



**PACIFIC LEGAL
FOUNDATION**

July 17, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of Interior
1849 "C" Street NW
Washington, DC 20240

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

The Honorable Greg Sheehan
Principal Deputy Director
U.S. Fish & Wildlife Service
1849 "C" Street NW, Room 3331
Washington, DC 20240

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Re: 60-Day Notice of Intent To Bring a Citizen Suit Pursuant to 16 U.S.C. § 1540(g)

Dear Secretary Zinke and Deputy Director Sheehan:

This letter provides notice of intent to commence civil litigation for violations of the Endangered Species Act.¹ The notice is submitted on behalf of Petitioners Dr. Rob Roy Ramey II; Center for Environmental Science, Accuracy & Reliability; Wyoming Stock Growers Association; Colorado Cattlemen's Association; Colorado Association of Home Builders; and Housing & Building Association of Colorado Springs.

Introduction

The Endangered Species Act authorizes the Secretary of the Interior, and through his delegate the United States Fish and Wildlife Service (collectively "Service"), to protect endangered and threatened populations of animals and plants.² The Act also provides a process whereby interested persons may petition the Service to add or remove these

¹ 16 U.S.C. §§ 1531-1544.

² *See id.* § 1533(a).

populations from the Act's lists of protected groups.³ The Service is required to delist a protected population when, for among other reasons, the best available data indicate that the population was originally listed in error.⁴

Earlier this year, the Service rejected the Petitioners' petition to delist the Preble's meadow jumping mouse on the ground of erroneous taxonomy.⁵ In doing so, the Service determined that the Preble's is properly considered its own subspecies and should remain listed.⁶ The Service's petition denial is illegal, for three reasons.

First, to evaluate the petition, the Service improperly employed a heightened standard, rather than the relaxed 90-day standard that the Act requires at the initial stage of the administrative process.

Second, the Service misconstrued Malaney & Cook (2013),⁷ which the delisting petition relies upon to challenge the Preble's current subspecies classification. Specifically, the Service mistook the study's disclaiming of any effort to comprehensively revise jumping mouse taxonomy for a concession that a revision of the Preble's taxonomy would be premature. In fact, the study demonstrates that such a revision is ripe, because the study's results reveal that the Preble's is closely related to plentiful, and previously unanalyzed, jumping mouse populations in Canada and Alaska.

Third, by affirming the Preble's subspecies classification without articulating a definition for what constitutes a subspecies, the Service violated the fundamental administrative law principle of rational decision-making.

For these reasons, more fully explained below, Petitioners urge the Service to reconsider its petition denial, in order to avoid litigation.

³ See *id.* § 1533(b).

⁴ See *id.* § 1533(b)(3)(B)(ii); 50 C.F.R. § 424.11(d)(3).

⁵ 83 Fed. Reg. 16,819 (Apr. 17, 2018).

⁶ See *id.* at 16,821.

⁷ Jason L. Malaney & Joseph A. Cook, *Using biogeographical history to inform conservation: the case of Preble's meadow jumping mouse*, 22 MOLECULAR ECOLOGY 6000 (2013).

Parties

Dr. Rob Roy Ramey II is a longtime advocate for sound and unbiased scientific research. He earned his Bachelor's degree in Biology and Natural History from the University of California at Santa Cruz, his Master's degree in Wildlife Ecology from Yale University, and his Ph.D. in Ecology and Evolutionary Biology from Cornell University. Dr. Ramey's postdoctoral work included research at the University of Colorado, Boulder. There, his efforts answered a longstanding question on the host specificity of psoroptic scabies mites, which harm bighorn sheep and many other wild and domestic animal species. Later, with the Center for Reproduction of Endangered Species at the San Diego Zoo, and then the University of California's White Mountain Research Station, he pioneered the development of non-invasive genetic sampling for mountain sheep. Dr. Ramey went on to become the Curator of Vertebrate Zoology at the Denver Museum of Nature & Science. There, among other activities, he researched the genetic and morphological uniqueness of jumping mouse subspecies (including the so-called Preble's meadow jumping mouse). In 2007, he founded Wildlife Science International, Inc., and began research and consulting full-time on scientific issues involving the Endangered Species Act. Dr. Ramey has an active research program, has published the results of his research in peer-reviewed journals, and has testified three times before congressional committees on the need for changes in the implementation of the Endangered Species Act, including greater transparency and public access to the data upon which decisions are based. Dr. Ramey is committed to the conservation of threatened and endangered species, a commitment which includes advocating for the effective prioritization of conservation efforts. He believes that this commitment will be furthered by the delisting of the Preble's.

