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Sent via electronic and certified mail

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RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act Relating to the U.S. Fish and Wildlife Service's Failure to Designate Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo (*Coccyzus americanus*)

Dear Sirs,

In accordance with Section 11(g) of the Endangered Species Act, the Center for Biological Diversity ("Center") provides this 60-day notice of its intent to sue the U.S. Fish and Wildlife Service ("Service") for violations of the Act in connection with the Service's failure to designate critical habitat for the western distinct population of the yellow-billed cuckoo (*Coccyzus americanus*) (hereafter, "western yellow-billed cuckoo" or "cuckoo").¹ The Service violated and continues to be in violation of Section 4 of the Act, which requires the Service to designate critical

¹ 16 U.S.C. § 1540(g).

habitat concurrently with its listing determination for the cuckoo, and further requires the Service, if it issues a proposal to designate critical habitat, to make a final determination within one year of that date.²

I. The Imperiled Western Yellow-billed Cuckoo

The western yellow-billed cuckoo is a member of the avian family Cuculidae and is a Neotropical migrant bird that winters in South America and summers in the western United States, northwestern Mexico, and southwestern Canada. The cuckoo is a riparian obligate, and “nests almost exclusive[ly] in low to moderate elevation riparian woodlands that cover 50 acres or more within arid to semiarid landscapes.”³ Western yellow-billed cuckoos primarily place their nests in willow trees, but also use alder, cottonwood, mesquite, box elder, sycamore, and tamarisk.⁴

The cuckoo historically occurred throughout the western U.S. As stated by the Service:

Based on historic accounts, the species was widespread and locally common in California and Arizona, locally common in a few river reaches in New Mexico, common very locally in Oregon and Washington, generally local and uncommon in scattered drainages of the arid and semiarid portions of western Colorado, western Wyoming, Idaho, Nevada, and Utah, and probably uncommon and very local in British Columbia.⁵

² 16 U.S.C. §§ 1533(a)(3)(A)(i), (b)(6)(A).

³ Proposed Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo, 78 Fed. Reg. 61621, at 61633 (Oct. 3, 2013) (“Proposed Listing Rule”).

⁴ *Id.* While the cuckoo sometimes nests in tamarisk, the conversion of native riparian woodlands to tamarisk and other nonnative vegetation is a documented threat to the species.

⁵ 12-Month Finding for a Petition to List the Yellow-billed Cuckoo in the Western Continental States, 66 Fed. Reg. 38611 (July 25, 2001) (“Warranted but Precluded Finding”).

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Today, however, the cuckoo has been extirpated from large portions of that range and only breeds rarely and locally along rivers, with the largest remaining populations in New Mexico, Arizona, and California. This restriction of the cuckoo's historic range "is primarily the result of habitat loss and degradation."⁶ Even in its remaining strongholds, "past riparian losses are estimated to be about 90 to 95 percent in Arizona, 90 percent in New Mexico, and 90 to 99 percent in California."⁷ As a result of this habitat loss and other threats discussed in more detail below, the western yellow-billed cuckoo "has declined by several orders of magnitude over the past 100 years, and [] this decline is continuing."⁸ For example, the Service noted in 2013 that "[r]ecent declines over the past 15 years have shown both a loss of breeding yellow-billed cuckoos in smaller isolated spots and declines in numbers at core breeding areas."⁹ According to recent estimates, western yellow-billed cuckoos have been reduced to 350 to 495 pairs in the United States and 330 to 530 pairs in Mexico.¹⁰

II. The Service's Legal Duty to Designate Critical Habitat

The Service is generally required to designate critical habitat concurrently with the listing of a species as threatened or endangered.¹¹ The Endangered Species Act defines critical habitat as:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I)

⁶ Determination of Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo, 79 Fed. Reg. 59992, at 60015 (Oct. 3, 2014) ("Final Listing Rule").

⁷ *Id.*

⁸ Proposed Listing Rule, 78 Fed. Reg. at 61642.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 16 U.S.C. §§ 1533(a)(3)(A)(i), 1533(b)(6)(C).

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essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it was listed . . . upon a determination by [the Services] that such areas are essential for the conservation of the species.¹²

“Conservation,” in turn, means recovery of these species “to the point at which the measures provided pursuant to this chapter are no longer necessary.”¹³

Critical habitat provides essential protection for imperiled species beyond that provided by listing alone. Pursuant to section 7(a)(2) of the Act, federal agencies must ensure through consultation with the Service that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species.”¹⁴ For species with critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of the critical habitat.¹⁵

III. Timeline of Endangered Species Act Protections for the Western Yellow-billed Cuckoo

The Center for Biological Diversity petitioned to list the western yellow-billed cuckoo as a federally endangered species more than twenty years ago, on February 2, 1998.¹⁶ Despite the cuckoo’s clearly imperiled

¹² 16 U.S.C. § 1532(5)(A).

