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January 31, 2013

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Brian Kelley
State Supervisor
U.S. Fish and Wildlife Service
Idaho Fish and Wildlife Office
1387 S. Vinnell Way
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Secretary Ken Salazar
Department of Interior
1849 C Street, NW
Washington, D.C. 20240

RE: Notice of Intent to Sue for Violations of the Endangered Species Act Regarding
Designation of Critical Habitat for the Southern Selkirk Mountains Population of
Woodland Caribou

Dear Supervisor Kelley,

In accordance with the 60-day notice requirement of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), Center for Biological Diversity, Conservation NW, Selkirk Conservation Alliance, The Lands Council, Idaho Conservation League, and Defenders of Wildlife hereby provide notice of intent to sue for violations of the ESA related to the U.S. Fish and Wildlife Service's final designation of critical habitat for the southern Selkirk Mountains population of woodland caribou.

The final designation of critical habitat for this population of woodland caribou is arbitrary and capricious and violates the ESA by: (1) failing to adequately consider unoccupied habitat that may be essential to the conservation of the species; (2) failing to designate all areas essential to the conservation of the species; (3) significantly reducing the amount of critical habitat from what was considered necessary in the proposed designation without adequately explaining and demonstrating how the final designation complies with the requirements of the

ESA; (4) failing to rely on the best available science; and (5) failing to provide notice and comment on the substantially revised critical habitat before issuing the final rule.

BACKGROUND

The southern Selkirk Mountains population of woodland caribou was emergency listed as endangered under the ESA on January 14, 1983 (48 Fed. Reg. 1722) and a final listing rule was published on February 29, 1984 (49 Fed. Reg. 7390). This population is the only woodland caribou population that still occurs in the United States, and is found in northeast Washington, northern Idaho, and southern British Columbia. At the time it was listed, only an estimated 25-30 animals existed in this population and thus woodland caribou was considered one of the most critically endangered mammals in the United States. Since then, the population has fluctuated between about 30 animals and 50 animals, with recent counts at the lower end of that range. The listing rules stated that 100 animals were considered to be a viable population. The size of the current population puts it at serious risk of inbreeding, especially because the population is separated from other woodland caribou populations and thus individuals from those populations rarely immigrate to the southern Selkirk population to provide necessary genetic diversity.

Historically, woodland caribou occupied much of Canada and the northern tier of the United States, coming as far south as the Salmon River in Idaho. Woodland caribou consist of three ecotypes: boreal caribou, northern caribou, and mountain caribou. The southern Selkirk population is part of the mountain caribou ecotype. As recently as the 1950s, this population consisted of at least 100 animals and its overall range was as far south as the St. Joe River and over to western Montana, but, like most of the other mountain caribou populations, this population has declined in size and range.

After the southern Selkirk Mountains population was listed as endangered, U.S. Fish and Wildlife Service (“FWS”) completed a recovery plan for the population in 1985 and then revised it in 1994. This plan contained objectives to maintain an increasing population, and to secure and enhance at least 443,000 acres of habitat in the Selkirk Mountains. This area largely coincided with the “approximate area of normal utilization” by this population described in the emergency and final listing rules. The recovery plan stated that for recovery, woodland caribou in the Selkirks must be distributed over a wider area than at present. Later Recovery Action Plans for the southern Selkirk Mountains woodland caribou written by the Woodland Caribou Recovery Team set a goal of 125 animals for this population.

Mountain caribou require large contiguous areas of high-elevation old growth coniferous forest with little or no disturbance from vehicles or other human activities. Mountain caribou make movements between seasonal habitat types. In winter, they go up to high elevation ridgetops that have old-growth subalpine fir and Engelmann spruce forests and walk on top of the compacted snow to access arboreal lichens, which is their primary food source in winter. In spring, the animals move to lower elevations where snow has melted to forage on new green vegetation. In summer months, the caribou move back to mid and upper elevation spruce/alpine fir forests to forage on forbs, grasses and other plants, often using riparian areas where vegetation is lush. Pregnant females seek out high-elevation areas in early summer for calving to avoid predators, and subsist primarily on arboreal lichen as green forage is not yet available in

these secluded high-elevation habitats. In early winter, the animals move back down in elevation to old-growth western hemlock/western red cedar forests, which have higher canopy cover to intercept early snow and leave vegetation accessible before the snows at higher elevations have consolidated enough for the animals to walk on top and reach the arboreal lichen. The animals also must have corridors or transitions zones that connect their seasonal habitats.