The Center for Environmental Science, Accuracy & Reliability (CESAR) is a California nonprofit corporation committed to identifying fact-based science to assist in the conservation of species, to ensure the fair and consistent application of environmental laws, and to provide information on conservation to the public, policy makers, and agency staff. CESAR has a longstanding concern over the misuse of taxonomic data to justify the listing of populations under the Endangered Species Act. This concern is demonstrated by the many delisting petitions that CESAR has submitted to challenge the Service's faulty taxonomic decision-making, including those dealing with the coastal California gnatcatcher and the Southwestern willow flycatcher, as well as the Preble's.

The Wyoming Stock Growers Association (WSGA) is a Wyoming nonprofit corporation that represents approximately 1,000 members engaged in ranching across the state. Founded in 1872, WSGA seeks to protect, promote, and assert the business, economic, social, and educational interests of its members, including producers of sheep and beef cattle. It represents these interests by regularly engaging in legislative, administrative, and legal advocacy, especially regarding the sustainable management of public and private lands. WSGA promotes the role of the Wyoming livestock industry in resource stewardship by informing and educating the public. The organization has a longstanding interest in endangered species issues, including controversies concerning the Preble's and the impacts that its regulatory protections have on the livestock industry.

The Colorado Cattlemen's Association (CCA) is a nonprofit organization working collectively to advance the viability of beef production while enhancing the role of beef in a healthy lifestyle. CCA works as a voice for the beef production industry, as well as for related industry members and landowners. Beef producers join CCA voluntarily and manage it cooperatively to accomplish goals that no producer could accomplish alone. Although there are numerous scientific and sociological reasons why CCA is interested in the Preble's delisting, the one that is foremost in importance to CCA's members and the organization is the economic factor. The cost of keeping the Preble's listed—when the listing is unwarranted—harms landowners (including CCA's members) by imposing expensive conservation and management measures, among other regulatory burdens. Peer-reviewed science establishes that the Preble's is genetically the same as other jumping mice, and does not qualify as a separate subspecies. For that reason, its continued listing is improper.

The Colorado Association of Home Builders (CAHB) is the unified voice of the Colorado home building industry. Founded in 1974, CAHB is an affiliate of the National Association of Home Builders and has ten local home builder associations across Colorado. With a statewide membership of nearly 2,000, representing 40,000 jobs, and adding \$11.5 billion annually to the Colorado economy, CAHB plays a crucial role in providing housing for Coloradans. CAHB's mission is to provide attainable quality housing for all Coloradans. CAHB achieves its mission by: advocating for positive legislative solutions and by opposing measures that impair the ability to deliver housing or that unreasonably regulate the industry; empowering its members with learning opportunities at the local, state, and national levels; and supporting the goals and activities of each of the ten local associations. CAHB represents builders and developers whose property has been negatively affected by the listing of the Preble's. The cost of complying with the Preble's

threatened species regulations, along with the ensuing delays in the submittal and approval processes, the set-asides of usable land, cost overruns on infrastructure, and other measures requested by the Service, have reduced the affordability of housing in Colorado. Therefore, the Preble's delisting would further CAHB's mission to protect and enhance the state's homebuilding industry.

The Housing & Building Association of Colorado Springs (CSHBA) is a member trade association comprising more than 500 companies, which include builders, developers, and remodelers, as well as trade contractors, materials suppliers, mortgage lenders, realtors, title companies, interior designers, architects, and landscapers. CSHBA works to promote policies that allow these and other businesses to contribute to the production of safe and affordable housing for, and the economic growth of, El Paso County, Colorado. CSHBA is interested in the Preble's listing status because a delisting would help developers and builders regain full use of the developable portion of their land and avoid further unneeded delays and cost caused by Endangered Species Act regulations.

