



December 9, 2004

**60-DAY NOTICE OF INTENT TO SUE  
UNDER THE ENDANGERED SPECIES ACT**

Gale Norton, Secretary of Interior  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240  
[gale\\_norton@ios.doi.gov](mailto:gale_norton@ios.doi.gov)

Steve Williams, Director  
United States Department of the Interior  
Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, D.C. 20240  
[steven\\_a\\_williams@fws.gov](mailto:steven_a_williams@fws.gov)

Ralph Morgenweck, Region 6 Director  
United States Department of the Interior  
Fish and Wildlife Service  
Denver Federal Center  
P.O. Box 25486  
Denver, CO 80225-0286  
[mountain-prairie@fws.gov](mailto:mountain-prairie@fws.gov)

VIA EMAIL AND CERTIFIED MAIL

**In re: Swift Fox**

Dear Secretary Norton, Director Williams, and Director Morgenweck:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), you are hereby notified that Forest Guardians, Predator Conservation Alliance, Great Plains Restoration Council, and the Center for Biological Diversity intend to bring a civil action for violations of the ESA, 16 U.S.C. § 1531 et seq. and its implementing regulations, 50 C.F.R. § 402 et seq. Plaintiffs' claims arise from the actions or inactions of the Secretary of the U.S. Department of Interior and the U.S. Fish and Wildlife Service (FWS) with respect to the Swift Fox (*Vulpes velox*). The "not warranted" determination on the petition to list the swift fox as endangered under the Endangered Species Act is arbitrary and capricious, does not use best available science in violation of ESA Section 4(1)(A), illegally considers future conservation actions as a reason not to list the species, and violates interagency peer review guidelines.

On Monday, January 8, 2001 you announced a finding of “not warranted” for the swift fox. This determination is based on data from five annual reports of the Swift Fox Conservation Team (1995-2000) and the Team’s Swift Fox Conservation Assessment and Conservation Strategy.

The finding notice (66 Federal Register 1298) concluded that the fox was “more abundant and distributed more widely than previously thought and more flexible in its habitat needs that was represented in the 1995 12-month finding (60 Federal Register 31663). FWS characterized the fox as abundant and widespread on the basis of county data collected from 1995 – 2000. Analysis results of these data indicated that the fox occupied 38 – 41% of its historic range. However, the standard for listing species, since 1973, demands that an imperiled species be protected in a *significant* portion of its range. The 59 – 62% of unoccupied swift fox range is a significant portion. And, this area is particularly significant given the following description in the 2000 *Candidate and Listing Priority Assignment Form* for the swift fox: “swift fox populations appear to have been extirpated in North Dakota, are declining in South Dakota, and are present in low numbers in only a few counties in western Nebraska” (p.4).

You opted to remove the swift fox from ESA candidacy despite the disappearance and continued imperilment of the swift fox in the Northern Plains. The definitions of “endangered” and “threatened” require the listing of imperiled species “throughout all or a significant portion of its range” (ESA Section 3(6), (19)). Removal of a species, in this case the swift fox, that remains imperiled in the majority of its range from ESA candidacy is premature.

Moreover, at the time the last Swift Fox Conservation Team annual report (2000) included in the “not warranted” finding was issued, most states were still in the process of conducting baseline surveys of swift fox distribution and abundance. Thus, it was not possible to determine trend data on swift fox populations across their range from the state annual reports at the time of the “not warranted” decision. The best available science was insufficient in 2001 to conclude that the swift fox population was recovering and that the swift fox was not warranted for listing as endangered under the ESA.

#### Illegal Consideration of Future Conservation Actions in Swift Fox Not Warranted Finding

As you know, several courts have held that future conservation efforts, even by federal and state agencies, do not justify further delay in listing candidate species. District courts struck down FWS’s reliance on possible future actions of the U.S. Forest Service as a basis for not warranted determinations for both the Alexander Archipelago wolf (*Canis lupus ligoni*) (Biodiversity Legal Foundation v. Babbitt, 943 F.Supp. 23 (D.D.C.1996) and the Queen Charlotte goshawk (*Accipiter gentilis laingi*) (Southwest Center for Biological Diversity v. Babbitt, 939 F.Supp. 49 (D.D.C.1996)). The U.S. District Court in Texas also rejected an FWS determination that listing was not warranted for the Barton Springs Salamander (*Eurycea sosorum*) because of a conservation agreement between FWS and Texas state agencies (Save Our Springs Legal Defense

Fund, Inc. v. Babbitt, Civ No. 96-168-CA (W.D.Tex., Mar 25, 1997)). The court held that the efficacy of the conservation agreement was speculative (Id. at 9).