The primary threats to mountain caribou are habitat loss or fragmentation such as from timber harvest or wildfire, disturbances that displace caribou from their habitat such as snowmobile use in winter or off-road vehicle use in summer, and predation. One of the primary ways caribou avoid predators is to spread out at low densities and in areas with few other ungulates, meaning they require large expanses of undisturbed habitat to support this evolutionary technique of predator avoidance.

FWS did not designate critical habitat for the southern Selkirk Mountains population of caribou at the time the species was listed. A coalition of environmental groups petitioned the agency in 2002 to designate critical habitat, and when FWS never acted on the petition, the coalition finally sued in 2009. A settlement of that lawsuit resulted in a proposed critical habitat rule being issued on November 30, 2011 (76 Fed. Reg. 74,018) and then a final rule on November 28, 2012 (77 Fed. Reg. 71,042). The proposed rule designated 375,562 acres while the final rule designated only 30,010 acres. The final rule also only designated areas above 5,000 feet in elevation as critical habitat while the proposed rule used 4,000 feet as the elevation cut-off.

LEGAL FRAMEWORK

The ESA requires FWS to designate critical habitat for any species listed as threatened or endangered to the maximum extent prudent and determinable. 16 U.S.C. § 1533(a)(3)(A)(i). The designation must be based on the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. *Id.* § 1533(b)(2). FWS may exclude any area from critical habitat if it determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless it determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned. *Id.*

The ESA defines critical habitat as: (1) the specific areas within the geographical area occupied by the species at the time it was listed on which are found those physical and biological features essential to the conservation of the species and which may require special management considerations or protection, and (2) specific areas outside the geographical area occupied by the species at the time it was listed that FWS determines are essential for the conservation of the species. 16 U.S.C. § 1532(5). “Conservation” of a species under the ESA means the use of all methods and procedures which are necessary to bring an endangered species to the point at which it no longer needs the protective measures of the ESA. *Id.* § 1532(3).

ESA regulations state that when determining critical habitat, FWS shall consider those physical and biological features that are essential to the conservation of a species and that may

require special management considerations or protection, where such requirements include (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. 50 C.F.R. § 424.12(b). In its critical habitat determination, the Service must focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species and must list the known primary constituent elements with the critical habitat description. *Id.*

When issuing rules under the ESA, including critical habitat rules, FWS must comply with the requirements of section 553 of the Administrative Procedure Act. 16 U.S.C. § 1533(b)(4). These requirements include providing public notice and opportunity for comment on proposed rules. 5 U.S.C. § 553(b)-(c).

LEGAL VIOLATIONS

The final critical habitat rule violates the ESA and APA because it significantly reduces the critical habitat from what was in the proposed rule without adequately explaining how the final determination is sufficient to conserve the species, and without demonstrating that the designation is supported by substantial evidence and based on the best scientific information available. Specifically, the final rule: (1) fails to adequately consider unoccupied habitat that may be essential to the conservation of the species; (2) fails to designate all areas essential to the conservation of the species; (3) significantly reduces the amount of critical habitat from what was considered necessary in the proposed designation without adequately explaining and demonstrating how the final designation complies with the requirements of the ESA; (4) fails to rely on the best available science; and (5) fails to provide notice and comment on the revised critical habitat before issuing the final rule.

In its proposed rule, FWS considered 375,562 acres of land in the Selkirk Mountains of Idaho and Washington as critical habitat for the southern Selkirk Mountains population of woodland caribou. 76 Fed. Reg. 74,018 (Nov. 30, 2011). The proposed rule noted that this population of caribou occurs in steep, mountainous terrain generally above 4,000 feet in elevation. Rather than aggregating into large herds, these animals spread out at low densities (i.e. 30-50 caribou/250,000 acres) as a predator avoidance tactic, and this strategy is the dominant factor that determines the natural population density of caribou populations. Thus, these animals need large contiguous areas of high-elevation forest with little disturbance to spread out at these low densities. The proposed rule also described the seasonal movements of woodland caribou between lower elevation cedar/hemlock forests (generally between 4,000 and 6,200 feet in elevation) and higher elevation spruce/fir forests on ridgetops (generally higher than 6,000 feet in elevation).

