



October 13, 2020

*Via Electronic and Certified Mail*

David Bernhardt, Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
exsec@ios.doi.gov

Aurelia Skipwith, Director  
U.S. Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, D.C. 20240  
Aurelia\_Skipwith@fws.gov

**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 and Develop a Recovery Plan for 'I'iwi (*Drepanis coccinea*)**

Dear Secretary Bernhardt and Director Skipwith:

In accordance with section 11(g) of the Endangered Species Act ("ESA"), 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 ESA in connection with the Service's failure to designate critical habitat and develop a valid recovery plan for 'i'iwi (*Drepanis coccinea*).<sup>1</sup> The Service violated and continues to violate section 4 of the ESA, which requires the Service to designate critical habitat concurrently with its listing determination and develop and implement a recovery plan for the species.<sup>2</sup>

'I'iwi (*Drepanis coccinea*) is a threatened forest bird endemic to Hawai'i. Once one of the most abundant native forest birds in Hawai'i, 'i'iwi now persists on only three islands, with the population on one of these islands likely to go extinct by 2050.<sup>3</sup> Absent the protections provided

---

<sup>1</sup> U.S. Fish and Wildlife Service, Threatened Species Status for the Iiwi (*Drepanis coccinea*), 82 Fed. Reg. 43,873 (Sept. 20, 2017).

<sup>2</sup> 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(A); 16 U.S.C. § 1533(f)(1). The Service's failure to designate critical habitat and develop a recovery plan for 'i'iwi also constitutes agency action unlawfully withheld or unreasonably delayed or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 706(1) & 706(2)(A).

<sup>3</sup> 82 Fed. Reg. at 43,875, 43,880.

by critical habitat, and a valid recovery plan, ‘i‘iwi will continue down an unacceptable path towards extinction.

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the conservation of imperiled species, including ‘i‘iwi, and the effective implementation of the ESA.

## **BACKGROUND**

Its bright red plumage and distinctive long, curved bill make ‘i‘iwi “one of the most spectacular and iconic” native Hawaiian forest birds.<sup>4</sup> Historically, ‘i‘iwi abounded throughout Hawai‘i’s forested areas.<sup>5</sup> However, with the introduction of mosquitoes and mosquito borne diseases such as avian malaria and avian pox, ‘i‘iwi have been forced out of lower elevations, where mosquito prevalence and disease proliferation are higher, into high elevation disease-free areas.<sup>6</sup>

Like many native Hawaiian forest birds, ‘i‘iwi are highly susceptible to avian malaria.<sup>7</sup> In fact, the ‘i‘iwi is “one of the most vulnerable species,” with an extremely low resistance to avian malaria and an average 95 percent mortality rate.<sup>8</sup> The combination of low resistance and high mortality means that nearly every ‘i‘iwi that comes into contact with avian malaria dies from the disease. Therefore, conservation of remaining high elevation disease-free habitat is of utmost importance for the continued survival of ‘i‘iwi.

Surviving primarily on nectar from the lehua blossoms of the ‘ōhi‘a tree (*Metrosideros polymorpha*), ‘i‘iwi migrate seasonally to follow ‘ōhi‘a’s blooms.<sup>9</sup> During the non-breeding season, the ‘i‘iwi leaves its high elevation disease-free habitat and descends to lower elevations in search of flowering ‘ōhi‘a.<sup>10</sup> At these lower elevations, ‘i‘iwi comes into contact with disease-carrying mosquitoes, facilitating disease transmission within previously healthy populations.<sup>11</sup> Therefore, controlling mosquito populations at lower elevations, particularly during ‘ōhi‘a blooming season, is necessary for the survival and recovery of ‘i‘iwi.

Warmer temperatures associated with climate change further exacerbate the eminent danger of avian malaria facing ‘i‘iwi. Mosquitoes are temperature-limited species that cannot currently

---

<sup>4</sup> U.S. FISH & WILDLIFE SERV., IWI (*DREPANIS COCCINEA*) SPECIES STATUS REPORT 1 (2016).

<sup>5</sup> *Id.* at 2–3.

<sup>6</sup> *Id.* at 55.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 55, 51.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 1–2.

<sup>11</sup> *Id.* at 55.

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 and Develop a Recovery Plan for ‘I‘iwi (*Drepanis coccinea*)

survive at higher elevations in Hawai‘i due to cooler temperatures.<sup>12</sup> Unfortunately due to climate change, temperatures at high elevations in Hawai‘i are increasing at a “disproportionately greater” rate than at mid and low elevations.<sup>13</sup> This warming allows mosquitoes to expand their range into higher elevations, bringing with them avian malaria and avian pox.<sup>14</sup> Additionally, the virus that causes avian malaria survives better in warmer temperatures, meaning warmer high elevation habitats will no longer be safe refugia from the disease.<sup>15</sup>

