

High-speed rail project runs afoul of kit fox conservation requirements

By Tim Sheehan

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About the San Joaquin kit fox

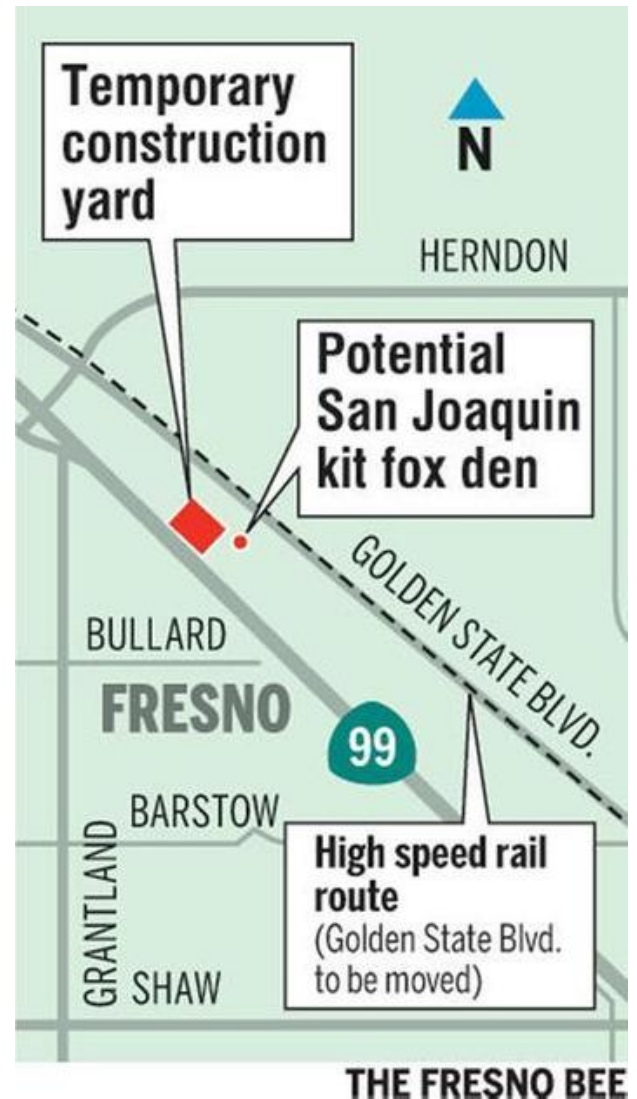
The San Joaquin kit fox, the smallest fox in North America, has been on the federal endangered species list since 1967.

- **Latin name:** *Vulpes macrotis mutica*.
- **Physical characteristics:** Adults have an average body length of 20 inches and weigh about five pounds —about the size of a house cat. They have long legs and long ears, and their coats range from tan to buffy gray in the summer to silvery gray in the winter. Their belly is whitish and their tail is black-tipped. It is typically nocturnal in its activity.
- **Why it's endangered:** Reduction of historic range in the San Joaquin Valley and adjacent areas of California. Its population is believed to have been reduced over the years to a few hundred to a few thousand individuals. Factors contributing the decline include habitat loss and degradation from human activity such as the conversion of historic habitat to agriculture, predation by and competition from coyotes and red foxes, and rodent-poisoning efforts that have reduced populations of prey.
- **Why it matters:** The San Joaquin kit fox is considered an “umbrella species” in the San Joaquin Valley environmental scene, which means that conserving the kit fox and its habitat helps shelter other sensitive plant and animal species. The kit fox, which generally eats rodents and insects, is an integral part of a balanced ecosystem and the region’s natural heritage.

Sources: U.S. Fish and Wildlife Service, NatureServe Explorer, Bee archives

Kit fox concerns

- Contractors for the California High-Speed Rail Authority worked last summer on equipment staging and testing sites in Fresno and Madera, disrupting habitat of the endangered San Joaquin kit fox.
- The tiny fox has been included on the federal endangered species list since 1967.
- The work included destruction of a potential fox den near a construction yard on Golden State Boulevard south of Herndon Avenue, in violation of agreements with the U.S. Fish and Wildlife Service.



- The state must renegotiate and re-evaluate environmental effects of the work sites to avoid violations of the federal Endangered Species Act. No fines or penalties are currently expected.

The U.S. Fish and Wildlife Service has declared the California High-Speed Rail Authority and Federal Railroad Administration to be out of compliance with their environmental commitments for construction of the bullet-train line in the Fresno-Madera area after a contractor's preliminary work infringed on habitat for the endangered San Joaquin kit fox.

In a [Jan. 26 letter](#) to the rail authority and the Federal Railroad Administration, Fish and Wildlife deputy assistant field administrator Dan Russell chastised the rail agencies for work done by prime contractor Tutor Perini/Zachry/Parsons on two pieces of property that were considered kit fox habitat before getting proper authorization from wildlife officials.

The San Joaquin kit fox is the smallest species of fox in North America. It's about the size of a cat, is largely nocturnal in nature, and uses underground burrows as dens across its large foraging range. The fox has been on the federal endangered species list since 1967.