Background

Listed by the Service as "threatened" in 1998, the Preble's is a small rodent found along the Front Range of the Rocky Mountains in Colorado and southeastern Wyoming.⁸ It is "greyish to yellowish-brown in color," has "large hindlegs and hindfeet," and "is adapted for digging."⁹ Nocturnal or crepuscular in nature, the Preble's "lives primarily in heavily vegetated riparian habits" and "hibernates approximately 7 months of the year in an underground burrow."¹⁰ The Service considers the Preble's to be a subspecies of the species *Zapus hudsonius* (the meadow jumping mouse). The Service's original subspecies designation for the Preble's was based on "geographic separation and morphological differences from other subspecies."¹¹ More recently, the Service has relied on genetic analyses that purport to show distinctions between the Preble's and nearby jumping mouse populations.¹² A key assumption underlying all of this prior taxonomic work is

⁸ 63 Fed. Reg. 26,517, 26,517 (May 13, 1998).

⁹ *Id.* at 26,517-18.

¹⁰ *Id.*

¹¹ 78 Fed. Reg. 31,680, 31,682 (May 24, 2013) (citing P.H. Krutzsch, *North American jumping mice (genus Zapus)*, 4 UNIV. KANSAS PUBL., MUS. NAT. HIST. 349, 452-53 (1954)).

¹² See 78 Fed. Reg. at 31,686.

that spatially adjacent jumping mouse “subspecies” are the most closely related—an assumption which has resulted in prior studies’ use of narrow sample sizes.¹³

The taxonomic shortcomings of such limited sampling have been demonstrated by Malaney & Cook (2013), the first and only study of the Preble’s to combine genetic analyses with species distribution modeling and tests of ecological interchangeability.¹⁴ Unlike all previous genetic reviews of North American jumping mice, Malaney & Cook (2013) obtained a comprehensive sampling of every subspecies of jumping mouse found on the continent, using DNA sequences from 762 specimens.¹⁵ The study produced a species-tree phylogeny that identified 21 significantly divergent historical-biogeographical lineages of North American jumping mice.¹⁶ Notably, the tree “failed to document significant support for all morphologically based subspecies,” such as the Preble’s.¹⁷ In addition to its comprehensive sampling, Malaney & Cook (2013) used a quantitative approach to assess lineage distinctiveness, integrating genetic, evolutionary, and ecological data. Consequently, the study’s lineage-based species-tree phylogeny is vastly superior to prior morphologically based taxonomy in its representation of the genetic diversity of North American jumping mice. And in contrast to prior genetic studies, Malaney & Cook (2013) used a much broader sampling approach, the employment of which revealed that “far northern (geographically distant) subspecies . . . form a closely related clade with Front Range *Z. h. preblei*.”¹⁸ Indeed, the study found no distinguishing nuclear DNA base pair changes between Front Range populations (*i.e.*, all Preble’s mouse populations) and populations found much farther north in Canada and Alaska.

¹³ See Malaney & Cook, *supra* note 7, at 6009-10.

¹⁴ *Id.* at 6000.

¹⁵ See *id.* at 6002, 6006.

¹⁶ See *id.* at 6003 fig. 2.

¹⁷ *Id.* at 6007.

¹⁸ *Id.*

The results of Malaney & Cook (2013) were informed by the study's integration of historical biogeography, a spatiotemporal perspective analyzing demographic signals and spatial shifts of lineages over time. With regard to the Northern lineage, including the Preble's, the study found low measures of intra-lineage genetic differentiation. This finding is consistent with a recent northward expansion of the jumping mouse's Northern lineage.¹⁹ Such expansion was an ecological response to the Earth's latest deglaciation, which allowed closely related jumping mice populations to expand rapidly to the north as part of a general "poleward shift of biota."²⁰ In addition to genetic data, fossil data and niche studies bolster the conclusion "that during the early Holocene as glaciers retreated, ancestors of the Northern lineage . . . tracked suitable conditions westward from the Great Plains to regions along the Front Range of the Southern Rockies and northward to Alaska."²¹

Malaney & Cook (2013) emphasized "the need to assess evolutionary variation within a comprehensive historical-biogeographical context, as a first step in evaluating conservation status."²² As noted above, the critical shortcoming of all prior Preble's studies was their assumption "that spatially adjacent subspecies were most closely related."²³ Malaney & Cook (2013) determined that, in light of the genetic similarity and the lack of any distinct variation in both niche and morphological characteristics, the Preble's should be considered taxonomically synonymous with the two other subspecies constituting the Northern lineage, *Z. h. alascensis* and *Z. h. tenellus*.²⁴ And because this tri-population grouping of the Northern lineage has a wide and expanding range, as well as a comparatively large effective population size, with recent demographic growth to boot, Malaney & Cook (2013) concluded that the Preble's most likely fits the International Union for Conservation of Nature status of "least concern."²⁵

¹⁹ *Id.* at 6000.

