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***Via Electronic Mail & Certified Mail, Return Receipt Requested***

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Re: Notice of Intent to Sue for Violations of the Endangered Species Act (“ESA”)

Dear Director Ashe, Secretary Jewell, Regional Director Thorson, and State Supervisors Henson and Berg,

On behalf of the Center for Biological Diversity, Northwest Environmental Defense Center, Cascadia Wildlands and Oregon Wild, I hereby provide 60-days notice of the organizations’ intent to sue Director Ashe, Secretary Jewell, the U.S. Fish and Wildlife Service (“Service”) and the U.S. Department of the Interior over violations of Sections 4 and 7 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1533, 1536, for listing streaked horned larks as a threatened species instead of an endangered species and promulgating an unlawful 4(d) rule for the species.<sup>1</sup> This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision.<sup>2</sup>

The Center for Biological Diversity is a national, non-profit conservation organization supported by more than 900,000 members and online activists. The Center is dedicated to securing a future for all species, great and small, hovering on the brink of extinction. In 2002, the Center and

<sup>1</sup> 78 Fed. Reg. 61,452 (Oct. 3, 2013); 50 C.F.R. §§ 17.11, 17.41(a).

<sup>2</sup> 16 U.S.C. § 1540(g)(2).

others petitioned the Service to protect the streaked horned lark under the ESA. The Northwest Environmental Defense Center (“NEDC”), founded in 1969, is dedicated to the preservation and protection of the natural resources of the Pacific Northwest. NEDC’s members are lawyers, scientists, students, and citizens interested in protecting the environment of the Pacific Northwest, including the region’s imperiled wildlife and the habitat upon which these species depend. The Center, NEDC, Cascadia Wildlands, Oregon Wild, and their members have a long-standing interest in the conservation of the unique prairie habitat of western Oregon and Washington and the species that rely upon these areas including the streaked horned lark. Indeed, this distinctive ecosystem is one of the most imperiled in the United States.

On October 3, 2013, the Service listed streaked horned larks as a threatened species.<sup>3</sup> The listing decision paints a grim picture for this prairie species and its future. Despite this bleak outlook, using its authority under Section 4(d) of the Act, the Service created regulations exempting from substantive protections in Section 9 of the Act numerous activities the agency specifically identified as threats to larks. In establishing this 4(d) rule, the Service failed to comply with the plain language of the ESA<sup>4</sup> acted arbitrarily and capriciously and contrary to law in violation of the Administrative Procedure Act (“APA”)<sup>5</sup> and failed to comply with the ESA’s consultation requirements.<sup>6</sup>

## **I. Legal Requirements.**

### **A. Endangered Species Act.**

Congress passed the ESA to conserve endangered and threatened species and the ecosystems upon which they depend.<sup>7</sup> 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.”<sup>8</sup> 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.”<sup>9</sup>

The ESA requires the Secretary of Interior to determine whether any species is “endangered” or “threatened,” and only those species that have been listed as “endangered” or “threatened” receive protection under the ESA.<sup>10</sup> A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.”<sup>11</sup> 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.”<sup>12</sup>

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<sup>3</sup> 78 Fed. Reg. 61452 (Oct. 3, 2013).

<sup>4</sup> 16 U.S.C. § 1533(d).

<sup>5</sup> 5 U.S.C. § 706.

<sup>6</sup> 16 U.S.C. §§ 1536(a)(2), 1536(a)(4).

<sup>7</sup> 16 U.S.C. § 1531(b).

<sup>8</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

<sup>9</sup> *Id.* 437 U.S. at 184.

<sup>10</sup> 16 U.S.C. § 1533(a).

<sup>11</sup> *Id.* § 1532(6).

<sup>12</sup> *Id.* § 1532(20).

