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VIA EMAIL AND CERTIFIED MAIL

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RE: Sixty-day notice of violations of the Endangered Species Act regarding a determination that protection of the red tree vole (north Oregon coast population) is not warranted

Dear Secretary Bernhardt:

This letter serves as a 60-day notice of intent to sue the Secretary and U.S. Fish and Wildlife Service (“Service”) from the Center for Biological Diversity, Cascadia Wildlands, Oregon Wild, Noah Greenwald, Quinn Read and other interested parties for violations of the Endangered Species Act (“ESA”) in denying protection to the north Oregon coast population of the red tree vole (*Arborimus longicaudus*)(“red tree vole”).¹

The red tree vole is severely imperiled by loss and fragmentation of its old forest habitats to logging, infrequent, high-severity fires and other factors. It is likely already gone from more than three quarters of its historic range and is continuing to lose habitat. The severity of this reduction places the red tree vole at immediate risk of extinction from ongoing habitat loss to logging and large fires that occur in Oregon’s Coast Range roughly every 150 years, but may be growing more frequent with climate change, and could wipe out remaining populations in a single event.

¹ Federal Register, 84: 69707-69712, Thursday, December 19, 2019.

Despite the precarious state of the red tree vole and having concluded the red tree vole warranted protection in 2011, the Service reversed course and denied ESA protections. This decision arbitrarily and capriciously ignores substantial evidence before the agency showing the red tree vole to be endangered, fails to follow the best available scientific information and is in violation of the plain language of the Act.

The Center for Biological Diversity is a national, non-profit conservation organization supported by more than 1.7 million members and online activists. The Center is dedicated to securing a future for all species, great and small, hovering on the brink of extinction. This letter is provided to you pursuant to the 60-day notice requirement of the ESA's citizen suit provision.²

I. Background

The red tree vole is a distinctive rodent that lives nearly the entirety of its life in trees, building its nests on tree branches or inside cavities, and foraging on the needles of conifers, making it one of the most arboreal mammals in North America. It is closely associated with old forests, depending on tree deformities and high canopy cover, and is thus an excellent indicator of late-successional forest characteristics required by a plethora of other species.

The red tree vole is highly sensitive to logging and can't survive stand removal by clearcutting or fire. This sensitivity is increased by the fact that tree voles have extremely low mobility, relatively low productivity, and make their nests in tree deformities, such as forked and broken treetops and witches brooms, which are often targeted during commercial thinning operations.

Remaining populations of the red tree vole are isolated and threatened by the continued loss and fragmentation of habitat by logging and development and environmental and demographic stochasticity. Current regulations do not adequately protect the red tree vole, failing to require surveys or protection for known sites and allowing continued destruction and fragmentation of habitat across most of its range. This lack of regulation is likely to result in further population decline, increasing risk of extinction.

Based on the above factors, the Center for Biological Diversity and allies petitioned to list the red tree vole under the ESA on June 18, 2007. On October 28, 2008, the Service issued a 90-day finding concluding that the petition presented substantial information indicating that listing the north Oregon coast population of the red tree vole may be warranted, and on October 13, 2011, the Service issued a 12-month finding concluding listing the north Oregon coast population of the red tree vole was warranted, but that such listing was precluded by higher priority listings and the red tree vole was added to the candidate species lists.³ In concluding the red tree vole did warrant protection, the Service found:

² 16 U.S.C. § 1540(g)(2).

³ Federal Register, 73: 63919, Federal Register 76: 63720

Because of the existing habitat conditions, the limited ability of the red tree vole to persist in much of the DPS, and its vulnerability in the foreseeable future until habitat conditions improve, we find that the North Oregon Coast DPS of the red tree vole is in danger of extinction now or in the foreseeable future.⁴

From 2012 through 2016, FWS addressed the status of the north Oregon coast DPS of the red tree vole annually and in each case determined that listing continued to be warranted.⁵

II. Statutory Framework

Congress passed the ESA to conserve endangered and threatened species and the ecosystems upon which they depend.⁶ The Supreme Court's review of the ESA's "language, history, and structure" convinced the Court "beyond a doubt" that "Congress intended endangered species to be afforded the highest of priorities."⁷ As the Court found, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."⁸

The ESA requires the Secretary of Interior to determine whether any species is "endangered" or "threatened."⁹ A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range."¹⁰ A species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."¹¹

No matter how imperiled a species might be, it does not receive any protection under the ESA until it is officially listed under Section 4 of the Act as either threatened or endangered.¹² In making all listing determinations, the Secretary must consider five statutory listing criteria: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.¹³ If a species meets the definition of threatened or endangered because it is imperiled by any one or more of these five factors, the Secretary must list the species.¹⁴

⁴ *Id.* at 63755

⁵ see 77 FR 69994, November 21, 2012; 78 FR 70104, November 22, 2013; 79 FR 72450, December 5, 2014; 80 FR 80584,

December 24, 2015; 81 FR 87246, December 2, 2016

⁶ 16 U.S.C. § 1531(b).

