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Sent via electronic and certified U.S. Mail

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Dear Acting Secretary Bernhardt:

This letter serves as a 60-day notice of intent to sue the Secretary and U.S. Fish and Wildlife Service (“Service”) on behalf of the Center for Biological Diversity, The Lands Council, and Defenders of Wildlife for failing to issue a final rule listing the Southern Mountain Caribou distinct population segment (“DPS”) of the woodland caribou, and for failing to reconsider the caribou’s critical habitat designation, as required by court order. This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the Endangered Species Act (“ESA”). 16 U.S.C. § 1540(g)(2)(C).

The Service’s Failure to Designate and Make a Listing Determination for the Southern Mountains Caribou DPS

On May 8, 2014, the Service issued a 12-month finding on a petition to delist the southern Selkirk Mountains population of woodland caribou. 79 Fed. Reg. 26,504 (May 8, 2014). The Service found that delisting the species was not warranted, but rather that the southern Selkirk herd is part of a larger population known as the southern mountain caribou DPS and that this population warrants protection as a threatened species. *Id.* at 26,504. The Southern Mountain Caribou DPS is found in southern British Columbia, northern Idaho, and northeastern Washington and is facing significant threats.¹ *Id.*; *id.* at 26,514-26-528. The Service also affirmed that its previously finalized critical habitat designation of 30,010 acres for the southern Selkirk Mountains population shall apply to the Southern Mountain Caribou DPS. *Id.* at 26,504, 26,532-33.

Upon issuing the proposed rule, the Service held two public hearings in June 2014 and accepted public comments for 90 days, ending August 6, 2014. *See* 80 Fed. Reg. 15,545, 15,546 (Mar. 25, 2015). After the public comment period had ended, the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”) finalized their biological assessment of the Southern Mountain caribou population, changing its designation from threatened to endangered. *Id.* The assessment contained pertinent updates on population size, population trends, current threats to the population, and population viability analyses. *Id.* Because the Service believed these updates would add to the best scientific and commercial data available, upon which any final rule must be based, the Service reopened the comment period on the proposed rule. *Id.* at 15,546-47.

On April 19, 2016, the Service once again reopened the comment period on the May 8, 2014 proposal, this time to comply with a court order finding procedural errors in the Service’s 2012 final critical habitat designation (explained more fully below). 81 Fed. Reg. 22,961 (Apr. 19, 2016).

¹ The Service concluded in its proposal that the Southern Mountain Caribou population meets both the discreteness and significance elements of the agency’s DPS policy and therefore qualifies as a DPS. 79 Fed. Reg. at 26,513.

Since reopening the comment period on April 19, 2016, the Service has not taken any action and has failed to issue a final rule. The ESA requires that the Service publish a final regulation within one year of a proposal. 16 U.S.C. § 1533(b)(6)(i). The Service's failure to finalize its proposal to designate the Southern Mountain Caribou DPS and list the species as threatened violates the ESA and the Administrative Procedure Act. *Id.*; 5 U.S.C. § 706(1).

The Service's Failure to Reconsider Critical Habitat for the Southern Mountain Caribou

On December 6, 2002, the Center for Biological Diversity and allies petitioned the Service to designate critical habitat for the southern Selkirk Mountains population of woodland caribou. *See* 79 Fed. Reg. at 26,506. On February 10, 2003, the Service responded that they could not address the petition due to budgetary constraints. *Id.* On January 15, 2009, petitioners filed suit over the Service's failure to adequately respond to the petition. *Defenders of Wildlife v. Salazar*, 2:09-cv-00015-EFS (Jan. 15, 2009). The parties entered into a stipulated settlement agreement, and on November 30, 2011, the Service issued a proposed rule to designate approximately 375,562 acres as critical habitat in Boundary and Bonner Counties in Idaho and Pend Oreille County in Washington. 76 Fed. Reg. 74,018 (Nov. 30, 2011). The Service accepted public comment and peer review on the proposed designation. In August 2012, the Service prepared a draft final rule proposing to designate 227,100 acres of critical habitat, a lower sum than that proposed based on changing the base habitat elevation from 4,000 to 5,000 feet. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1196 (Mar. 23, 2015). On November 28, 2012, issued a final rule, designating only 30,101 acres of critical habitat in Boundary County, Idaho and Pend Oreille County, Washington. 77 Fed. Reg. 71,042 (Nov. 28, 2012).

On January 31, 2015, the Center for Biological Diversity and allies filed suit against the Service, claiming the Service's elimination of more than 90 percent of the proposed critical habitat was arbitrary and capricious and that the Service failed to provide public notice and comment on the substantially revised critical habitat designation before issuing the final rule. *Ctr. for Biological Diversity v. Kelly*, 93 at 1197-98. On March 23, 2015, the U.S. District Court of Idaho remanded the Service's November 28, 2012 final critical habitat rule, finding that the Service violated law by failing to provide public notice and comment on the significant change between the proposed critical habitat designation and the final designation. *Id.* at 1204-07.

To comply with the court's order, on April 19, 2016, the Service opened a comment period on the 2012 critical habitat designation. 81 Fed. Reg. 22,961 (Apr. 19, 2016). The Service declared this comment period as a reopening of the comment period on the May 8, 2014 proposed rule, within which the Service proposed to designate as a DPS and list as threatened the Southern Mountain Caribou distinct population segment, but also proposed to reaffirm the agency's November 28, 2012 final designation of critical habitat for the southern Selkirk Mountains Population of woodland caribou as critical habitat for the proposed Southern Mountain Caribou DPS. *See id.* at 22,961.

Since reopening the comment period on April 19, 2016, the Service has not taken any action and has failed to finalize a designation of critical habitat. The ESA requires that the Service publish a final regulation within one year of a revision of critical habitat. 16 U.S.C. § 1533(b)(6)(i). The Service's failure to finalize a critical habitat designation for the Southern Mountain Caribou DPS violates the ESA and Administrative Procedure Act. *Id.*; 5 U.S.C. § 706(1).

Accordingly, the Secretary and the Service are in violation of the law and have abrogated their duty to ensure protections for the Southern Mountain Caribou DPS in a timely manner to avoid the increased risk of extinction. If the Service does not make the required findings, including a final listing rule and a final critical habitat designation within the next sixty days, we intend to file suit. Please feel free to contact me if you have any questions or would like to discuss this matter.

Sincerely,



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