As warmer temperatures facilitate the spread of mosquitoes and avian malaria, ‘i‘iwi’s disease-free habitat contracts. This is having a devastating impact on the threatened ‘i‘iwi. For example, on Kaua‘i, warmer temperatures now allow mosquitoes and the avian malaria virus to survive at all elevations, exposing ‘i‘iwi to the disease throughout its range.<sup>16</sup> In response, the Kaua‘i ‘i‘iwi population has decreased drastically since 2000 and is expected to go extinct on the island by 2050.<sup>17</sup>

In addition to disease limits on the ‘i‘iwi’s range, massive die offs of ‘ōhi‘a tree, which ‘i‘iwi depend on for nesting and food, further limit ‘i‘iwi’s available habitat. *Ceratocystis spp.*, an introduced fungal disease that emerged on the island of Hawai‘i, causes a disease known as rapid ‘ōhi‘a death (“ROD”).<sup>18</sup> ROD can infect entire stands of ‘ōhi‘a trees, killing upwards of 50 percent of an infected stand.<sup>19</sup> Though originally limited to the island of Hawai‘i, as of June 2020, ROD has spread to Kaua‘i, Maui, and O‘ahu.<sup>20</sup> Mapping by the State of Hawai‘i showed “more than 60,000 ha of ROD-symptomatic ‘ōhi‘a forests.”<sup>21</sup> With no effective means of containing ROD,<sup>22</sup> ‘ōhi‘a forest death poses a significant risk to the continued survival of ‘i‘iwi.

Due to the extensive threats of avian malaria, ROD, and climate change, the Service listed ‘i‘iwi as threatened on September 20, 2017.<sup>23</sup> However, to date, the Service has not designated critical habitat for ‘i‘iwi nor developed a recovery plan.

---

<sup>12</sup> *Id.* at 68.

<sup>13</sup> *Id.* at 69.

<sup>14</sup> *Id.* at 68.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 70.

<sup>18</sup> *Id.* at 30.

<sup>19</sup> *Id.* at 31.

<sup>20</sup> College of Tropical Agriculture and Human Resources, *Rapid Ohia Death*, U. OF HAW. AT MANOA (last updated June 2020), <https://cms.ctahr.hawaii.edu/rod/>.

<sup>21</sup> Lucas B. Fortini, *The Evolving Threat of Rapid ‘Ōhi‘a Death (ROD) to Hawai‘i’s Native Ecosystems and Rare Plant Species*, 448 FOREST ECOLOGY & MGMT. 376, 377 (2019).

<sup>22</sup> U.S. FISH & WILDLIFE SERV., IWI (*DREPANIS COCCINEA*) SPECIES STATUS REPORT 32 (2016).

<sup>23</sup> 82 Fed. Reg. 43,873.

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 and Develop a Recovery Plan for ‘I‘iwi (*Drepanis coccinea*)

## THE ENDANGERED SPECIES ACT

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>24</sup> Congress enacted the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species.”<sup>25</sup> Species listed as “endangered” or “threatened” are entitled to substantive protections under the ESA, and federal agencies have a duty to conserve listed species.<sup>26</sup> Indeed, “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>27</sup>

### **A. The Service’s Legal Duty to Designate Critical Habitat**

Recognizing the important role habitat plays in species recovery, Congress stated that:

[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence . . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then **the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.**

H.R. Rep. No. 94-887, at 3 (1976) (emphasis added).

Through designating and protecting critical habitat the Service works to achieve one of the ESA’s fundamental goals: to conserve “the ecosystems upon which endangered species and threatened species depend.”<sup>28</sup>

Thus, Congress imposed a duty on the Service to designate critical habitat “concurrently with” listing.<sup>29</sup> The Service may, however, delay designating critical habitat if it determines that the critical habitat is not determinable at the time of listing.<sup>30</sup> Regardless, in that case the agency

---

<sup>24</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

<sup>25</sup> 16 U.S.C. § 1531(b).

<sup>26</sup> *Id.* § 1531(c).

<sup>27</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

<sup>28</sup> *Id.* § 1531(b).

<sup>29</sup> *Id.* § 1533(a)(3)(A).

<sup>30</sup> *Id.* § 1533(b)(6)(C)(ii).

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 and Develop a Recovery  
Plan for ‘I’iwi (*Drepanis coccinea*)

must designate critical habitat within one year.<sup>31</sup> Like listing determinations, critical habitat determinations must be made “on the basis of the best scientific data available.”<sup>32</sup>

The ESA defines critical habitat as “the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.”<sup>33</sup> Critical habitat may also encompass unoccupied habitat that is “essential for the conservation of the species.”<sup>34</sup>

As the definition plainly states, critical habitat is essential for species’ survival and recovery. Species without designated critical habitat are half as likely to move towards recovery than species with critical habitat.<sup>35</sup> Therefore, listed status alone does not adequately protect endangered and threatened species as critical habitat designations provide additional needed protections. For example, during section 7 consultation between federal agencies and the Service, the federal agency must guarantee that its actions will not “result in the destruction or adverse modification of” a species’ critical habitat.<sup>36</sup>

