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**EXPLOITERS**  
**FRIENDS**  
**of ANIMALS**

November 24, 2015

Via U.S. Certified Mail, Return Receipt Requested

Hon. Sally Jewell  
Secretary of the Interior  
Department of the Interior  
1849 C Street NW  
Washington D.C., 20240

Dan Ashe  
Director, U.S. Fish & Wildlife Service  
Department of the Interior  
1849 C Street NW, Room 3331  
Washington D.C., 20240

RE: Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Secretary Jewell and Director Ashe:

Western Watersheds Project,<sup>1</sup> the Buffalo Field Campaign,<sup>2</sup> and Friends of Animals<sup>3</sup> write to inform you that you are in violation of the Endangered Species Act ("ESA"), 16

<sup>1</sup> Western Watersheds Project ("WWP") is a nonprofit environmental conservation group with approximately 1,500 members, founded in 1993. WWP works to influence and improve public lands management throughout the West with a primary focus on the negative impacts of livestock grazing on 250 million acres of western public lands, including harm to ecological, biological, cultural, historic, archeological, scenic resources, wilderness values, roadless areas, Wilderness Study Areas and designated Wilderness.

<sup>2</sup> Buffalo Field Campaign was founded in 1997 to protect the natural habitat of wild migratory buffalo and native wildlife, to stop the slaughter and harassment of America's last wild buffalo, as well as to advocate for their lasting protection, and to work with people of all Nations to honor the sacredness of wild buffalo.

<sup>3</sup> Friends of Animals is a non-profit international advocacy organization incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation

☐ NATIONAL HEADQUARTERS - 777 POST ROAD SUITE 205 - DARIEN, CT 06820 - T 203 656 1522 - F 203 656 0267

☐ NEW YORK OFFICE - 1841 BROADWAY SUITE 350 - NEW YORK, NY 10023 - T 212 247 8120 - F 212 582 4482

■ WILDLIFE LAW PROGRAM - 7500 E. ARAPAHOE ROAD SUITE 385 - CENTENNIAL, CO 80112 - T 720 949 7791

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U.S.C. §§ 1531-1544, by failing to take action required by subsection 4(b)(3)(A)-(B) concerning the Petition to List the Yellowstone Bison as Threatened or Endangered under the ESA (hereinafter, "Petition"). 16 U.S.C. § 1533(b)(3)(A)-(B). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision in the ESA. 16 U.S.C. § 1540(g)(2)(C).

### STATUTORY BACKGROUND

The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b). The ESA's ultimate goal is to recover listed species to the point where they no longer need legal protection. 16 U.S.C. §§ 1531(b)-(c), 1532(3), 1533(f).

Before the ESA can protect a species facing extinction or that species' habitat, the species must be listed as either endangered or threatened. 16 U.S.C. § 1533(d). A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is "threatened" if it is "likely to become an endangered species within the foreseeable future." 16 U.S.C. § 1532(20). The listing process is the essential first step in the ESA's system of species protection and recovery.

Any interested person can begin the listing process by filing a petition to list a species with the Secretary of Interior, or the U.S. Fish and Wildlife Service as her delegate (collectively, "FWS"). 16 U.S.C. §§ 1533(a)(1) and (2); 1533(b)(3)(A); 50 C.F.R. § 424.14(a). When a citizen petition initiates the listing process, Congress imposed important, mandatory, and non-discretionary deadlines on FWS. *See* 16 U.S.C. §§ 1533(b)(3)(A); 1533(b)(3)(B).

First, on receipt of a petition to list a species, FWS is required to make an initial finding known as a "90-day finding." Specifically, within 90 days of receipt of a petition, "to the maximum extent practicable," FWS must determine whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). Implementing regulations define "substantial information" as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b). If FWS finds that the petition does not present substantial information indicating that the listing may be warranted, the petition is rejected and the process ends. This is known as a

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around the world, and to promote a respectful view of non-human, free-living and domestic animals. Headquartered in Darien, CT, Friend of Animals also has offices in Centennial, CO, and New York City, NY.