Russell's letter also took the rail authority and FRA to task for waiting several months before notifying Fish and Wildlife about the disruption of the habitat on the two properties, including the destruction of a potential San Joaquin kit fox den in northwest Fresno.

One of the sites is a seven-acre temporary construction yard that the contractor has developed on Golden State Boulevard, south of Herndon Avenue, to stage heavy equipment that will be used to build the first 29-mile section. The second is a two-acre site near Highway 145, the Fresno River and the BNSF Railway freight tracks on the eastern edge of Madera, where contractors did tests last year of underground concrete pilings for a planned bridge over the river.

Neither the equipment-staging site nor a portion of the Madera test-piling site were included in the project footprint — agreed upon in 2012 by the state rail authority, FRA and the Fish and Wildlife Service — for construction activities for the Fresno-Madera segment. They represent what Russell described as an “unauthorized take” of kit fox habitat.

Work at both sites took place last June. In his letter, Russell complained that Fish and Wildlife was not notified of the unauthorized work until an Aug. 29 telephone conversation, nor in writing until Oct. 21.

In its October letter formally notifying Fish and Wildlife of the problems, the rail authority said the contractor moved ahead with work on the two sites before the state had completed its review of biological reports to initiate formal changes to the environmental agreements.

“When the authority became aware of the work outside the environmental footprint, a verbal stop-work order was issued to the contractor,” wrote Mark McLoughlin, the rail agency's director of environmental services. “However, the staging areas had already been established and the equipment had been staged.”

McLoughlin said the agency immediately addressed with Tutor Perini/Zachry/Parsons how the contractor had failed to follow the proper process before moving ahead with its work. “Efforts to ensure that the contractor sufficiently addresses all environmental compliance obligations moving forward have been ongoing since the authority was made aware of this incident,” McLoughlin wrote.

A biologist hired by Tutor Perini/Zachry/Parsons determined that the potential San Joaquin kit fox den near the Fresno site was not active last summer. In his letter, Russell noted that after the biological survey, “a decision was made to set up a camera to monitor the den for activity for a period of four consecutive days.” On July 1, he added, “the camera was retrieved and the den was collapsed ... without notification of and prior approval” from Fish and Wildlife.

The 2012 biological opinion issued by Fish and Wildlife and agreed to by the state and federal rail agencies set forth the terms and conditions governing how sensitive habitat for endangered species are to be treated during construction of the rail route. That agreement is binding not only on the rail authority but also on its contractors. Russell said that the agencies and the contractor “have failed to comply fully” with the agreement in several key ways:

- By taking nine acres of suitable kit fox habitat outside the established project footprint without previously notifying Fish and Wildlife.
- Failing to provide weekly acreage updates to Fish and Wildlife.
- Violating a requirement to avoid or minimize ground disturbance, as well as a requirement for prior authorization or a permit from Fish and Wildlife for the destruction of kit fox dens.
- Failing to comply with a requirement for direction or supervision by a Fish and Wildlife-approved biologist to excavate a kit fox den.
- Not providing copies of field, biological and monitoring reports as required by conservation measures and as requested by Fish and Wildlife.
- Failing to provide agreed-upon reports of habitat loss since May 2012.

Both the Fish and Wildlife Service’s regional office in Sacramento and the state rail authority characterized the problem as a communication issue, not willful disregard of the rules. The authority has pledged to make up for the loss of the kit fox habitat by providing additional habitat elsewhere in the Valley.

The concerns raised by Fish and Wildlife require the state and federal rail agencies to take steps to renegotiate their environmental agreement. “They do not require project activities to come to a halt during this process, but it is imperative that the action agencies and (Fish and Wildlife) begin this re-evaluation of effects quickly,” Russell told McLoughlin in an email exchange over the weekend.

Sarah Swenty, a spokeswoman for the Fish and Wildlife in Sacramento, said Monday that it’s not uncommon for plans to change on large infrastructure projects between the time her agency issues its biological opinions and work begins. There is often time for an agency to bring those changes in consultation to Fish and Wildlife. “But there are also times when miscommunication happens between all the various components ... and design changes are implemented without talking to the service first,” she added.

Because the rail authority has notified Fish and Wildlife of the problems and asked to reopen the environmental consultation, “they are essentially operating within the letter of the law,” Swenty said. If an agency fails to re-initiate those discussions, a project could lose its exemptions from the Endangered Species Act, creating violations of the federal law. “The repercussions of that could involve a variety of penalties and/or fines, and those would depend on a number of factors evaluated by law enforcement personnel.”

Despite the array of concerns raised by Russell’s letter, the authority’s “appropriate efforts to re-initiate consultation with us puts us in a place where we can ensure they take all the necessary steps to address these concerns,” Swenty added.

Lisa Marie Alley, a spokeswoman for the state rail authority, said the incident represents a lesson learned for the agency. “I think this is an example, in undertaking one of the largest infrastructure projects in decades in this country, to make sure that we’re streamlining and coordinating with all of our partners,” Alley said Monday. “We are looking for ways to do a better job in the future.”

Tutor Perini/Zachry/Parsons was awarded a contract of about \$1 billion in mid-2013 for the design and construction of the first segment, between Fresno and Madera, of California’s high-speed rail project.

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