²⁰ *Id.*

²¹ *Id.* at 6011 (citations omitted).

²² *Id.* at 6010.

²³ *Id.* at 6009.

²⁴ *Id.* at 6008.

²⁵ *Id.*

Relying on Malaney & Cook (2013), Petitioners submitted in March, 2017, a petition to delist the Preble's on the basis of taxonomic error. The Service's denial of that petition, issued in April, 2018, makes two basic arguments, one procedural and one substantive. As to procedure, the petition denial observes that Malaney & Cook (2013) had already been the subject of two agency reviews: the Service's 2014 Preble's status review, and its 2016 draft Preble's recovery plan.²⁶ In the 2014 status review, the Service determined that the results of Malaney & Cook (2013) did not warrant a change in the Preble's taxonomy.²⁷ The 2016 draft recovery plan reiterates that conclusion without citing the status review.²⁸ In its petition denial, the Service concluded that, because Malaney & Cook (2013) had already been reviewed, the agency did not need to institute another review. As to substance, the petition denial asserts that Malaney & Cook (2013) disclaimed any effort to revise the taxonomic status of North American jumping mice.²⁹ Therefore, because the delisting petition purportedly "extrapolates a conclusion from Malaney & Cook (2013) beyond the support of those data examined in the study," the Service concluded that the petition should be denied.³⁰

Violations of the Endangered Species Act

The Service's denial of the Preble's delisting petition violates the Endangered Species Act in three related ways.

First, the petition denial improperly employs a heightened standard of review. The Endangered Species Act establishes a two-step procedure for processing petitions. The

²⁶ U.S. Fish & Wildlife Serv., 90-Day Finding on a Petition to Delist the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) under the Endangered Species Act, Fed. Doc. No. FWS-R6-ES-2017-0102, at 3, 6 (Feb. 2, 2018) [hereinafter *Petition Denial*].

²⁷ U.S. Fish & Wildlife Serv., 5-Year Review for the Preble's Meadow Jumping Mouse 5 (2014) [hereinafter *Status Review*].

²⁸ U.S. Dep't of Interior, U.S. Fish & Wildlife Serv., Mountain-Prairie Region, Draft Recovery Plan: Preble's Meadow Jumping Mouse 3 (2016) [hereinafter *Draft Recovery Plan*].

²⁹ See *Petition Denial*, *supra* note 26, at 5 ("[T]he study does not propose to revise the formal taxonomy of the Preble's mouse or any of the other subspecies of jumping mice (Malaney & Cook 2013, p. 10). Specifically, the study concludes, 'additional tests will be required before hypotheses of infraspecific taxonomic synonymy can be implemented ... [and that] a revised taxonomy of the group is needed but is outside the context of this study' (Malaney & Cook 2013, p. 10.)").

³⁰ *Petition Denial*, *supra* note 26, at 6.

first step (the step at which the Service denied the delisting petition) is for the Service to determine whether the petitioned action contains substantial scientific or commercial information indicating that the petitioned action “may be warranted.”³¹ This is “not a rigorous” standard,³² and evidence that is less than conclusive can satisfy it.³³ The regulations governing petition processing explain that this modest hurdle is surmounted whenever a petition presents credible information such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.³⁴ Thus, to move past this initial finding, a petition need not show that the requested action *is* warranted, but only that it *may be* warranted.³⁵ Moreover, a petition need not make a showing that would convince *the Service* that the requested action may be warranted, but instead merely a showing sufficient to convince *a reasonable person* that the requested action may be warranted.³⁶

But in denying the delisting petition, the Service did not employ the relaxed first-step standard. Rather, it used the standard that is to be applied at the second step of the petition process, when the agency must determine, in light of all the evidence collected through public comment and agency solicitation, whether *the Service* believes that the petitioned action *is* warranted.³⁷ The petition denial cites the 2014 status review, but in that document the Service merely asked itself, “Do we believe that this study merits a change in the Preble’s taxonomic status?”³⁸ And the draft recovery plan, also referenced in the petition denial, does not even cite the 2014 status review and offers no analysis of

³¹ 16 U.S.C. § 1533(b)(3)(A).

³² *Buffalo Field Campaign v. Zinke*, 289 F. Supp. 3d 103, 106 (D.D.C. 2018).