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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

The Secretary must base all listing determinations “solely on the basis of the best scientific and commercial data available.”<sup>16</sup> As a result, Congress aptly described Section 4 of the ESA<sup>17</sup> as “[t]he cornerstone of effective implementation of the Endangered Species Act . . . .”<sup>18</sup>

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,<sup>19</sup> and “develop and implement” recovery plans for listed species.<sup>20</sup> The Service also is authorized to acquire land for the protection of listed species,<sup>21</sup> and make federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species.<sup>22</sup>

Additionally, Section 9 of the statute prohibits various activities including the “take” of all endangered species.<sup>23</sup> “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>24</sup>

The ESA’s take provisions do not automatically apply to species listed as threatened.<sup>25</sup> Instead, Section 4(d) of the Act provides that the Service “may” extend any of the prohibitions in Section 9 of the Act to threatened species.<sup>26</sup>

Two years after the ESA was enacted, however, the Service exercised its authority under Section 4(d) to extend the prohibition on “take” in Section 9 of the ESA to all threatened species.<sup>27</sup> This general regulation applies to all threatened species, unless the Service decides to adopt a species’ specific 4(d) rule.

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<sup>13</sup> 16 U.S.C. § 1533.

<sup>14</sup> *Id.* § 1533(a)(1).

<sup>15</sup> *Id.* § 1533(1).

<sup>16</sup> *Id.* § 1533(b)(1)(A).

<sup>17</sup> 16 U.S.C. § 1533.

<sup>18</sup> S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10.

<sup>19</sup> 16 U.S.C. § 1533(a)(3).

<sup>20</sup> *Id.* § 1533(f).

<sup>21</sup> *Id.* § 1534.

<sup>22</sup> *Id.* § 1535(d).

<sup>23</sup> 16 U.S.C. § 1538(a).

<sup>24</sup> *Id.* § 1532(19).

<sup>25</sup> 16 U.S.C. § 1538(a)(1).

<sup>26</sup> 16 U.S.C. § 1533(d).

<sup>27</sup> 50 C.F.R. § 17.31(a); 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975).

Section 4(d) further specifies that the Service “shall issue such regulations as [it] deems necessary and advisable to provide for the conservation” of threatened species.<sup>28</sup> The statute defines conservation as:

the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.<sup>29</sup>

The term “conservation” includes ensuring a species’ survival as well as promoting its recovery.<sup>30</sup>

Within the ESA there are limited exceptions to the “take” prohibition. Section 10 of the Act provides that private applicants may receive a permit to incidentally take listed species upon submission of a conservation plan (commonly referred to as a habitat conservation plan) that meets several substantive requirements.<sup>31</sup> An incidental take permit and the associated habitat conservation plan, can only be issued by the Service after opportunity for public comment is provided,<sup>32</sup> and the agency assures itself that certain monitoring, reporting, and substantive requirements have been met.<sup>33</sup>

Under Section 7 of the Act, all federal actions that may affect a listed species must go through a consultation between the Service and the agency taking or approving the action to “insure” that their actions neither “jeopardize the continued existence” of any listed species or species proposed for listing, nor “result in the destruction or adverse modification” of its “critical habitat.”<sup>34</sup> Likewise, all activities that may jeopardize a species that has been proposed for listing under the ESA must undergo a conference with the Service.<sup>35</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> 16 U.S.C. § 1532(3) (emphasis added).

<sup>30</sup> *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (quoting *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.”)).

<sup>31</sup> 16 U.S.C. § 1539(a)(2)(A).

<sup>32</sup> *Id.* § 1539(a)(2)(B).

<sup>33</sup> *Id.* § 1539(a)(2); 50 C.F.R. §§ 17.22; 17.32(b)(1).

<sup>34</sup> *Id.* § 1536(a)(2).

<sup>35</sup> *Id.* § 1536(a)(4).

## II. Streaked horned larks.

Streaked horned larks (*Eremophila alpestris strigata*) are small, ground-dwelling songbirds. They are brown in color with a dark brown or black back, a ruddy nape, yellow underparts, and are best known for their conspicuous feather tufts, or “horns,” on its head.<sup>36</sup>

Streaked horned larks prefer flat areas with sparse vegetation. The Service has found “that sites used by larks are generally found in open (i.e., flat, treeless) landscapes of 300 ac (120 ha) or more (Converse et al. 2010, p. 21).”<sup>37</sup> Adults eat grass and weed seeds and feed their young insects.<sup>38</sup> They typically nest in prairies, dunes, mudflats, estuaries, sandy beaches, sparsely vegetated grasslands, and the like.<sup>39</sup> Streaked horned larks nest from mid-April to August in depressions in the ground lined with soft vegetation.<sup>40</sup> They tend to return to their natal nests each year and on average produce three eggs.