In addition, the U.S. District Court in Oregon went one step further in 1998 by holding that the National Marine Fisheries Service could rely neither on future or voluntary conservation measures within the Oregon Coastal Salmon Restoration Initiative Plan to deny listing of the Oregon Coast evolutionarily significant unit of coho salmon (*Oncorhynchus kisutch*) (Oregon Natural Resources Council et al. v. Daley et al., 6 F.Supp.2d 1139 (D.Or.1998)). Because they are unenforceable, the court maintained that voluntary conservation measures, like future measures, “should be given no weight in the listing decision” (Id. at 1155).

Similarly, the Oregon district court rejected FWS’s reliance on the Northwest Forest Plan as a justification for finding that the bull trout (*Salvelinus confluentus*) faced only a “moderate” threat and was therefore warranted but precluded (Friends of Wild Swan, Inc. v. U.S. Fish and Wildlife, 945 F.Supp. 1388 (D.Or.1996)). The court stated that FWS “cannot rely upon its own speculations as to the future effects of another agency’s management plans to put off listing a species” (Id. at 1398). That is precisely the mistake FWS is making in regard to the swift fox.

Your refusal to list the swift fox was illegally based on the assumption that future conservation actions, primarily through the work of the Swift Fox Conservation Team, will preserve and recover this species. In 2001, when the swift fox was removed from the Endangered Species Act candidate list, several states had not completed base-line surveys to assess swift fox distribution and abundance. Despite the FWS claim that swift fox were more abundance and widespread than believed in 1995, state-collected data do not demonstrate population trends that support the conclusion that swift fox populations are increasing. Despite the delegation of swift fox conservation to the states, the states for the most part have merely conducted research and have implemented no effective conservation plans or activities (see G. Schmitt. Swift Fox Conservation Team: 1999 Annual Report, September 2000; M. Grenier. Swift Fox Conservation Team: 2002 Annual Report, August 2003). While Colorado did try to develop an incentive program to protect swift fox habitat by paying ranchers not to poison prairie dog colonies, the program has lapsed. Despite some swift fox reintroduction and recovery efforts in the Northern Plains of the U.S. and Canada, insufficient data exist to support the claim that swift fox populations are recovering throughout their historic range and are no longer in danger of extinction.

#### Violation of Peer Review Process

By failing to provide peer reviewers with the opportunity to review the listing proposal withdrawal notice prior to its finalization and publication, you violated the interagency peer review guidance (59 Fed. Reg. 34270 (July 1, 1994)).

Conclusion

As provided under the ESA citizen suit provision, 16 U.S.C. § 1540(g), Forest Guardians, Predator Conservation Alliance, Great Plains Restoration Council, and the Center for Biological Diversity and other interested parties may institute legal action after 60 days following the date of this notice for any or all of the foregoing violations of law, and seek declaratory and injunctive relief as appropriate, as well as recovery of their costs and expert and attorney fees pursuant to the ESA citizen suit provision and/or the Equal Access to Justice Act.

The U.S. Supreme Court and other courts have frequently noted that the purpose of 60-day notice requirements, such as that contained in the ESA, is to encourage discussions among the parties, in order to avoid potential litigation. That is precisely our intent here in providing this notice. We prefer to avoid litigation if possible. However, we feel compelled to provide this notice in order to fulfill legal requirements necessary before instituting legal actions, should it become necessary in order to avoid significant additional harm to the swift fox.

Please contact Lauren McCain at 303-780-9939 or [lmccain@fguardians.org](mailto:lmccain@fguardians.org) to discuss this matter further, or if you believe any of the above statements to be in error.

Sincerely,

Lauren McCain, Ph.D.  
Desert and Grasslands Program Coordinator  
Forest Guardians  
Denver Office:  
1452 Hudson St.  
Denver, CO 80220

Jonathan Proctor  
Northern Plains Program Director  
Predator Conservation Alliance

Jarid Manos  
Executive Director  
Great Plains Restoration Council

Jay Tutchton  
as Counsel for  
Center for Biological Diversity