³³ *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1140 (D. Colo. 2004).

³⁴ 50 C.F.R. § 424.14(h)(1)(i).

³⁵ *Ctr. for Biological Diversity v. Kempthorne*, No. C 06-04186 WHA, 2007 WL 163244, at *7 (N.D. Cal. Jan. 19, 2007).

³⁶ *See Buffalo Field Campaign*, 289 F. Supp. 3d at 110 (“Unless the Service explains why the scientific studies that the petition cites are unreliable, irrelevant, or otherwise unreasonable to credit, the Service must credit the evidence presented.”).

³⁷ 16 U.S.C. § 1533(b)(3); 50 C.F.R. § 424.14(h)(2).

³⁸ *See Status Review*, *supra* note 27, at 5 (“We agree that this new information is not sufficient to formally change the taxonomy of the Preble’s.”).

Malaney & Cook (2013).³⁹ Thus, neither prior “review” addresses the right issue—namely, whether a taxonomic change *may be* warranted (as opposed to “is warranted”) in the view of a *reasonable person* (as opposed to the Service’s own estimation).

To be sure, the Service’s petition regulations warn that, “[w]here [a] prior review resulted in a final agency action, a petitioned action generally would not be considered [to] be warranted unless the petition provides new information not previously considered.”⁴⁰ But neither the 2014 status review nor the 2016 draft recovery plan qualifies as “a final agency action”: the former has no legal consequence,⁴¹ and the latter “draft” document is by definition not final.⁴² Hence, the Service’s peremptory delisting denial runs afoul of the Service’s regulations as well as the statute.

Second, the Service misconstrued the evidence on which the delisting petition relies. Although Malaney & Cook (2013) acknowledged that more work is necessary to essay a comprehensive taxonomy for North American jumping mice, that acknowledgement does not drain the study of all probative value.⁴³ Proposing a new taxonomic division for *all* of the existing twelve subspecies of jumping mice is unnecessary to show that the subspecies designation for one of them—the Preble’s—is unwarranted.⁴⁴ Moreover, Malaney & Cook (2013) stated that, in light of “the deep divergences of some lineages and shallow divergences of others, *a revised taxonomy of the group is needed*”⁴⁵—in other words, the status quo is flawed and corrective action should be taken. Such action is particularly

³⁹ See Draft Recovery Plan, *supra* note 28, at 3.

⁴⁰ 50 C.F.R. § 424.14(h)(1)(iii).

⁴¹ See Coos County Bd. of County Comm’rs v. Kempthorne, 531 F.3d 792, 793 (9th Cir. 2008) (the Service has no duty to act on a status review).

⁴² See generally Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (final agency action must mark the consummation of the decision-making process and determine rights or obligations, or produce legal consequences).

⁴³ See Humane Soc’y of the U.S. v. Pritzker, 75 F. Supp. 3d 1, 11 (D.D.C. 2014) (observing that “the need for more thorough analysis suggests that a reasonable person might conclude that ‘a review of the status of the species concerned’ was warranted,” and thus that the 90-day standard has been met) (quoting 50 C.F.R. § 424.14(h)(2)).

⁴⁴ See Malaney & Cook, *supra* note 7, at 6009 (noting that the Preble’s “may be considered synonymous” with two northern jumping mouse subspecies).

⁴⁵ *Id.* (emphasis added).

warranted given that the Service's 2013 affirmation of the Preble's subspecies classification (the Service's most recent "final agency action" addressing the Preble's subspecies status) cites the purported "considerable genetic differentiation" between the Preble's and other jumping mouse populations as one important basis to justify the Preble's subspecies designation.⁴⁶ Yet that conclusion was based entirely on comparisons between the Preble's and neighboring jumping mouse populations,⁴⁷ whereas Malaney & Cook (2013) demonstrated that the Preble's is quite closely related to plentiful (but somewhat more distant) northern jumping mouse populations,⁴⁸ groups which were *not* reviewed in the studies that the Service's 2013 finding cites.⁴⁹

Third, the Service failed to articulate any standard for what constitutes a "subspecies," either generally or as applied to jumping mice. Although the Endangered Species Act authorizes the Service to list "subspecies,"⁵⁰ the Act does not define the term,⁵¹ and the Service has never promulgated a regulation or policy fleshing it out.⁵² The Service's 2013 finding asserts that the Preble's "meets or exceeds numerous, widely accepted subspecies

⁴⁶ 78 Fed. Reg. at 31,686 (citing Tim L. King, *et al.*, *Comprehensive genetic analyses reveal evolutionary distinction of a mouse (Zapus hudsonius preblei) proposed for delisting from the US Endangered Species Act*, 15 MOLECULAR ECOLOGY 4331, 4336-48 (2006); Sustainable Ecosys. Inst., *Evaluation of Scientific Information Regarding Preble's Meadow Jumping Mouse* 41-43 (2006)).