Formerly a common nesting species in grasslands and prairies west of the Cascade Mountains from southern British Columbia through Washington and Oregon, streaked horned larks were so abundant around Puget Sound that they were considered a nuisance by turn-of-the-century golfers.

Streaked horned lark populations have plummeted primarily due to habitat loss and fragmentation.<sup>41</sup> The destruction of 98 percent of native grasslands on the West Coast caused cataclysmic population declines. Now, the lark is extirpated from the San Juan Islands, northern Puget Sound, the Rogue Valley in Oregon, and Canada.<sup>42</sup>

Today, streaked horned lark populations nest in just four regions in Washington and Oregon: 1) South Puget Sound; 2) South Washington coast; 3) the Lower Columbia River islands; and 4) the Willamette Valley. The South Puget Sound population is estimated to be decreasing between 40 and 45 percent per year.<sup>43</sup> The South Washington coast population and the Lower Columbia River islands population are both estimated to be declining by 40 percent per year. The Willamette Valley/Oregon population is not as well studied but estimated to be declining by roughly 4.6 percent per year.<sup>44</sup> A majority of the remaining streaked horned larks winter in the Willamette Valley or on islands in the Columbia River. Because larks winter in just two to three locations, they are extremely vulnerable to stochastic events, predation, and disease.

Starting in 2001, the Service identified streaked horned larks as candidates for listing under the ESA.<sup>45</sup> In 2002, the Center for Biological Diversity, Friends of the San Juans, Oregon Natural Resources Council, and Northwest Ecosystem Alliance petitioned the Service to list streaked

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<sup>36</sup> 78 Fed. Reg. at 61,456.

<sup>37</sup> *Id.* at 61,459.

<sup>38</sup> *Id.* at 61,460.

<sup>39</sup> *Id.* at 61,459.

<sup>40</sup> *Id.* at 61,460.

<sup>41</sup> *Id.* at 61,473.

<sup>42</sup> *Id.* at 61,495.

<sup>43</sup> *Id.* at 61,498.

<sup>44</sup> *Id.* at 61,459.

<sup>45</sup> 66 Fed. Reg. 54,808, 54,810 (Oct. 30, 2001).

horned larks as an endangered species.<sup>46</sup> Streaked horned larks were not proposed for listing until 2012 as a result of a 2011 settlement agreement between the Center and the Service requiring the agency to make listing or not warranted decisions for 757 species across the country. Streaked horned larks were listed as threatened with a 4(d) rule on October 3, 2013.<sup>47</sup>

### **III. Legal Violations.**

We hereby provide notice of the legal violations associated with the Service's promulgation of a 4(d) rule establishing vast exemptions from the otherwise applicable prohibition on take of threatened species in the Service's regulations,<sup>48</sup> and for the Service's regulation listing streaked horned larks as a threatened species instead of an endangered species.

#### **A. Promulgation of an Unlawful 4(d) Rule for Streaked Horned Larks.**

In adopting the 4(d) rule for streaked horned larks, the Service violated several requirements of the ESA and the APA. The 4(d) rule, according to the Service, authorizes:

take of streaked horned lark caused by certain common practices by agricultural operations; by wildlife hazard management at airports on State, county, private, or tribal lands; and by noxious weed control conducted on non-federal lands would be exempt from section 9 of the Act.<sup>49</sup>

In other words, the 4(d) rule authorizes three categories of activities on non-federal lands: agriculture activities, airport management activities, and noxious weed control. This rule violates the law in at least, the following ways:

First, the 4(d) Rule is invalid because streaked horned larks must be listed as an endangered species, not as a threatened species, and therefore, the Service has no discretion to reduce the protections provided by Section 9 of the ESA or pass a 4(d) rule for the conservation of the species (see below). Even if the species could be lawfully listed as threatened, for the reasons discussed below, the 4(d) rule accompanying the threatened listing is unlawful.

Second, the Service failed to comply with the plain language of Section 4(d), which specifies that the Service shall issue regulations that are "necessary and advisable for the conservation" of the species.<sup>50</sup> Instead, the Service issued a rule authorizing activities the agency acknowledges "cause some level of harm to or disturbance of the streaked horned lark."<sup>51</sup> As detailed below, issuing a rule to allow activities that are known to be threats to the species is not "necessary or advisable for the conservation" of the species because conservation is defined to mean recovery

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<sup>46</sup> 77 Fed. Reg. 61,938, 61,940 (Oct. 11, 2012).