¹³ *Id.* § 1532(3).

¹⁴ *Id.* § 1536(a)(2).

¹⁵ *Id.*

¹⁶ The Center’s listing petition is available at http://www.biologicaldiversity.org/species/birds/yellow-billed_cuckoo/pdfs/petition.pdf (last accessed July 10, 2018). A previous petition to list the yellow-billed cuckoo as endangered in the states of California, Washington, Oregon, Idaho, and Nevada was submitted to the Service in 1986. The Service concluded that the listing was not warranted, finding that the petitioned area did

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status and numerous recognized threats to its continued existence, litigation has been repeatedly necessary to compel the Service to meet its requirements to respond to that petition under the Endangered Species Act.

In March 1999, the Center sued the Service for its failure to make the required 90-day finding as to whether the petition presented substantial or commercial information indicating that the listing may be warranted.¹⁷ Following the initiation of that suit, the Service published the required finding on February 17, 2000, determining that listing “may be warranted.”¹⁸

On July 31, 2000 the Center again filed suit, challenging the Service’s failure to make the required 12-month finding on whether to list the western yellow-billed cuckoo, which was due February 9, 1998.¹⁹ On October 11, 2000, a federal judge agreed with the Center that the Service had missed its mandatory deadline and ordered the agency to make a decision on whether to propose listing for the cuckoo by July 19, 2001.²⁰

On July 25, 2001, the Service determined that Endangered Species Act protection for the western yellow-billed cuckoo was warranted, but that “an immediate proposal to list is precluded by other higher priority

not encompass a distinct subspecies or a distinct population segment. 53 Fed. Reg. 52746 (Dec. 29, 1988).

¹⁷ 16 U.S.C. § 1533(b)(3)(A); *Southwest Ctr. for Biological Diversity v. Badgley* (D. Or. Case No. 3:99-cv-00396-KI). The lawsuit also challenged the Service’s “Listing Priority Guidance” and its application to the cuckoo, as well as the southern California mountain yellow-legged frog, Great Basin redband trout, and Spaulding’s catchfly.

¹⁸ 65 Fed. Reg. 8104 (Feb. 17, 2000).

¹⁹ 16 U.S.C. § 1533(b)(3)(B); *Center for Biological Diversity v. Badgley* (D. Or. Case No. 3:00-cv-1045-KI).

²⁰ *Center for Biological Diversity v. Badgley*, 2000 U.S. Dist. LEXIS 15155 (D. Or. Oct. 11, 2000).

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listing actions.”²¹ The Service made no progress towards protecting the cuckoo for the next decade.

On July 25, 2011, the Center for Biological Diversity and the Service reached a legal settlement requiring the agency to make overdue decisions on whether to add 757 species, including the western yellow-billed cuckoo, to the endangered list by 2018.²²

Following that agreement, the Service proposed to list the cuckoo as a threatened species on October 2, 2013.²³ In that listing proposal, the Service acknowledged that more than 90 percent of the cuckoo’s riparian habitat in the western U.S. has been destroyed or degraded, and that this loss of riparian habitat and consequent habitat fragmentation resulted from a multitude of threats.

On December 26, 2013, the Service reopened the public comment period on the listing proposal for an additional 60 days.²⁴ On April 10, 2014, the Service again reopened the public comment period for another 15 days.²⁵

On October 3, 2014, the Service issued a final rule listing the western yellow-billed cuckoo as threatened. In summarizing the factors compelling listing, the Service stated:

The primary factors threatening the western DPS of the yellow-billed cuckoo are the loss and degradation of habitat for the species from altered watercourse hydrology and natural stream

²¹ 12-Month Finding for a Petition to List the Yellow-billed Cuckoo, 66 Fed. Reg. 38611 (July 27, 2001).

²² Stipulated Settlement agreement (Docket No. 42-1). *In re Endangered Species Act Section 4 Deadline Litigation* (D.D.C. Case No. 1:10-cv-0377-EGS) (filed July 12, 2011).

²³ Proposed Listing Rule, 78 Fed. Reg. at 61621.