⁴⁷ See King, *supra* note 46, at 4332-33; Sustainable Ecosys. Inst., *supra* note 46, at 41-43 (reviewing King).

⁴⁸ Malaney & Cook, *supra* note 7, at 6000, 6011.

⁴⁹ Petition of Dr. Rob Roy Ramey II, *et al.*, to Delist the Preble's Meadow Jumping Mouse under the Endangered Species Act 19-24 (2017).

⁵⁰ See 16 U.S.C. § 1532(16).

⁵¹ See *id.* Cf. Anna L. George & Richard L. Mayden, *Species Concepts and the Endangered Species Act: How a Valid Biological Definition of Species Enhances the Legal Protection of Biodiversity*, 45 NAT. RESOURCES J. 369, 374 (2005) (observing that the Act's "definition" for species "does not define a species at all" but "merely provides for protection of groups below the species level").

⁵² Existing regulation does direct the Service to consult with its own experts and the outside scientific community when making taxonomic decisions. 50 C.F.R. § 424.11(a). But that instruction is unhelpful here because there is no universally accepted definition among taxonomists for subspecies. Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1100-01 (1997) ("Although many biologists use the word subspecies, it carries no similar, generally recognized biological meaning.").

definitions.”⁵³ But the cited definitions are not identical, and thus the regulated public still has no way of knowing what must be shown to disprove the Service’s subspecies finding.

Not just fairness, but logic as well obliges the Service not to list a “subspecies” without articulating what does in fact constitute a valid subspecies.⁵⁴ Here, the Service rejected the delisting petition without providing any standard for what would have to be shown in order to disprove the Preble’s subspecies status. Without setting forth a standard, the Service impermissibly insulates its decision-making by keeping the public in the dark as to the relevant goals.⁵⁵ Such opportunistic inconsistency is in fact already happening: the Service criticized Malaney & Cook (2013) as “insufficient to formally change the taxonomy of the Preble’s mouse,”⁵⁶ yet in 2013 the Service purported to disavow any necessary allegiance to existing taxonomic classification.⁵⁷ The Service should end this gaming of the system by binding itself to reasonable *and* publicly articulated standards for subspecies diagnosis.

Conclusion

The Service’s denial of the delisting petition violates the Endangered Species Act by (i) employing an improperly heightened standard of review, (ii) misconstruing the petition and its evidence, and (iii) failing to articulate a standard to govern subspecies designation which would guide the Service’s decision on the petition.

⁵³ 78 Fed. Reg. at 31,686.

⁵⁴ See *Trafalgar Cap. Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 n.11 (1st Cir. 1998) (an “ad-hoc standardless determination . . . is likely to be arbitrary and capricious”). Cf. *Kunkel v. Comm’r*, 821 F.3d 908, 910 (7th Cir. 2016) (“[Y]ou can’t beat something with nothing.”).

⁵⁵ Cf. *Pennsylvania v. Surface Transp. Bd.*, 290 F.3d 522, 535 (3d Cir. 2002) (“[A]gencies must apply consistent standards and principles to insure the fairness of the administrative process.”).

⁵⁶ Petition Denial, *supra* note 26, at 3, 6.

⁵⁷ 78 Fed. Reg. at 31,686 (“In reaching this conclusion [viz., that the Preble’s is a subspecies], we have not presumed that we must rely on the established taxonomy in the absence of contradictory data.”).

The Honorable Ryan Zinke
The Honorable Greg Sheehan
July 17, 2018
Page 13

If the Service does not promptly remedy these legal errors, Petitioners will commence a civil action to require their correction following expiration of the statutory 60-day notice period.

Sincerely,

A handwritten signature in blue ink, appearing to read "Damien Schiff", is written over the typed name.

Damien M. Schiff

Jeffrey W. McCoy

Attorneys for Dr. Rob Roy Ramey II, *et al.*