“negative” 90-day finding. All findings are subject to judicial review in a U.S. District Court. See 16 U.S.C. § 1540(c) and (g).

If FWS finds that the petition presents substantial information indicating that listing may be warranted, it must then commence a status review of the species. 16 U.S.C. § 1533(b)(3)(A)-(B). This is known as a “positive” 90-day finding.

The second deadline is known as the “12-month finding.” Unless, FWS makes a negative 90-day finding, the agency has 12 months from the date the petition was received to make one of three 12-month findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals to list species of higher priority, provided that the FWS is making expeditious progress in listing other species. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). The 12-month deadline for making this finding is mandatory.

Importantly, regardless of when the 90-day finding is made, the 12-month period begins to run from the date of receipt of the initial petition. *Biodiversity Legal Found. v. Norton*, 180 F.Supp.2d 7, 9 (D.D.C. 2001) (“The ‘12-month determination’ must be made ‘within 12 months after receiving a petition,’ regardless of when the Service issued its 90-day finding.”) (quoting 16 U.S.C. § 1533(a)(3)(D)(ii)). There is no lawful mechanism by which the Secretary can extend the deadline for making a 12-month finding. See *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176 (9th Cir. 2002).

## **FACTUAL BACKGROUND AND ENDANGERED SPECIES ACT VIOLATIONS**

On November 13, 2014, Western Watersheds Project and the Buffalo Field Campaign (collectively, “Petitioners”) submitted a petition to FWS to list the Yellowstone bison, the last remaining wild population of bison in the United States, as an endangered Distinct Population Segment (“DPS”) of plains bison, *Bison bison bison*. FWS received the Petition on November 14, 2014.

### **1. Violation of 16 U.S.C. § 1533(b)(3)(A).**

More than 90 days have passed since the FWS received the Petition to list the Yellowstone bison under the ESA. In accordance with the statutory deadline, the initial 90-day petition finding was due, to the maximum extent practicable, by February 12, 2015. 16 U.S.C. § 1533 (b)(3)(A). FWS did not make a 90-day finding by February 12, 2015, nor did it indicate why such a finding would be impracticable. As of the date of this notice, FWS has still not made a 90-day finding on the Petition. Thus, FWS is in violation of subsection 4(b)(3)(A) of the ESA.

## 2. Violation of 16 U.S.C. § 1533(b)(3)(B).

More than 12 months have passed since the FWS received the Petition to list the Yellowstone bison under the ESA. In accordance with the statutory deadline, the 12-month finding on the Petition was due on November 14, 2015. § 16 U.S.C. § 1533(b)(3)(B). FWS did not make a 12-month finding by November 14, 2015. As of the date of this notice, FWS has still not made a 12-month finding on the Petition. Thus, FWS is in violation of subsection 4(b)(3)(B) of the ESA.

## CONCLUSION

If you do not promptly issue the overdue 90-day finding and 12-month finding described above, Petitioners and Friends of Animals intend to file suit to require that you do so. However, this is not our preference. The purpose of the 60-day notice provision in the ESA is for violators of the law to come into compliance, therefore avoiding the need for litigation. We believe we have been patient concerning these deadlines, but our patience is not unlimited. Accordingly, if you have any plans to issue any of the findings discussed above in the near future or believe any of the information above is incorrect, please contact us to discuss the matter.

Sincerely,



Jennifer Barnes  
Associate Attorney  
Wildlife Law Program  
Friends of Animals  
Western Region Office  
7500 E. Arapahoe Rd., Suite 385  
Centennial, CO 80112  
(720) 949-7791  
jenniferbarnes@friendsofanimals.org

Paul Ruprecht  
Staff Attorney  
Western Watersheds Project  
126 NE Alberta St., Suite 208  
Portland, OR 97211  
(208) 421-4637  
paul@westernwatersheds.org