

September 16, 1998



Nancy Kaufman, Region 2 Director  
U.S. Fish and Wildlife Service  
P.O. Box 1306  
Albuquerque, NM 87103

Bruce Babbitt  
Secretary of the Interior  
U.S. Department of the Interior  
Main Interior Building  
1849 C Streets N.W.  
Washington, D.C. 20240

RE: Sixty-day notice of intent to sue over violations of Sections 4 of the Endangered Species Act and the Administrative Procedures Act, regarding a negative 90-day finding on the Rio Grande cutthroat trout.

This letter serves as a 60-day notice from the Southwest Center for Biological Diversity, Southwest Trout, Biodiversity Legal Foundation, Carson Forest Watch and other interested parties of intent to sue Secretary Babbitt over violations of Section 4 of the Endangered Species Act (“ESA”), by failing to use the best available scientific data in making a negative 90-day determination for the Rio Grande cutthroat trout (*Oncorhynchus clarki virginalis*). See 16 U.S.C. §§ 1533(b)(1)(A) & 1533(b)(3)(A). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. See 16 U.S.C. § 1540(g).

On September 14, 1998, the USFWS, representing the Secretary, issued a “not warranted” finding on a petition to list the Rio Grande cutthroat trout (*Oncorhynchus clarki virginalis*) as an endangered species submitted February 17, 1998 by the Southwest Center for Biological Diversity, Southwest Trout, Biodiversity Legal Foundation, Carson Forest Watch, Ancient Forest Rescue, Rex Johnson and Kieran Suckling (Federal Register, September 14, 1998, V. 63, # 177). This finding violates the ESA’s mandatory requirement to only consider the best available commercial and scientific data. See 16 U.S.C. §§ 1533(b)(1)(A) & 1533(b)(3)(A). For example, the finding failed to consider any of the substantial and peer reviewed scientific references cited within the petition and in letters from the plaintiffs submitted to the USFWS, on the status of the Rio Grande cutthroat trout. Instead, they solely relied on two documents, one by Colorado Division of Wildlife and another by New Mexico Game and Fish, both produced in response to the petition, and neither peer reviewed. The USFWS used these documents not to determine whether the petition provided substantial commercial and scientific data indicating the action may be warranted, as required by the ESA, but instead to argue the Rio Grande cutthroat trout did not require listing as an endangered species. See 16 U.S.C. § 1533(b)(3)(A). A determination on whether a species merits listing as endangered only is to be made after a detailed status review and 12 months. See 16 U.S.C. § 1533(b)(3)(B). That the USFWS improperly made a twelve month finding without considering information presented to them in the petition and otherwise and without a status review, is further indication they failed to use the best available commercial and scientific information.

**Tucson Office**

Tucson, AZ 85702-0710  
520.623.5252 (x. 309)/ 9797 (fx)  
ngreenwald@sw-center.org

The Secretary's finding is arbitrary and capricious, and as such is a violation of the Administrative Procedures Act. For example, the USFWS, arbitrarily and capriciously bases their finding to not list the cutthroat on the availability of potential habitat and voluntary promises on the part of several agencies to restore populations to this habitat at unspecified dates in the future, rather than the current status of and threats to the species, as required by the ESA. See 16 U.S.C § 1533(a).

This letter puts you on statutory notice that the Southwest Center intends to file suit in Federal District Court to enforce the aforementioned violations of the Endangered Species Act and the Administrative Procedures Act. The Southwest Center may forego litigation should the USFWS revoke the negative 90-day finding for the Rio Grande cutthroat trout. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact Jay Tutchton or Neil Levine of Earthlaw at (303) 871-6996, or myself at 520-623-5252 x. 309.

Sincerely,

David Noah Greenwald

A black rectangular box containing a white handwritten signature that reads "David Greenwald".

