

August 12, 2004

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

Gale Norton, Secretary of Interior
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Ralph Morgenweck, Region 6 Director
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VIA ELECTRONIC MAIL, FAX, AND CERTIFIED MAIL

**In re: Notice of Intent to Sue Concerning Not Warranted Black-tailed Prairie Dog
Petition Finding**

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, Biodiversity Conservation Alliance, Center for Biological Diversity, Center for Native Ecosystems, Predator Conservation Alliance and other interested parties 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. Your “not warranted” determination on the petitions to list the Black-tailed Prairie Dog (*Cynomys ludovicianus*) under the Endangered Species Act is arbitrary and capricious, not in accordance with law, and not based on the best available science, in contravention of Section 4(b) of the ESA (See 16 U.S.C. § 1533(b)(1)(A)).

The Black-tailed Prairie Dog continues to suffer an onslaught of threats, including poisoning, shooting, habitat destruction, and sylvatic plague. We have provided extensive documentation on continued actual threats to this species. The removal of the Black-tailed Prairie Dog from the candidate list will likely exacerbate existing threats and perhaps create new threats

to the persistence of this species. The removal of this species from the candidate list has prompted us to advise you that we intend to see that the Endangered Species Act is enforced. The Black-tailed Prairie Dog merits listing and is a keystone species in the ecosystems it inhabits. It is your duty, under the law, to issue a listing proposal for this species, notwithstanding the considerable political pressure we are certain you are under. In addition to preventing the further imperilment of the Black-tailed Prairie Dog, listing this species will go a long way in enforcing the ecosystem protection purpose of the ESA.

Your “not warranted” determination flies in the face of the best available science, which indicates massive historic declines of the Black-tailed Prairie Dog and the continuation of threats responsible for such declines. The belief that current threats to the Black-tailed Prairie Dog will not impair the species’ persistence is spurious and not based upon the scientific literature, which documents devastating impacts of sylvatic plague on this species and high-magnitude impacts from poisoning, shooting, habitat destruction, and the cumulative impact of these threats. For example, at least 16,000 of the 21,000 acres of BTPDs on the Thunder Basin National Grassland in Wyoming have been lost to plague since the Service’s 2000 determination that the Black-tailed Prairie Dog warranted listing but was precluded by higher priorities (65 Fed. Reg. 5476-5488 (February 4, 2000)). We have chronicled continued, multiple threats to this species throughout its range and have provided this information to FWS in 2000, 2001, and 2003.¹ In addition, we have significant concerns regarding the validity of state estimates of Black-tailed Prairie Dog occupied acreage and believe these estimates to be inflated, particularly in the state of Colorado.

The Service has cited management progress among the states and tribes within the 11-state historic range of the Black-tailed Prairie Dog as partial justification for determining that the species does not warrant Endangered Species Act listing. However, several courts have held that future conservation efforts by federal and state agencies do not justify further delay in listing candidate species. First, 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

¹See Forest Guardians et al. 2003a. Correspondence to Pete Gober, FWS, in re: Annual black-tailed prairie dog status review information request. Dated December 1, 2003; Forest Guardians et al. 2003b. Correspondence to Pete Gober, FWS, in re: Annual black-tailed prairie dog status review information request. Dated February 3, 2003; Forest Guardians et al. 2001. Correspondence to Pete Gober, FWS, in re: Annual black-tailed prairie dog status review information request. Dated December 14, 2001; Rocky Mountain Animal Defense. 2000. Correspondence to Pete Gober, FWS, in re: Data on continued declines in black-tailed prairie dogs. Dated November 9, 2000. By reference, we incorporate these four documents in their entirety.

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 Black-tailed Prairie Dog.

In an effort to continue using candidate conservation measures as a justification for further delay of listing candidate species, FWS announced a policy to evaluate conservation measures when making listing decisions (68 Fed. Reg. 15100-15115 (March 28, 2003)). This policy forebodes more delay of listing species and perpetuates the Service’s reliance on voluntary measures to protect species in decline, rather than employing the array of statutory conservation tools the ESA provides to prevent extinction and achieve recovery.

Moreover, the new FWS policy for evaluating conservation measures when making listing decisions entails consideration of two factors: 1) the certainty that the conservation measures will be implemented; and 2) the certainty that these measures will be effective (68 Fed. Reg. 15100, 15101). In the case of the Black-tailed Prairie Dog, your not warranted determination violates both prongs of this policy, i.e., conservation measures for this species have little certainty of being implemented or will be effective if implemented. Given continued declines and significant threats throughout the Black-tailed Prairie Dog’s range² there can be no doubt that conservation efforts being undertaken short of listing are not effectively conserving this species.

As provided under the ESA citizen suit provision, 16 U.S.C. § 1540(g), Forest Guardians, Biodiversity Conservation Alliance, Center for Biological Diversity, Center for Native Ecosystems, Predator Conservation Alliance 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, if you do not take action to correct these violations within 60 days, we will initiate a citizen suit against you to force you to comply. We urge the re-instatement of the Black-tailed Prairie Dog to the Endangered Species

²Ibid.

Act candidate list and the prompt issuance of a proposed rule to list this species as Endangered or Threatened under the ESA.

Please contact me at 505-988-9126x156 to discuss this matter further, or if you believe any of the above statements to be in error.

Sincerely,

Nicole J. Rosmarino, Ph.D.
Conservation Director
Forest Guardians

Jeff Kessler
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