



June 16, 2015

Ms. Sally Jewell
Secretary, U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Sent via certified mail

Mr. Dan Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

RE: Sixty-day notice of intent to sue over violations of the Endangered Species Act regarding a negative 12-month finding on the Rio Grande Cutthroat Trout.

Dear Secretary Jewell and Director Ashe,

This letter serves as a 60-day notice from the Center for Biological Diversity, Rocky Mountain Wild, Noah Greenwald (collectively the "Center") and other interested parties of intent to sue Secretary Jewell over violations of Section 4 of the Endangered Species Act ("ESA") including but not limited to: (1.) failing to use the best available science in making a negative 12-month determination for the Rio Grande Cutthroat Trout (*Oncorhynchus clarki virginalis*) (see 16 U.S.C. §§ 1533(b)(1)(A)); (2.) ignoring the plain language of the ESA, which clearly specifies that any species threatened by one or more of five factors listed in 16 U.S.C. § 1533(a)(1) shall be designated as a threatened or endangered species; (3.) failing to list the Rio Grande cutthroat trout despite the fact that it is threatened or endangered in a significant portion of range; and (4.) relying on promised and future management actions in determining the Rio Grande cutthroat trout does not merit listing. 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).

The Center is also noticing the Service over violations of the Endangered Species Act in connection with adoption of a final policy for interpretation of the phrase "significant portion of its range" ("SPOR") in the Act's definitions of "endangered" and "threatened" species. *See* U.S. Department of the Interior, Fish and Wildlife Service, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Final Policy on Interpretation of the Phrase "Significant Portion of its Range" in the endangered species act's definitions of "endangered species" and "threatened species"; final rule, 79 Fed. Reg. 37,578 (July 1, 2014). The policy provides a fundamental underpinning of the denial of protection for the Rio Grande cutthroat trout by allowing the Service to ignore the fact that the trout is lost from 89 percent of its historic range when considering whether it is threatened or endangered in a significant portion of its range. 79 Fed. Reg. 59147.

The Center petitioned for endangered species protection for the Rio Grande cutthroat trout on February 25, 1998, beginning a 17 year process in which the Service has repeatedly denied or delayed protection for the trout only to conclude later that new information indicates listing may be or is warranted. 79 Fed. Reg. 59141. The Service issued a negative 90-day finding on the petition September 14, 1998, but in response to a challenge from the Center agreed to conduct a status review of the species, leading to a June 11, 2002, negative 12-month finding. Following another challenge from the Center, the Service agreed to conduct a second status review. On May 14, 2008, the Service determined that the Rio Grande cutthroat trout warrants protection as a threatened or endangered species, but rather than provide protection, the Service found listing was precluded by listing of other higher priority species and placed the trout on the candidate list, which already included more than 250 species. 73 FR 27900. In 2011, the Center reached a settlement with the Service, whereby the agency agreed to make protection decisions for all candidate species, including the Rio Grande cutthroat trout. In accordance with the settlement, the Service again reversed course and issued a negative 12-month finding on a petition to list the Rio Grande Cutthroat Trout (*Oncorhynchus clarki virginalis*) as an endangered species ("finding"), which is the subject of the present notice. Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition To List the Rio Grande Cutthroat Trout as Threatened or Endangered, Federal Register: October 1, 2014, Vol. 79: 59140-59150-32605.

In this latest finding, the U.S. Fish and Wildlife Service acknowledged that the "total amount of currently occupied stream habitat" by the Rio Grande cutthroat trout is "estimated to be about 11 percent of the historically occupied range." 79 Fed. Reg. 59142. The finding further acknowledged:

Rangewide, the resiliency of the subspecies has declined substantially due to the large decrease in overall distribution in the last 50 years. In addition, the remnant Rio Grande cutthroat trout populations are now mostly isolated to headwater streams due to the fragmentation that has resulted from the historical, widespread introduction of nonnative trout across the range of Rio Grande cutthroat trout. Therefore, if an extant population is extirpated due to a localized event, such as a wildfire and subsequent debris flow, there is little to no opportunity for natural recolonization of that population. This reduction in resiliency results in a lower probability of persistence for the subspecies as a whole. 79 Fed. Reg. 59143.

Despite this clear description of the trout's endangered status and the Service's previous finding that listing was warranted, the agency denied listing of the trout. This decision is unlawful because it failed to rely on the best available information and ignored the plain language of the Act, which requires listing of species threatened by any one of five factors: 1.) the present or threatened destruction, modification, or curtailment of its habitat or range; 2.) overutilization for commercial, recreational, scientific, or educational purposes; 3.) disease or predation; 4.) the inadequacy of existing regulatory mechanisms; or 5.) other natural or manmade factors affecting its continued existence. 16 U.S.C. §§ 1533(b)(A-E)). The finding and accompanying species status report makes clear that the Rio Grande cutthroat trout faces threats from demographic risks related to small populations and other factors, hybridization and competition from non-native trout, wildfire, stream drying, disease, and climate change. 79 Fed. Reg. 59142.

The finding is also unlawful because it fails to consider whether the Rio Grande cutthroat trout is threatened or endangered in the 89 percent of its range where it has been extirpated or in the portions of range where it currently occurs, but faces threats and is likely to be lost. Ignoring lost historic range when considering whether a species is threatened or endangered has already been expressly rejected by the Ninth Circuit Court of Appeals, which concluded:

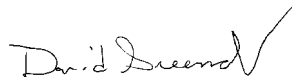
The Secretary necessarily has a wide degree of discretion in delineating “a significant portion of its range,” since the term is not defined in the statute. But where, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary *must at least explain* her conclusion that the area in which the species can no longer live is not a “significant portion of its range.”

Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001).

Finally, the finding is illegal because it relies on voluntary and promised management actions to reduce threats to the survival of the Rio Grande cutthroat trout. Such reliance is a violation of the Act’s requirement that the agency only rely on existing regulatory mechanisms.

This letter puts you on statutory notice that the Center for Biological Diversity, Rocky Mountain Wild, Noah Greenwald and other interested parties intend to file suit in Federal District Court to enforce the aforementioned violations of the Endangered Species Act. The Center may forego litigation should the USFWS revoke the negative 12-month 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 me at 503-484-7495.

Sincerely,

A handwritten signature in black ink, appearing to read "David Greenwald", with a stylized flourish at the end.

D. Noah Greenwald
Endangered Species Director
Center for Biological Diversity
PO Box 11374
Portland, OR 97211