

November 28, 2012

Daniel Ashe  
Director, U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

Re: Endangered Status for the Acutildea Cactus and the Fickeisen Plains Cactus and Designation of Critical Habitat

Dear Mr. Ashe:

The Office of Advocacy (Advocacy) submits these comments on the U.S. Fish and Wildlife Service's (FWS) proposed rule 12-Month Finding for the Lemmon Fleabane; Endangered Status for the Acutildea Cactus and the Fickeisen Plains Cactus and Designation of Critical Habitat.<sup>1</sup> Although FWS has not published an Initial Regulatory Flexibility Analysis (IRFA) with this proposed rule, Advocacy recognizes that FWS has published a proposed rule that will, when finalized, require FWS to issue an IRFA or a certification of "no significant impact" at the time of publication of all of its proposed rules designating critical habitat.<sup>2</sup> Advocacy is pleased that FWS is taking this important step to come into compliance with the Regulatory Flexibility Act. Advocacy is providing these comments in anticipation of FWS publication of its IRFA or certification.<sup>3</sup>

#### Background on Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>4</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>5</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of

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<sup>1</sup> *12-Month Finding for the Lemmon Fleabane; Endangered Status for the Acutildea Cactus and the Fickeisen Plains Cactus and Designation of Critical Habitat*, 77 Fed.Reg. 60510 (October 3, 2012).

<sup>2</sup> *Revisions to the Regulations for Impact Analyses of Critical Habitat*, 77 Fed. Reg. 51501 (August 24, 2012).

<sup>3</sup> 5 U.S.C. §601 et. seq.

<sup>4</sup> 5 U.S.C. § 601 et seq.

<sup>5</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>6</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>7</sup>

#### Commercial and Recreational Effects of this Critical Habitat Designation

Although it is not clear how much land may be affected, FWS has indicated that land proposed to be designated as critical habitat under this proposed rule is being used for commercial, agricultural and recreational purposes. For example, FWS has indicated that cattle grazing operations are taking place in areas where the Fickeisen cactus is present and that these operations may threaten habitat. FWS has also identified off road vehicle (ORV) recreational activities, hunting, hiking and camping activities as potential threats.<sup>8</sup> Small businesses may be engaged in each of these activities for example, ORV rental companies, companies that provide hiking-tour trips, and cattle ranchers. Advocacy believes that these small businesses may be directly affected by the proposed designation of critical habitat. FWS should make every effort to identify companies that may be affected by this proposed designation of critical habitat and determine the costs that this designation will impose upon them. To the extent that the costs of designating a particular area as critical habitat outweigh the benefits of such designation, Advocacy encourages FWS to exclude that area from the proposed critical habitat designation.

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<sup>6</sup> Small Business Jobs Act of 2010 (PL 111-240) § 1601.

<sup>7</sup> Id.

<sup>8</sup> 77 Fed. Reg at 60534-41.

Conclusion

Advocacy is pleased that FWS will begin publishing economic analysis simultaneously with the publication of critical habitat designations. We remain committed to helping FWS comply with its RFA obligations. If we can be of any further assistance, please contact Kia Dennis, Assistant Chief Counsel at (202) 205-6936. Thank you for your attention to this matter.

Sincerely,

/s/ Winslow Sargeant, Ph.D  
Chief Counsel  
Office of Advocacy

/s/ Kia Dennis  
Assistant Chief Counsel