<sup>47</sup> 78 Fed. Reg. 61,451 (Oct. 3, 2013).

<sup>48</sup> 50 C.F.R. § 17.31(a).

<sup>49</sup> 78 Fed. Reg. at 61,500.

<sup>50</sup> 16 U.S.C. § 1533(d).

<sup>51</sup> 78 Fed. Reg. at 61,502.

of the species and not maintenance of the status quo.<sup>52</sup> It also violates the plain language of the ESA.

The Service's justification for issuing a rule allowing harmful activities is that some of these activities also "create and improve habitat for the subspecies, and are important elements in the subspecies' conservation and recovery efforts."<sup>53</sup> The problem with this approach is twofold. One, a 4(d) rule is not necessary for activities that are beneficial since these activities do not need an exemption from the prohibitions in Section 9. For example, the many airports where the lark occurs need to mow to maintain aviation safety. Mowing during the majority of the year when the larks are not nesting does not cause any harm to the lark and is indeed beneficial, and thus no special exemption is needed for these activities. In contrast, mowing during nesting, when nests, eggs or even birds could be destroyed, does cause harm, but exempting this clearly harmful activity is not "for the conservation" of the species, and thus contrary to section 4(d). The Service acknowledged that mowing, as well as airplane strikes, kills larks and often in large numbers, but exempted these activities anyway.<sup>54</sup>

Many of the other activities authorized by the 4(d) rule are similarly harmful to the lark or its habitat. In particular, the 4(d) rule exempts all normal agricultural activities in the Willamette Valley. This exemption is so broad that it would allow conversion of streaked horned lark habitat to blueberries or other crops that provide no benefit to the species whatsoever. Likewise, the rule allows all noxious weed spraying, including directly spraying streaked horned lark habitat during the nesting season when birds are present.

Two, in exempting these activities, the Service has failed to put in place any restrictions or tailor the exemptions in any way to benefit larks, such as limiting mowing activities to outside lark nesting season, or limiting the agricultural exemption to specific forms of agriculture, like grass seed production, that actually benefit larks.<sup>55</sup> Nor does the 4(d) rule prevent a landowner from mowing, planting, or spraying chemicals to such an extent that he or she eliminates larks from the landscape entirely.<sup>56</sup> Without such restrictions, the 4(d) rule fails to ensure lark conservation,

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<sup>52</sup> 16 U.S.C. § 1532(3); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species." (quoting *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001))).

<sup>53</sup> 78 Fed. Reg. at 61,502.

<sup>54</sup> See 77 Fed. Reg. at 61,952 ("Burning and mowing are beneficial to larks in that they maintain the habitat structure required by the bird, but these activities can also harm larks if the activities occur during the breeding season when nests and young are present (Pearson and Hopey 2005, p. 29). In the nesting seasons from 2002 to 2004, monitoring at the Puget lowlands sites (Gray Army Airfield, McChord Field, and Olympia Airport) documented nest failure of 8 percent of nests caused by mowing over the nests, young, and adults (Pearson and Hopey 2005, p. 18)."); 77 Fed. Reg. at 61966 ("Horned lark strikes are frequently reported at military and civilian airports throughout the country" and for example, "[a]ircraft strikes are potentially a large source of adult mortality for streaked horned larks at McChord Field.").

<sup>55</sup> 78 Fed. Reg. at 61,464 ("We believe that imposing a timing restriction would likely reduce the utility of the special rule for land managers, and could have the unintended side effect of causing landowners to discontinue their habitat creation activities.").

<sup>56</sup> *Id.* at 61,468 ("the concern that land managers could inadvertently eliminate streaked horned larks from a site is valid, and we will work with land managers to identify opportunities to conserve larks on sites and for activities that are covered by the special rule.")

and may even jeopardize the continued existence of the species. Indeed, the activities authorized by the 4(d) rule are the same activities that the Service identifies as threats to the species that led to lark imperilment in the first place. As such, the lark 4(d) rule is not necessary or advisable for the conservation of the species as required by the plain language of the ESA.<sup>57</sup>

Third, in issuing the lark 4(d) rule the Service has done an end run around Section 10 of the ESA. Unlike Section 4(d), Section 10 of the ESA does permit activities that result in incidental take of listed species in exchange for the imposition of conservation measures that will benefit the species. Section 4(d) on the other hand requires that the authorized activities themselves are “necessary and advisable for the conservation of the species.”

