

GATZKE DILLON & BALLANCE LLP

ATTORNEYS & COUNSELORS AT LAW

EMERALD LAKE CORPORATE CENTRE
1525 FARADAY AVENUE, SUITE 150
CARLSBAD, CALIFORNIA 92008
TELEPHONE 760.431.9501
FACSIMILE 760.431.9512

OF COUNSEL
MICHAEL SCOTT GATZKE
ANTHONY T. DITTY

April 8, 2008

By Overnight Mail

H. Dale Hall, Director
U.S. Fish and Wildlife Service
1849 C Street N.W.
Washington D.C. 20240

Secretary Dirk Kempthorne
U.S. Department of Interior
1849 C Street N.W.
Washington D.C. 20240

Secretary Carlos M. Gutierrez
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: *Notice of Intent to Sue for Violations of the Endangered Species Act in Connection with the U.S. Fish and Wildlife Service's Failure to Publish Twelve-Month Determination on the Delisting of the Peirson's milk-vetch*

On behalf of The American Sand Association, the San Diego Off-Road Coalition, The Off-Road Business Association, the California Off-Road Vehicle Association and the American Motorcycle Association District 37 (collectively, "ASA *et al.*"), this letter serves to notify the U.S. Fish and Wildlife Service ("Service"), the Secretary of the Interior, and the Secretary of Commerce of their intention to file a civil action for violation of the Endangered Species Act ("ESA"). Specifically, the Service and the Secretaries of the Interior and Commerce violated section 4 of the ESA, 16 U.S.C. §1533, and its implementing regulations, by failing to issue a 12-month finding regarding ASA *et al.*'s petition to request delisting of the Peirson's milk-vetch. The citizen suit provision of the ESA requires notice be given to the Secretary and any alleged violator of a party's intent to file suit sixty days prior to the initiation of a civil action under ESA section 4. 16 U.S.C. §1540(g)(2)(A). This letter fulfills that 60-day notice requirement.

GATZKE DILLON & BALLANCE LLP

U.S. Fish and Wildlife Service, *et al.*

Notice of Intent to Sue

April 8, 2008

Page 2

I. THE ENDANGERED SPECIES ACT

Congress enacted the ESA to ensure the protection and conservation of threatened and endangered species. 16 U.S.C. §1531(b). To achieve this purpose, the statute requires that the Service review the "best scientific and commercial data available" in order to make determinations about the status and listing of a species. 16 U.S.C. §1533(b)(1), 1533(a)(2)(B)-(C). The statute also allows species to be removed from the federal list when they no longer require special protection, thus allowing federal resources to be spent on efforts to safeguard and recover species that are at greater risk. Upon receiving a petition to delist a species, the Service has approximately 90 days to make a finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. §1533(b)(3)(A); 50 C.F.R. §424.14(b)(1). Twelve months after receipt of the petition to delist, the Service must determine whether: (1) listing is not warranted; (2) listing is warranted; or (3) listing is warranted but presently precluded by other pending proposals for listing species, provided other circumstances are met. 16 U.S.C. §1533(b)(3)(B). If the Service determines that listing of the species is not warranted or that a species should be delisted, it "shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based." 16 U.S.C. §1533(b)(3)(B). *See also, Center for Biological Diversity v. Norton*, 254 F.3d 833, 840 (9th Cir. 2001) ("In order to 'force action on listing and delisting proposals,' . . . Congress amended the ESA's petition process expressly to provide certain mandatory deadlines by which the Secretary must act on a petition.").

II. VIOLATION OF THE ENDANGERED SPECIES ACT

On June 30, 2005, ASA *et al.* submitted a formal petition to remove the Peirson's milk-vetch (*Astragalus magdalenae* var. *peirsonii*) from the federal list of threatened and endangered species, pursuant to Section 4(b)(3) of the Endangered Species Act (16 U.S.C. § 1533(b)(3)) and Title 5, Section 553(e) of Administrative Procedures Act. The petition provided detailed scientific data supporting the determination that Peirson's milk-vetch has a stable, viable population that is not threatened with extinction, including evidence that: (1) the Peirson's milk-vetch has a large seed bank containing as many as 5.6 million seeds, (2) the above-ground expression of Peirson's milk-vetch fluctuates according to climate conditions, and (3) during rainy years such as 2001 and 2004, the Peirson's milk-vetch will germinate profusely, producing as many as 286,000 plants.

In response, the Service concluded that the petition contained scientific data sufficient to warrant further review, and published a 90-day finding on November 30, 2005 to that effect. 70 Fed.Reg. 71795-71799 (November 30, 2005). The subsequent twelve-month finding was due in July 2006. 16 U.S.C. §1533(b)(3)(B). Pursuant to communications with the Service, ASA *et al.* agreed to extend the twelve month finding deadline to October 2006.

GATZKE DILLON & BALLANCE LLP

U.S. Fish and Wildlife Service, *et al.*

Notice of Intent to Sue

April 8, 2008

Page 3

As of April 2008, the twelve month finding has still not been published, and is now 18-months delinquent in light of the extended deadline of October 2006. Therefore, the Service is currently in violation of the ESA, 16 U.S.C. §1533. Accordingly, we request that the Service immediately remedy its ESA violation by promptly publishing the twelve-month finding on the potential delisting of the Peirson's milk-vetch.

Pursuant to the citizen suit provision of the ESA, the Secretary's failure to meet the requirements of section 4 is a non-discretionary act or duty as defined by section 11(g). 16 U.S.C. §1533(g)(1)(C). If the Service does not initiate consultation before the end of this 60-day notice period, ASA *et al.* intends to file a civil action to correct this violation, seeking injunctive and declaratory relief, as well as legal fees and cost regarding these violations. ASA *et al.* may be contacted through their counsel at the following address:

David Hubbard
Gatzke Dillon & Ballance LLP
1525 Faraday Avenue, Suite 150
Carlsbad, California 92008

Please contact us if you have any questions or wish to discuss this matter further.

Very truly yours,



David P. Hubbard
of
Gatzke Dillon & Ballance LLP

DPH/rif