.

C. Comments: Human Dimension, Socio-economic impacts

1. The Service is required to analyze economic impacts that may arise from their proposed critical habitat designations as well as fully displaying socioeconomic (human dimension) impacts. In past in their NEPA effects analyses, the Service has failed to identify and fulfill statutory and regulatory requirements by not including adequate and detailed socioeconomic, cultural or distributional effects analyses. The Service has not analyzed the distributional effects (e.g., equity) or federal rights regulations. On numerous occasions, local government and private land and water management and development have been subjected to mitigation requirements for listed species and their critical habitat, that include either dedication of the portion of the property or water for habitat or the purchase of mitigation lands or water to offset the impacts created by the development actions. Local governments and private land owners have also been required to bear the costs extensive, time consuming and expensive analysis in order to proceed with projects. Without adequate and detailed socioeconomic, cultural or distributional effects analyses, the Agency, the public and local governments cannot properly assess the proposed rule changes.

The Service should provide detailed assessment about who will bear the costs in management changes, use reduction or loss of property rights, such as depreciation of land values. Presidential Executive Order 12630, *Takings Implication Assessment* (TIA), provides the analytical process for analyzing takings implications as well as assessing disproportionate effects. The Service should conduct a TIA to analyze the effects on land and water rights where appropriate.

2. In the past, the Service has failed to include the regulatory impact analysis per Presidential Executive Order 12291) and the Regulatory Flexibility Analysis (5 U.S.C. 603 & 604). The President Executive Order 13563 of January 18, 2011, *Improving Regulation and Regulatory Review*, reaffirms the Regulatory Flexibility Analysis: "...Each agency must propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs and tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account the costs of cumulative regulations".

These federal requirements are further underscored in the recent *Presidential Memorandum of January 18, 2011 Regulatory Compliance* and the *Regulatory Flexibility, Small Business, and Job Creation Memorandum for the Heads of Executive Departments and Agencies* - to promote its central goals, the RFA imposes a series of requirements designed to ensure that agencies produce regulatory flexibility analyses that give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on small businesses.

The Service should analyze and fully display to the public in the Agency's NEPA analyses, and explain how the proposed rule changes may impact local businesses for compliance with these federal statutes, regulations, presidential executive orders and memorandum directives cited above.

3. In the past NEPA analyses, the Service has failed to communicate with each minority or low income community about the proposed rule change, as required by the Presidential Executive Order and specified the CEQ Environmental Justice Interim Guide. The Guide is designed specifically for federal agencies in addressing the effects on protected classes of citizens. The Service should provide outreach to minority and low income communities in the proposed critical habitat area, as well as throughout the impacted counties and comply with other Environmental Justice processes, procedures and communication requirements.

4. The Service has failed to coordinate development of the proposed rule changes with local government. The Service cannot know if designation may have any benefit or detriment to local governments without coordination with these governments, which have responsibility for the economic and social health and welfare of its citizens. Under the Tenth Circuit ruling in *Apache County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), a NEPA analysis for critical habitat designation would be required. The NEPA process requires early involvement of local government and that the Service takes into account local planning. The Service should immediately invite local government involvement with the proposed rule change development, and should additionally analyze and document local resource and economic planning.

Apache County Board of Supervisors requests that our affected County be considered for participation in any continued proposed amendment of part 17, subchapter B of Chapter I, Title 50 of the Code of Federal Regulations. We believe it is time to begin coordination in order to discuss the consistencies, conflicts, opportunities for coordination, and coordinated monitoring. We request a meeting with you, as soon as possible, for coordination for the Uplisting and Critical Habitat Designation for the Chiricahua Leopard Frog. The purpose is to lay out the framework for coordination which is mandated by Congress and pursuant to the National Environmental Policy Act (42 USC §4331(b) (5), early in the Uplisting and Critical Habitat Designation process

Conclusion

The mission of the U.S. Fish and Wildlife Service is to conserve, protect and enhance fish, wildlife, plants and their habitats for the continuing benefit of the American people. This mission will work much better when done with the support of local citizen. Local citizen support is only gained through open honest communications and when a sense of fairness is part of the equation. The FWS needs to honestly consider the impacts of their actions on the local citizens.

Due to the potential for controversy and potential for significant impacts to the economy of Apache County; thus adverse impacts to the health, safety and welfare of the local

citizens that could result from designation of critical habitat and the listings, we feel that it is imperative that the FWS honestly consider the above comments and deal honestly and fairly with the citizens of Apache County.

Thank you for your attention to our comments.

Sincerely,

SIGNATURES OF APACHE COUNTY BOARD OF SUPERVISORS