Specifically, under Section 10, the Service may issue permits for incidental take of species from otherwise lawful activities provided that the applicant submits a conservation plan and the Service finds “after opportunity for public comment” that:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required under subparagraph (A)(iv) will be met.<sup>58</sup>

Here, the Service is authorizing activities under the lark 4(d) rule that result in incidental take that need to be permitted under Section 10 and accompanied by conservation measures and monitoring and reporting requirements because the activities in-and-of-themselves are not necessary and advisable for the conservation of the species. By doing an end run around Section 10 of the ESA, the Service is dodging its responsibility to have public notice and comment, find that the incidental take not appreciably reduce the survival of the lark, and impose monitoring and reporting requirements.

Fourth, the Service unlawfully relied upon voluntary actions to form the basis of the 4(d) rule for streaked horned larks. Just as the Service cannot rely upon such voluntary measures in deciding not to list a species, it also cannot rely upon them to “conserve” the species.<sup>59</sup>

Fifth, the Service has unlawfully delegated its ESA authority to private, municipal, and other landowners under the 4(d) rule. The lark 4(d) rule simply authorizes a host of ill defined activities to occur without reporting, monitoring, or any other required oversight by the Service. The agency cannot lawfully delegate its authority in this manner.<sup>60</sup>

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<sup>57</sup> 16 U.S.C. § 1533(d).

<sup>58</sup> 16 U.S.C. § 1539(a)(2)(B).

<sup>59</sup> See *Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (“NMFS must base its decision on current, enforceable measures”); *Fed’n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1169 (N.D. Cal. 2000).

<sup>60</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).



Finally, the 4(d) rule is also unlawful because it was adopted without the required consultations or conferences under Section 7 of the Act. Section 7(a)(2) of the Endangered Species Act requires “[e]ach federal agency,” including the Service, to “insure that any action authorized, funded, or carried out by” it “is not likely to jeopardize the continued existence of any endangered species or threatened species . . . .”<sup>61</sup> Section 7(a)(4) requires the Service to consult on agency actions that are “likely to jeopardize the continued existence of” a species proposed for listing.<sup>62</sup> Therefore, a 4(d) rule, such as the one established for streaked horned larks, is a federal action that requires conference under Section 7 of the Act.<sup>63</sup>

A Section 7 conference is particularly critical for the lark 4(d) rule given the impacts the authorized activities will have on larks. In its Federal Register notices the Service fails to quantify the impacts to the lark from the 4(d) rule. The agency does, however, document a four percent annual mortality rate of streaked horned larks at an airport due to strikes with aircraft and an eight percent nest failure for larks due to mowing at another airport.<sup>64</sup> This means without accounting for any other takes of larks at airports authorized by the 4(d) rule, such as from chemical applications that might eliminate food sources or other “hazardous wildlife management” techniques, airports are likely causing at least a twelve percent population reduction of streaked horned larks per year. Add to this take of larks the added take on agricultural lands due to mowing, burning, plowing, and vehicle strikes on dirt and back-country roads and the exemption for agriculture is also likely contributing at least an additional eight percent reduction in lark populations. Given that the record shows only “28 percent” nest success in Washington and “23 to 60 percent” in Oregon, the take authorized by the 4(d) rule poses a great risk of jeopardy to the species, especially to the three remaining lark populations in Washington.<sup>65</sup> As this example illustrates, the Service needs to consult on the effects of the lark 4(d) rule and ensure it will not jeopardize the continued existence of the species.

The Service’s attempts to justify the 4(d) rule are otherwise arbitrary and capricious and contrary to law.<sup>66</sup> The rule fails to require the implementation of any conservation measures but authorizes a host of activities to occur throughout the limited remaining range of the species.

## **B. Failure to List the Streaked Horned Lark as Endangered.**

In deciding to list the streaked horned lark as threatened instead of endangered, the Service violated the requirements of the ESA and the APA. These violations include, *inter alia*, the following:

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<sup>61</sup> 16 U.S.C. § 1536(a)(2).