⁷ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

⁸ *Id.* 437 U.S. at 184.

⁹ 16 U.S.C. § 1533(a).

¹⁰ *Id.* § 1532(6).

¹¹ *Id.* § 1532(20).

¹² 16 U.S.C. § 1533.

¹³ *Id.* § 1533(a)(1).

¹⁴ *Id.* § 1533(1).

The Secretary must base all listing determinations “solely on the basis of the best scientific and commercial data available.”¹⁵ As a result, Congress aptly described Section 4 of the ESA¹⁶ as “[t]he cornerstone of effective implementation of the Endangered Species Act”¹⁷

Once a species is listed under the ESA, an array of statutory protections applies. For example, the Service must designate “critical habitat” for listed species,¹⁸ and “develop and implement” recovery plans for listed species.¹⁹ The Service also is authorized to acquire land for the protection of listed species,²⁰ and make federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species.²¹

Additionally, Section 9 of the statute prohibits various activities including the “take” of all endangered species.²² “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²³

A “species” “includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”²⁴ Listing determinations must be made based “solely on the basis of the best scientific and commercial data available.”²⁵

After receiving a petition “to add a species to,” the endangered species list, the Service “shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”²⁶ “If such a petition is found to present such information, [the Service] shall promptly commence a review of the status of the species concerned[,]” and promptly publish its findings.²⁷ Within 12 months of receiving the petition, the Service shall find that “[t]he petitioned action is not warranted,” that “the petitioned action is warranted,” or that “[t]he petitioned action is warranted, but . . . is precluded by pending proposals to determine whether any species is an endangered species or threatened species,” and “expeditious progress is being made to add qualified species to” the list.²⁸

If the petitioned action is warranted, the Service must “promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement

¹⁵ *Id.* § 1533(b)(1)(A).

¹⁶ 16 U.S.C. § 1533.

¹⁷ S. Rep. No. 418, 97th Cong., 2d Sess. at 10; see also H. Rep. No. 567, 97th Cong., 2d Sess. at 10.

¹⁸ 16 U.S.C. § 1533(a)(3).

¹⁹ *Id.* § 1533(f).

²⁰ *Id.* § 1534.

²¹ *Id.* § 1535(d).

²² 16 U.S.C. § 1538(a).

²³ *Id.* § 1532(19).

²⁴ *Id.* § 1532(16).

²⁵ *Id.* § 1533(b)(1)(A).

²⁶ *Id.* § 1533(b)(3)(A).

²⁷ *Id.*

²⁸ *Id.* § 1533(b)(3)(B).

such action....”²⁹ The agency must then, 90 days before the effective date of the regulation, “publish a general notice and the complete text of the proposed regulation in the Federal Register.”³⁰ Within one year of the date of notice publication, the Service must take one of several potential actions, including providing “notice that such one-year period is being extended ... for no more than six months for the purposes of soliciting additional data ... [regarding a] substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned.”³¹ If the one year period is extended, and the Service decides to withdraw the regulation, the Service must “publish in the Federal Register ... notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.”³² Such a finding must be made based on a finding that “there is not sufficient evidence to justify the action proposed by the regulation[.]” and is judicially reviewable.³³

III. Legal Violations

A. The Service’s Determination that the Red Tree Vole does not Warrant Listing Was Arbitrary and Capricious, Contrary to the Best Available Science, and Violated the ESA.

The Service’s species status assessment (SSA) for the red tree vole paints a grim picture of its status, finding that:

The North Coast DPS of the red tree vole has lost viability over the past 100 years due to the loss of habitat that has not been restored or regrown, combined with an associated decline or extirpation of voles in these areas. The loss of historical viability is primarily due to a combination of timber harvest and catastrophic wildfires that are characteristic of the Oregon Coast Range fire regime. Consequently, tree voles currently occur in fragmented and isolated clusters primarily restricted to Federal and State lands. Multiple features of tree vole biology, including their low reproductive capacity and limited vagility, limit the ability of the population to rebound from the level of habitat loss and fragmentation that has occurred. Serious stressors will continue to affect species viability; these include continued timber harvest that removes or precludes habitat development, as well as the contribution of climate change to the increased spread of Swiss needle cast and the increased threat of wildfires.³⁴

The SSA determined that red tree voles have been substantially reduced or eliminated from most of their range, including nearly all private lands, which occupy 61 percent of

²⁹ *Id.* § 1533(b)(3)(B)(ii).

³⁰ *Id.* § 1533(b)(5)(A)(i).