## **B. The Service’s Legal Duty to Develop a Recovery Plan**

Section 4(f) of the ESA imposes a nondiscretionary duty on the Service to develop and implement recovery plans “for the conservation and survival” of listed species, unless the Service finds that “such a plan will not promote the conservation of the species.”<sup>37</sup> “Conservation,” means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which measures provided pursuant to this Act are no longer necessary.”<sup>38</sup> The purpose of recovery planning is to identify “actions that are necessary to halt or reverse [a] species’ decline.”<sup>39</sup>

---

<sup>31</sup> *Id.* § 1533(b)(6)(C)(i-ii) (if a species’ critical habitat is not determinable at the time of final listing rule, the Services have “one additional year [to designate critical habitat], but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat”).

<sup>32</sup> *Id.* § 1533(b)(2).

<sup>33</sup> *Id.* § 1532(5)(A)(i).

<sup>34</sup> *Id.* § 1532(5)(A)(ii).

<sup>35</sup> Martin F. J. Taylor, Kieran F. Suckling & Jeffrey J. Rachlinski, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 *BIOSCIENCE* 360, 362 (2005).

<sup>36</sup> *Id.* § 1536(a)(2).

<sup>37</sup> *Id.* § 1533(f)(1).

<sup>38</sup> *Id.* § 1532(3).

<sup>39</sup> 82 Fed. Reg. at 43,883.

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 and Develop a Recovery Plan for ‘I’iwi (*Drepanis coccinea*)

Each recovery plan must contain “(i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species; (ii) objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list; and (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan’s goal and to achieve intermediate steps toward that goal.”<sup>40</sup> In the absence of a statutory timeline for developing recovery plans, the Service adopted a policy to finalize a species’ recovery plan within 2.5 years of the species’ listing.<sup>41</sup>

## **ENDANGERED SPECIES ACT VIOLATIONS**

### **A. The Service’s Ongoing Failure to Designate Critical Habitat for ‘I‘iwi Violates the Endangered Species Act**

The Service is in violation of the ESA by failing to designate critical habitat for ‘i‘iwi, which received “threatened” status under the ESA on September 20, 2017. Because the Service found critical habitat was not determinable at that time, the Service had until September 20, 2018, to designate critical habitat for ‘i‘iwi.<sup>42</sup> To date, the Service has failed to propose critical habitat for ‘i‘iwi. Without protections for its critical habitat, ‘i‘iwi will continue to lose what little disease-free habitat remains throughout its range.

### **B. The Service’s Ongoing Failure to Develop a Recovery Plan for ‘I‘iwi Violates the Endangered Species Act**

The Service is in violation of the ESA by failing to develop a recovery plan for ‘i‘iwi.<sup>43</sup> Despite the Service’s own policy requiring it to develop a final recovery plan within 2.5 years of listing a species, ‘i‘iwi has now gone three years without a recovery plan.<sup>44</sup> This delay is unacceptable

---

<sup>40</sup> *Id.* § 1533(f)(1)(B).

<sup>41</sup> Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act, 59 Fed. Reg. 34,272 (July 1, 1994).

<sup>42</sup> *See* 16 U.S.C. § 1533(b)(6)(C)(ii).

<sup>43</sup> 16 U.S.C. § 1533(f). Although the Service prepared a “recovery outline” for ‘i‘iwi, this does not relieve the Service of its duty to prepare a legally valid recovery plan because “[a] recovery outline is *not* an outline of a recovery plan,” but rather “a brief document that sketches, in broad brushstrokes, the interim conservation and management program for a species during the time between the final listing under the [ESA] and completion of [a] recovery plan.” REVISED GUIDANCE AND TEMPLATE FOR THE DEVELOPMENT OF RECOVERY OUTLINES, U.S. FISH & WILDLIFE SERV. 1 (2018).

<sup>44</sup> Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act, 59 Fed. Reg. 34,272 (July 1, 1994).

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 and Develop a Recovery Plan for ‘I‘iwi (*Drepanis coccinea*)

given that 'i'iwi face population declines of 70 to 90 percent over the next 80 years if actions are not taken to minimize the threats of disease and habitat loss.<sup>45</sup>

### **CONCLUSION**

In sum, the Service's failure to timely designate critical habitat and develop a recovery plan for 'i'iwi violates section 4 of the ESA. Until the Service publishes a final rule designating critical habitat and develops a recovery plan, the Service will continue to be in violation of the ESA. If the Service does not act to correct these violations within 60 days, the Center will pursue litigation in federal court. Please contact us should you have any questions or if you would like to discuss this matter.

Sincerely,

Maxx Phillips  
Hawai'i Director and Staff Attorney  
Center for Biological Diversity  
1188 Bishop Street, Suite 2412  
Honolulu, Hawai'i 96813  
(808) 284-0007  
Mphillips@biologicaldiversity.org

---

<sup>45</sup> See 82 Fed. Reg. at 43,883.