When describing the geographic range of the southern Selkirk Mountains caribou population, the proposed rule stated that historically caribou ranged as far south as the St. Joe River and Elk City near the Clearwater River, and as recently as 1959 were found near the city of St. Maries. The current range extends approximately 484 miles “from the north end of the Hart

Ranges in B.C. to the south end of the Selkirk Mountains in Idaho and Washington.” 76 Fed. Reg. 74,019. The rule also stated that this population of caribou is at risk of extirpation, and is separated from other populations of woodland caribou by at least 30-60 miles.

The proposed rule noted that the objective of the critical habitat designation was to provide for the recovery of the southern Selkirk Mountains population of woodland caribou. FWS stated that the primary source of information when determining which areas should be designated as critical habitat is the information developed during the listing process. The proposed critical habitat designation consisted of the geographic area occupied at the time of listing, which equated to the 375,562 acres of “normal utilization described in the final listing rule.” 76 Fed. Reg. 74,023. The FWS explained that it could also designate critical habitat in areas outside the geographic area occupied by a species at the time it was listed if a designation limited to its range would be inadequate to ensure the conservation of the species. Here, the 375,562 acres of occupied area was sufficient for the conservation of the species and additional unoccupied areas were not necessary to ensure recovery.

The proposed rule also explained that, based on a variety of studies and reports by FWS and other scientists, telemetry data from 1987 through 2004, and the habitat suitability model by Kinley and Apps (2007), critical habitat included mature cedar/hemlock and spruce/fir forests above 4,000 feet in elevation, as well as some areas below 4,000 feet where seasonal connectivity between habitats was required.

The final rule, however, significantly reduced the critical habitat designation to just 30,010 acres. 77 Fed. Reg. 71,042 (Nov. 28, 2012). This reduction was based on a change in what was considered the geographic area occupied by the species at the time of listing as well as considering only habitat above 5,000 feet in elevation as essential to the conservation of the species. This reduction in critical habitat eliminated any designation of State, County, or private land as critical habitat.

FWS did not demonstrate that the much smaller area designated as critical habitat in the final rule is sufficient to provide for the recovery of this population, as required by the ESA. The proposed rule concluded that designating the areas occupied at the time of listing, which it said constituted 375,562 acres, was sufficient to ensure the conservation of the species and that additional unoccupied areas were not essential for recovery of the population. In the final rule, however, FWS never demonstrated that 30,010 acres of critical habitat was sufficient to ensure the conservation of the species or that none of the additional 345,552 acres of “unoccupied” habitat were essential for recovery. Thus, the final rule does not comply with the requirements of the ESA and is arbitrary and capricious.

At the time of listing, only an estimated 25-30 animals existed in the population. The final rule provides no explanation as to why the habitat supporting such a small number of animals would be sufficient to ensure recovery of a viable population of more than 100 animals that previously ranged over a much larger area. FWS recognizes that this species requires large contiguous areas of habitat so they can spread out at low densities of 30-50 caribou per 250,000 acres of land and reduce susceptibility to predation. FWS considers the inability to spread out over large areas at low densities to be a threat to the conservation of caribou. Yet the final rule

designates only 30,010 acres of critical habitat, far less than what a viable population of caribou would need. The fact that the southern Selkirk Mountains woodland caribou population has shrunk to less than 40 animals and does not range as far south as it previously did does not mean it no longer needs all or some of that habitat to achieve recovery. The focus of the final rule on only the area used by a caribou population that is far below a viable population size skips the necessary step of assessing what is essential for recovery, including what unoccupied habitat may be essential.

Without any explanation of what the current recovery goals are for this population, how the designation of just 30,010 acres of critical habitat is sufficient to achieve these goals, and why no unoccupied habitat is essential for recovery, the final rule violates the ESA and is arbitrary and capricious. The historic range of the species when it was at a viable population size was much larger. FWS does not adequately explain why the very limited area occupied by 25-30 animals at the time of listing is now enough to provide for recovery of the species, especially when it previously believed a much more extensive area in the United States was essential for recovery.

With regard to revising the determination of the geographic area occupied by the southern Selkirk Mountains population of woodland caribou at the time of listing, the final rule indicated that caribou actually occupied a much smaller area than what was described in the listing decision. FWS changed its determination in the final rule based on one study but did not explain why that study should completely override the area described in the final listing rule as the “area of normal utilization” for this population. The final rule did not explain why a single study of short duration was more reliable than all of the contemporaneous information the agency considered at the time of listing to assess the habitat used by this population. As stated in the proposed rule, the *primary source of information* on which the agency should rely when determining critical habitat is the information developed during the listing process. If the agency strays from that, it must at least provide an adequate explanation for why.