³¹ *Id.* §1533(b)(6)(A)(i)(III), (6)(B)(i).

³² *Id.* § 1533(6)(B)(iii).

³³ *Id.* § 1533(6)(B)(ii).

³⁴ USFWS 2019. Species status assessment: north Oregon coast population of the red tree vole (*Arborimus longicaudus*) Version 1.0. U.S. Fish and Wildlife Service, Portland, Oregon at 92.

its range, and most of the state forests, which make up another 14 percent of their range.³⁵

Where red tree voles are known to survive, their future is bleak and highly uncertain, showing an overall risk of extinction that clearly undermines the Service's conclusion that listing is not warranted. Overall, the Service found the red tree vole survives in 11 clusters, of which two were considered to have high resilience, four moderate resiliency and five low resiliency with expected extirpation for four of them within 60 years.³⁶ All of these clusters, however face threats and some risk of extinction with the Service concluding that "remaining vole clusters are all considered to be highly affected by habitat loss and fragmentation";³⁷ and that only the "two largest tree vole clusters that encompass the large blocks of Federal land in the analysis area are expected to maintain resiliency through time," but that "[c]atastrophic wildfires in the Oregon Coast Range are difficult, if not impossible, stressors to manage for and are the principle threat to the two large clusters of tree voles."³⁸

In determining the red tree vole does not warrant listing, however, the Service concluded that stressors to the red tree vole, including logging, wildfire, climate change and others "do not, alone or in combination, rise to a level that causes the north Oregon coast population of the red tree vole to meet the definition of an endangered species or a threatened species."³⁹ These conclusions run directly counter to the conclusions of the Service's own SSA, as well as past findings determining the red tree vole did in fact warrant listing. The Listing Decision was accordingly arbitrary and capricious, contrary to the best available science, and violated the ESA.

B. The Service Violated the ESA by Failing to Evaluate Whether the Red Tree Vole is Threatened or Endangered Throughout a Significant Portion of Its Range.

The ESA defines an "endangered" species as one that is "in danger of extinction throughout all *or a significant portion* of its range."⁴⁰ Similarly, a "threatened" species is defined as a species that is "likely to become an endangered species within the foreseeable future throughout all *or a significant portion* of its range."⁴¹ Consistent with the plain language of these definitions, courts have made clear that the determination of whether a species is threatened or endangered "throughout a significant portion of its range" cannot be conflated with the question of whether it is threatened or endangered throughout its entire range.⁴² The Service has published a final policy that purports to interpret the phrase "significant portion of its range" for purposes of ESA listing

³⁵ *Id.* at 7 and 11.

³⁶ *Id.* at 91.

³⁷ *Id.* at 49.

³⁸ *Id.* at 93.

³⁹ Fed. Reg. 84 at 69710.

⁴⁰ 16 U.S.C. § 1532(6) (emphasis added)

⁴¹ *Id.* § 1532(20) (emphasis added).


⁴² *See, e.g., Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001)

decisions.⁴³ Although portions of that policy have now been vacated as insufficiently protective of species at risk in portions of their range, even that policy recognizes that “[i]f the species is neither endangered nor threatened throughout all of its range, we will determine whether the species is endangered or threatened throughout a significant portion of its range.”⁴⁴ According to the guidance, the Service should determine whether there is substantial information indicating that (1) portions of the range may be significant and (2) the species may be in danger of extinction or likely to become so in the foreseeable future in these portions.⁴⁵

The Service, however, utterly fails to determine if the red tree vole warrants listing in a significant portion of its range as either threatened or endangered. Neither the listing determination nor the underlying SSA provide any analysis or determination of the red tree vole’s status in anything but the entirety of its range, both historic and current, despite the fact that the species has been severely reduced or lost from the majority of its range and faces threats in the remainder. The Ninth Circuit has repeatedly explained that the Service “must ‘develop some rational explanation for why the lost and threatened portions of a species’ range are insignificant before deciding not to designate the species for protection.”⁴⁶ The Service has thus violated the ESA by failing to determine whether the red tree vole is endangered or threatened throughout a significant portion of its range, and by failing to include any rationalization for why the portions of the its range identified as at risk of extirpation are not significant.

Sincerely,

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⁴³ See Final Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species”, 79 Fed. Reg. 37,578 (July 1, 2014)

⁴⁴ see, e.g., *Desert Survivors v. U.S. Dep’t of Interior*, 336 F. Supp. 3d 1131, 1133-37 (N.D. Cal. 2018) and SPR policy at 37,585.

⁴⁵ . See 79 Fed. Reg. at 37,586

⁴⁶ *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1064 (9th Cir. 2018) (quoting *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 877 (9th Cir. 2009); see also *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1144 (9th Cir. 2001) (“where, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a “significant portion of its range.”))