<sup>62</sup> *Id.* § 1536(a)(4).

<sup>63</sup> See *Wash. Envtl. Council v. Nat’l Marine Fisheries Serv.*, 2002 U.S. Dist. LEXIS 5432, \*30 (W.D. Wash. 2002) (“ESA § 7 requires a formal consultation for any agency action ‘authorized, funded, or carried out by’ a federal agency. 16 U.S.C. § 1536(a)(2). The parties do not dispute that promulgation of the final § 4(d) rule in this case is such an action.”).

<sup>64</sup> 77 Fed. Reg. at 61,966; 78 Fed. Reg. at 61,478.

<sup>65</sup> 78 Fed. Reg. at 61,460.

<sup>66</sup> 5 U.S.C. § 706(2).

The Service failed to adequately evaluate the ESA's statutory listing factors<sup>67</sup> in deciding to list the streaked horned lark as a threatened rather than endangered species. The small population size (less than 1,600 birds in small scattered populations), continuing decline in population numbers, loss of genetic diversity especially in two regions, loss of 90 percent of its historic range, contraction of the existing range, mortality of birds related to airport and agricultural operations, specific threats to the species in Washington and Oregon, inadequate regulatory mechanisms to ensure its survival, and other threats all support an endangered listing.

In making its threatened determination, the Service failed to utilize the best available science.<sup>68</sup> The best available scientific information regarding the status of the species and threats to its continued existence, including a documented continuous decline in lark populations both in Washington and Oregon, low reproductive success, mortality of larks at airports that provide some of the little remaining habitat for the birds, genetic bottlenecking, vulnerability to stochastic events because of winter flocking behavior, and other threats that all support a determination that the species is currently threatened with extinction and should be listed as an endangered species.

In addition, between the listing proposal and the final action, the Service learned that lark populations are declining in Oregon's Willamette Valley, learned that predation is a threat to the species, and got further information on genetic loss within the remaining populations. Nevertheless, the Service still listed the species as only threatened instead of endangered.

Moreover, the Service ignores the best available science that shows that larks in Oregon face distinct threats from larks in Washington thus negating the agency's conclusion that threats are concentrated in Washington. These threats include: conversion of grass seed agriculture to other forms of agriculture, a lack of field burning and the associated habitat it created, burying of larks and/or their nests by dredge spoils, and stochastic events in lark wintering habitat. The Service also assumes stability of streaked horned lark populations in Oregon despite the fact that available data indicates population declines.

The Service reached an arbitrary significant portion of the range determination for streaked horned larks. During the time frame in which the Service listed the lark as threatened, it changed its policy interpreting "significant portion of the range." In December 2011, the Service proposed changes to the significant portion of the range policy and in July 2014 adopted a new policy.<sup>69</sup> As such, the Service provided the following explanation for how it conducted and reached its significant portion of the range determination in listing the lark:

we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be both (1) significant and (2) endangered or threatened. To identify only those portions that warrant further

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<sup>67</sup> 16 U.S.C. § 1533(a)(1).

<sup>68</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>69</sup> 79 Fed. Reg. 37,578 (July 1, 2014).

consideration, we determine whether there is substantial information indicating that: (1) The portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that are not significant, such portions will not warrant further consideration. If we identify portions that warrant further consideration, we then determine whether the species is endangered or threatened in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, the Service may address either the significance question or the status question first. Thus, if the Service considers significance first and determines that a portion of the range is not significant, the Service need not determine whether the species is endangered or threatened there. Likewise, if the Service considers status first and determines that the species is not endangered or threatened in a portion of its range, the Service need not determine if that portion is significant. However, if the Service determines that both a portion of the range of a species is significant and the species is endangered or threatened there, the Service will specify that portion of the range as endangered or threatened under section 4(c)(1) of the Act.<sup>70</sup>

The Service first determined that the lark is threatened throughout its range. The Service identified four remaining streaked horned lark populations in Washington and Oregon. The agency then determined that three of these four populations are likely to go extinct.<sup>71</sup>

