May 27, 2004

By Facsimile and Certified Mail-Return Receipt Requested

Gale Norton
Secretary of the Interior
U.S. Department of the Interior
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Washington, D.C. 20240
Fax: (202) 208-6956

Steven Williams
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
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Re: Notice of Intent to Sue for Violations of Section 4 of the Endangered Species Act—Failure to Designate Critical Habitat and Develop and Implement Recovery Plans for the Holmgren Milk-Vetch and Shivwit's Milk-Vetch.

Dear Secretary Norton and Director Williams,

I write on behalf of the Center for Biological Diversity, Utah Native Plant Society, Southern Utah Wilderness Alliance, and other interested parties to inform you that you are in violation of section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, by failing to designate critical habitat for the Holmgren milk-vetch (Astragalus holmgreniorum) and Shivwit’s milk-vetch (Astragalus ampullarioides) and by failing to develop and implement recovery plans for these plant species. This letter is provided to you pursuant to the 60-day notice requirement of the ESA. 16 U.S.C. § 1540(g).

A member of the pea family, Holmgren milk-vetch is a non-woody perennial herb that produces leaves and small purple flowers in the spring. The milk-vetch grows on shallow, sparsely vegetated desert soils. The species is native to the Mojave Desert and is limited to locations along the Utah/Arizona border in the immediate vicinity of St. George, Utah. There are currently only three known populations of Holmgren milk-
vetch. The primary population lives on the Arizona/Utah border approximately seven miles south of St. George. Although the population numbers vary widely from year to year, the population averages about 9,000 to 10,000 plants in years with wet winters. This population is fragmented by Interstate Highway 15, areas of urban development, and spotty natural habitat occurrences. Two smaller populations exist five miles west and nine miles east of St. George. The western population contains approximately 1,000 plants and the eastern population contains around 30 plants.

Shivwit’s milk-vetch, also a member of the pea family, is a perennial, herbaceous plant that produces small cream colored flowers on a single stem in the spring. When not subject to grazing, flowering stems can reach up to one meter in height. There are currently only five small populations of Shivwit’s milk-vetch, totaling approximately 1,000 plants. All five populations live on a narrow band of the exposed Chinle formation over a distance of about 45 miles, also near St. George, Utah. Two of the five populations occur near Shivwits on the western edge of the species range and contain 50 and 135 plants respectively. Two other populations occur near Harrisburg Junction on the eastern edge of the species range. One of these populations is located within a rapidly expanding commercial, recreational, and residential development. This population contained over 1,000 individuals in 1995, but declined to less than 50 individuals by 2000. Most of its habitat has been converted to a golf course. The other population has approximately 300 plants. A final population, containing 300 to 500 individuals, lives in the southwestern corner of Zion National Park.

Although the population numbers discussed above are low for both species, they actually represent the population numbers under the best conditions possible. In reality, the populations will be 50% of those cited above in average years and 10% or less in drought years. Because of the small number of populations and restricted habitat of both the Holmgren milk-vetch and Shivwits milk-vetch, they are highly vulnerable to human-caused and natural disturbances. Their habitat has been destroyed by urban development, ORV use, livestock grazing, displacement by exotic weeds, and mineral exploration and development. As a result of these threats, both species are threatened with extinction.

Recognizing these threats back in 1975, the Smithsonian Institute included both species on a report of plant species considered to be threatened, endangered, or extinct within the United States. The U.S. Fish and Wildlife Service (“FWS”) treated the report as a petition to list the species. However, twenty-four years passed with no further action from FWS to protect the species. In 1999, the Center for Biological Diversity again petitioned FWS to list these species. Finally, in September of 2001, FWS listed both species as endangered. 66 Fed. Reg. 49560.

However, FWS still refused to designate critical habitat for the species. The ESA provides that, “to the maximum extent prudent and determinable,” the Secretary of the Interior shall designate critical habitat concurrently with the determination that a species is endangered or threatened. 16 U.S.C. § 1533(a)(3). Designation of critical habitat may be postponed for one year only if critical habitat is not determinable at the time the species is listed. Id. § 1533(b)(6)(C). When FWS listed the Holmgren milk-vetch and
the Shivwit’s milk-vetch, it determined that designation of critical habitat was prudent and it would result in benefits to the species. 66 Fed. Reg. 49565. FWS specifically recognized that designation of critical habitat would provide additional protection for the species in unoccupied habitat or occupied habitat that may become unoccupied in the future. However, rather than proposing critical habitat for the species, FWS determined the listing budget was insufficient and deferred the proposal until it was “feasible, considering [FWS’s] workload priorities and listing budget.” Id.

FWS’s decision not to designate critical habitat violates section 4 of the ESA and is arbitrary and capricious. Section 4 does not allow FWS to consider budgetary constraints as a factor in determining whether to designate critical habitat. Indeed, FWS is not relieved of its statutory duty to designate critical habitat because of a shortage of money. See, e.g., Conservation Council v. Babbitt, 24 F. Supp. 2d 1074 (Haw. 1998); Marbled Murrelet v. Babbitt, 918 F. Supp. 318, 321, n.4. (Wash. 1996). Therefore, FWS must designate critical habitat for the Holmgren milk-vetch and Shivwit’s milk-vetch regardless of its limited budget. FWS’s failure to designate critical habitat for these species is resulting in ongoing destruction of these plants and their habitat. Currently, local, state, and other federal agencies consider the milk-vetch and their needs only in a piecemeal fashion, rather than with a comprehensive knowledge of their habitat requirements for survival. Designation of critical habitat would help to fix these problems.

Finally, FWS has also failed to prepare and implement recovery plans for the Holmgren milk-vetch and the Shivwit’s milk-vetch. Section 4(f) of the ESA mandates that FWS develop and implement recovery plans for the conservation and survival of listed species. 16 U.S.C. § 1533(f). FWS has delayed developing and implementing a recovery plan for these species for almost three years. This delay is unreasonable and contrary to the mandates of the ESA.

Accordingly, the Center for Biological Diversity, Utah Native Plant Society, Southern Utah Wilderness Alliance, and other interested parties intend to file suit in federal district court to enforce the requirements of section 4 of the ESA. If you wish to discuss any of the matters raised in this letter or undertake efforts to avoid litigation, please contact me at (303) 871-6039.

Sincerely,

Robin Cooley
Staff Attorney