



10 October 2003

**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 AND CERTIFIED MAIL

In re: Mountain Plover

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, 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. 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 Mountain Plover (*Charadrius montanus*). In withdrawing the proposal to list the Mountain Plover under the Endangered Species Act (ESA or Act) (See 16 U.S.C. § 1533(b)), you have violated Section 4(b) of the ESA by 1) not basing your listing determination on solely a biological basis; 2) considering future conservation actions as a reason not to list; and 3) not employing the best available data standard contained in the Act. In addition, you have violated interagency peer review guidelines.

I. Political Interference in Mountain Plover Listing Determination

The ESA requires that listing determinations be made “solely on the basis of the best scientific and commercial data available” ((16 U.S. C. § 1533(b)(1)(A), emphasis added). The language of the ESA was quite deliberate here. Congress expressed its frustration in 1982 at FWS’s refusal to list species because of political considerations. The word “solely” was added to prevent political interference in the listing process.

In violation of this congressional mandate, you violated the ESA by basing your listing determination for the Mountain Plover on political considerations. In deference to economic and political interests (e.g., agricultural operators and oil and gas companies) concerned about potential impacts on land uses should the Mountain Plover be listed under the ESA, the Interior Secretary and FWS reversed their policy direction in the 1999 and 2002 proposals to list the Mountain Plover and withdrew the listing proposal for this critically imperiled bird.

II. Illegal Consideration of Future Conservation Actions in Mountain Plover Listing Determination

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 Mountain Plover.

Your refusal to list the Mountain Plover was illegally based on the assumption that future conservation actions will preserve and recover this species. Moreover, many of the conservation efforts cited by FWS – Rocky Mountain Bird Observatory, The Nature Conservancy, private land conservation efforts in South Park – are being conducted by private parties, not government agencies. While these parties may be well-intentioned, any number of circumstances, including organizational dissolution, diminished funding, and violated conservation easements, could occur, with negative ramifications to the Mountain Plover, unless the Plover is listed under the ESA. Consideration of these private efforts and current governmental conservation actions for the Mountain Plover illegally rest the fate of this critically imperiled species on precarious, voluntary, unenforceable, and potentially fleeting programs.

In addition, the considerations of conservation measures in the withdrawal notice do not even meet the inadequate standards contained in your “Policy for Evaluation of Conservation Efforts when Making Listing Decisions” (68 Fed. Reg. 15100-15115 (March 28, 2003)). While we question this policy, and believe it is an illegal effort by the current administration to further delay or avoid listing candidate species, we are amazed that you cannot – or will not – even follow your own guidance.

III. Violation of Best Available Data Standard in Endangered Species Act

You violated the standard that listing determinations be made “solely on the basis of the best scientific and commercial data available” ((16 U.S. C. § 1533(b)(1)(A), emphasis added). Specifically, you disregarded the only data sets available to assess the population trends of the species across its wintering and breeding ranges. In addition, you ignored and/or spuriously dismissed information about multiple significant threats to the Mountain Plover. Further, you unreasonably disregarded evidence supporting the listing of this species by demanding an impossible and inappropriate level of scientific certainty. Conversely, your standards for evidence contrary to the need for listing were indefensibly low.

IV. 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 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, Forest Guardians, Center for Native Ecosystems, Biodiversity Conservation Alliance, and the Center for Biological Diversity, and other interested parties 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 Mountain Plover.

Please contact Nicole Rosmarino 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.
Endangered Species Director
Forest Guardians
on behalf of

Jeff Kessler
Conservation Director
Biodiversity Conservation Alliance

Jay Tutchton
Staff Attorney
Center for Biological Diversity

Jacob Smith
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Center for Native Ecosystems