²⁴ 78 Fed. Reg. 78321 (Dec. 26, 2013).

²⁵ 79 Fed. Reg. 19860 (April 10, 2014).

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processes, livestock overgrazing, encroachment from agriculture, and conversion of native habitat to predominantly nonnative vegetation . . . Additional threats . . . include the effects of climate change, pesticides, wildfire, and small and widely separated habitat patches. The cumulative impact from various threats is also a factor that will exacerbate multiple existing threats to the western yellow-billed cuckoo and its habitat . . . [B]ecause the yellow-billed cuckoo is not a protected or sensitive species in a majority of the United States or in Canada and Mexico, the application of [existing] regulatory mechanisms to conserve the western yellow-billed cuckoo or its habitat is unknown and the effectiveness of these regulatory mechanisms is uncertain.²⁶

Approximately six weeks prior to the final listing rule, on August 15, 2014, the Service issued a proposed rule to designate 546,335 acres of critical habitat for the cuckoo in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Texas, Utah, and Wyoming.²⁷ Under the proposed rule, the Service described the physical or biological features essential to the conservation of the cuckoo as including riparian woodlands (“generally willow-dominated [with] above average canopy closure (greater than 70 percent) [that] have a cooler, more humid environment than the surrounding riparian and upland habitats”); adequate prey base (large breeding insects and tree frogs); and dynamic riverine processes (“allow[ing] habitat to regenerate at regular intervals, leading to riparian vegetation with variously aged patches from young to old.”).²⁸

The Service limited proposed river segment critical habitats to “blocks of riparian habitat greater than 200 acres in extent and greater than

²⁶ Final Listing Rule, 79 Fed. Reg. at 60034.

²⁷ Proposed Rule for Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-billed Cuckoo, 79 Fed. Reg. 48548 (Aug. 15, 2014).

²⁸ *Id.* at 48554.

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325 feet in width, with one or more densely foliated, willow-dominated nesting sites and cottonwood-dominated foraging sites.”²⁹ The proposed river segment critical habitats “were either occupied by mated pairs of western yellow-billed cuckoo in at least one year between 1998 and 2012 or were occupied by individual western yellow-billed cuckoos of unknown mating status during the breeding season (late June, July, mid-August) in at least 2 years between 1998 and 2012.”³⁰

The 546,335 acres of proposed critical habitat are comprised of 80 units (6 in California, 2 in California/Arizona, 37 in Arizona, 8 in New Mexico, 7 in Colorado, 8 in Utah, 4 in Idaho, 3 in Nevada, 1 in Nevada/Arizona, 1 in Wyoming, 1 in Wyoming/Utah, and 2 in Texas).³¹ The proposed rule, however, also included extensive exclusions under section 4(b)(2). In total, the 29 proposed exclusions (3 in California, 2 in California/Arizona, 18 in Arizona, 3 in New Mexico, 2 in Colorado, and 1 in Idaho) encompass 197,257 acres—more than 36% of the proposed acreage.³²

IV. The Service’s Ongoing Failure to Designate Critical Habitat for the Western Yellow-billed Cuckoo Violates the Endangered Species Act

The Service is in violation of the Endangered Species Act by failing to designate critical habitat for the western yellow-billed cuckoo within the statutory timeframes required under the Act. The Service unlawfully failed to designate critical habitat concurrently with its October 3, 2014 rule listing the species as endangered.³³ Although the Service published a proposed critical habitat rule on August 15, 2014, it has further violated the Act by failing to issue a final rule (which

²⁹ *Id.* at 48553.

³⁰ Proposed Critical Habitat Rule, 79 Fed. Reg. at 48556.

³¹ *Id.* at 48557-48558.

³² *Id.*; 16 U.S.C. § 1533(b)(2).

³³ *Id.* § 1533(a)(3)(A)(i).

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already would have been untimely) within one year of that proposed rule.³⁴

Consequently, the Service has failed to timely designate critical habitat for the western yellow-billed cuckoo, and is in violation of Section 4 of the Endangered Species Act. The Service will continue to be in violation of the Act until it publishes a final rule designating critical habitat for the western yellow-billed cuckoo. If the Service does not remedy this violation within the next 60 days, the Center intends to file suit in federal court. Please contact us should you have any questions or if you would like to discuss this matter. For written correspondence, please direct to: Brian Segee, Center for Biological Diversity, P.O. Box 1646, Ojai, CA, 93024.

Sincerely,



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³⁴ *Id.* § 1533(b)(6)(A)(ii)(I).

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