The Service then considered whether “some portion of the full range of the subspecies may face threats or potential threats acting individually or collectively on streaked horned lark to such degree that the subspecies as a whole should be considered endangered.”<sup>72</sup> The Service determined that the Oregon and Washington birds face the same threats but that the Washington populations are plummeting while the Oregon populations are only declining.<sup>73</sup> Despite these facts, the Service nevertheless concludes that because “the relatively larger, more stable population in the Willamette Valley of Oregon would likely persist . . . the subspecies as a whole is not presently in danger of extinction.”<sup>74</sup>

This determination is contrary to the ESA and APA. The conclusion that the larks in Washington and Oregon face the same threats is not borne out by the record, which shows that lark populations in Washington are suffering from significant genetic loss and greater impacts from recreation. Likewise, the conclusion that a species that has lost 90 percent of its historic range and will lose three of the four remaining populations is “not presently in danger of

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<sup>70</sup> 78 Fed. Reg. at 61,497.

<sup>71</sup> 78 Fed. Reg. at 61,481 (“The streaked horned lark population decline in Washington indicates that the observed range contraction for this subspecies may be continuing, and the subspecies may disappear from that region in the near future”).

<sup>72</sup> 78 Fed. Reg. at 61,497.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

extinction,” 78 Fed. Reg. at 61,498, cannot be squared with well established legal precedent or the record before the Service which documented declines in the Oregon population of larks that the agency did not grapple with. Thus, the Service’s significant portion of the range determination is unlawful.

In making its threatened determination, the Service also failed to define the “foreseeable future” for this species and provide a rational explanation for its determination based on the facts before it. The record shows: a 90 percent loss of the species’ historic range,<sup>75</sup>; that the Service predicts the extinction of three of the four remaining populations of larks; and a “continued decline of the grass seed industry in the Willamette Valley,”<sup>76</sup> and “reduction in agricultural field burning” and both contributing to a decline in streaked horned lark populations in Oregon.<sup>77</sup> This is unlawful given the record and information before the agency, which would enable it to predict at least the extinction of three of the four remaining populations, if not all four populations.<sup>78</sup> Even if the Service cannot predict the timeframe in which the Oregon population will go extinct, the agency has more than sufficient information to define the foreseeable future for streaked horned larks. As such, that definition needed to be presented to the public for comment and incorporated into the Service’s listing determination because it may have led to an alternative conclusion – i.e., an endangered listing – given the facts before the agency.

The Service also improperly relied upon private entities or landowners undertaking voluntary measures to list streaked horned larks as threatened rather than endangered. Just as the Service may not rely upon voluntary measures as a basis for not listing a species as endangered or threatened, it was similarly arbitrary for the agency to rely upon such voluntary measures to serve as the basis for a threatened listing.<sup>79</sup>

The Service otherwise acted arbitrarily, capriciously, and contrary to law in deciding to list streaked horned larks as threatened instead of endangered.<sup>80</sup>

## CONCLUSION

This letter provides notice that we intend to file suit against the Service and the Department of Interior for failing to abide by the ESA and APA in promulgating rules for the streaked horned lark. If the Service does not act to remedy these violations within 60 days, we will initiate litigation in federal district court against the Service concerning these violations and will seek declaratory and injunctive relief and reasonable attorneys’ fees and costs. If you would like to

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<sup>75</sup> *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870 (9th Cir. 2009) (“Defenders requires the Secretary to analyze lost historical range”)

<sup>76</sup> 78 Fed. Reg. at 61,954.

<sup>77</sup> 78 Fed. Reg. at 61,460. As of 2012, agricultural field burning is no longer allowed in the Willamette Valley. 78 Fed. Reg. at 61,460.

<sup>78</sup> See *Western Watersheds Project v. Ashe*, 2013 U.S. Dist. LEXIS 79804, 46-47 (D. Idaho June 4, 2013) (“Failure to define ‘foreseeable future’ constitutes reversible error where the available scientific information allows for such definition.”).

<sup>79</sup> *Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (“NMFS must base its decision on current, enforceable measures”); *Fed’n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1169 (N.D. Cal. 2000); *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 744 (W.D. Tex. 1997),

<sup>80</sup> 5 U.S.C. § 706(2).

discuss these issues or believe that anything stated above is in error, please contact me at (971) 717-6407. We appreciate your consideration of this letter and the issues it raises.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tanya Sanerib", is written over a light blue rectangular background.

Tanya Sanerib  
Senior Attorney  
Center for Biological Diversity