FWS’s decision in the final rule to change critical habitat to only areas above 5,000 feet in elevation is also arbitrary and capricious and not supported by the best available science. The final rule claims that the elevation limit changed from 4,000 feet to 5,000 feet based on the habitat suitability modeling by Kinley and Apps from 2007, which was based largely on telemetry locations of transplanted animals. FWS cited to that same study and data in its proposed rule when determining that habitat above 4,000 feet in elevation was essential for the conservation of the species. FWS did not demonstrate in the final rule why this same study supported a different conclusion in the final rule. In addition, the study that FWS used as the basis for its new “occupied area at the time of listing” determination found that caribou used habitat below 5,000 feet in early winter and sometimes in spring. Yet FWS then ignored that information for purposes of determining that only habitat above 5,000 feet was essential.

FWS decided it could not consider the telemetry data from the transplanted animals to determine the area of occupancy but could consider it to determine habitat use. Alternatively, FWS relied exclusively on one study to determine the area of occupancy but did not give this same study much weight when determining habitat use. This cherry-picking of information to use it to support one determination but ignoring it for another determination is arbitrary and

capricious and violates the ESA's mandate to use the best scientific data available. The final rule fails to take into account the full spectrum of habitat requirements for caribou, by focusing solely on habitat above 5000 feet.

Additional statements in the final rule also are not supported by substantial evidence and therefore further render the rule arbitrary and capricious. For instance, FWS asserts that from 2001-2012, the only caribou observed in the United States during annual census surveys were near the Canadian border and that it cannot use "anecdotal" evidence of additional caribou sightings farther south in Idaho from 2000 through 2008 because they were unconfirmed and not considered "best scientific data available." The dismissal of these additional sightings was arbitrary and capricious. Caribou observations farther south in Idaho occurred during annual census surveys after 2001, and other reliable observations confirmed by state and federal biologists occurred as well. These sightings were submitted as evidence in federal court, confirmed by live expert testimony, and deemed reliable by a federal judge. It is disingenuous to claim that these "anecdotal" sightings were unconfirmed and should not be considered part of the best available science that formed the basis of the designation. These sightings, corroborated by experts in federal court and relied upon by a federal judge, show that caribou were still occupying habitat on the east side of the Selkirk Mountains in Idaho after 2001.

Finally, FWS violated the ESA and APA by significantly changing the critical habitat designation without providing additional public notice and comment on the revised designation before issuing the final rule. The ESA and APA require public notice and comment on proposed rules. 16 U.S.C. § 1533(b)(4); 5 U.S.C. § 553(b)-(c). The change in critical habitat and the agency's reasoning were so substantial between the proposed and final rules, FWS should have issued a second proposed rule and allowed the public to comment on the substantial changes to comply with the ESA and APA notice and comment requirements.

The flaws in the final critical habitat rule described here render the rule arbitrary and capricious, not supported by substantial evidence, and contrary to the ESA, and thus the rule must be set aside under the APA.

RELIEF REQUESTED

Plaintiffs ask that you respond quickly to this notice letter, and begin remedying these violations of law by withdrawing the final rule designating critical habitat for the southern Selkirk Mountains population of woodland caribou and beginning work on a new final rule that complies with the ESA and APA and ensures the conservation of the species.

If FWS fails to take such action, or otherwise assure Plaintiffs that it is promptly acting to remedy the violations described above, Plaintiffs intend to file suit in federal court following expiration of 60 days from the date of this letter. Plaintiffs intend to seek appropriate declaratory, injunctive and/or other judicial relief, as well as recovery of their reasonable costs and litigation expenses (including reasonable attorney fees), pursuant to the ESA and other provisions of law.

Plaintiffs remain more than willing to discuss these issues further with you or other representatives of FWS, as Plaintiffs genuinely desire to avoid litigation through a mutually

acceptable solution. Thus, please feel free to contact Plaintiffs' representatives listed below, or myself at the address listed on the letterhead.

Thank you in advance for your consideration of these matters.

Sincerely,

s/Lauren M. Rule

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