



PACIFIC LEGAL FOUNDATION

June 24, 2014

Public Comments Processing
Attn: FWS-R1-ES-2012-0097
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

SUBMITTED VIA www.regulations.gov

Re: Comments on Petition to Delist the Southern Selkirk Mountains Population
of Woodland Caribou and Amend Listing, Docket No. FWS-R1-ES-2012-0097

Dear Director Ashe:

Bonner County, Idaho, Idaho State Snowmobile Association (ISSA), and Pacific Legal Foundation (PLF) appreciate the opportunity to comment on the proposal to list the Southern Mountain Caribou population as a distinct population segment (DPS).¹ Bonner County and ISSA, represented by PLF, submitted the petition that led to the Service's proposal to modify the DPS and downlist it from endangered to threatened.

COMMENTORS

Bonner County, its 40,000 residents, and local businesses depend on income generated by winter recreation, including activity on lands that are designated as habitat for the caribou. Through agreements with state and federal agencies, Bonner County maintains snowmobile trails, including on federal lands. But, as a result of the caribou's listing, the county's ability to maintain these trails, and for visitors to use them, has been severely limited.

ISSA is a nonprofit organization that represents approximately 4,000 organizational and individual members. It advocates for responsible recreational use of the outdoors and snowmobiles. Association members' ability to recreate in the Idaho Panhandle National Forests and other public lands have been impeded due to the caribou listing.

PLF is the nation's most experienced, nonprofit public interest legal organization litigating for a balanced approach to environmental regulation. Its attorneys regularly litigate cases challenging the Service's implementation of the Endangered Species Act (ESA).

¹ 79 Fed. Reg. 26,504 (May 8, 2014).

COMMENTS

Commentors believe that the Service's decision on Bonner County and ISSA's petition is insufficient and inconsistent with the ESA. First, the Service proposes to list a DPS of a subspecies although the ESA only allows the listing of a DPS of a species. Second, if the Service maintains the listing, it must analyze the impacts that the listing has on communities, residents, and businesses before regulating take or critical habitat.

I

THE ESA ONLY PERMITS THE LISTING OF A DPS OF A *SPECIES*

The ESA establishes only three wildlife entities that may be listed: "species," "any subspecies of fish or wildlife or plants," and "any distinct population segment *of any species* of vertebrate fish or wildlife which interbreeds when mature."² The ESA does not allow the Service to list any entity below a distinct population segment of a species, and therefore does not allow listing distinct population segments of subspecies.³

The county and ISSA originally petitioned for the recession of the original listing on the grounds that it purported to list a DPS of a metapopulation. Although the Service's proposed rule acknowledges that this listing was improper, the Service does not take the requested action of delisting the species. Rather, it changes the listing entity from the Southern Selkirk Mountains Population to the Southern Mountain Caribou, a DPS of a subspecies.

The Service continues to err in the manner that it applies the DPS policy. As the policy makes clear, the discreteness and significance of a population segment must be evaluated in relation to the *species* to which the DPS belongs.⁴

² 16 U.S.C. § 1532(16) (emphasis added).

³ See, e.g., *Trout Unlimited v. Lohn*, 559 F.3d 946, 960 (9th Cir. 2009) (Service may not list a wildlife population below the level of a DPS); *WildEarthGuardians v. Salazar*, No. CV-09-00574-PHX-FJM, 2010 WL 3895682, at *6 (D. Ariz. Sept. 30, 2010) (holding that Service may list only species, subspecies, and "distinct population segments of a species"); *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1163 (D. Or. 2001) ("Congress expressly limited the Secretary's ability to make listing distinctions among species below that of subspecies or a DPS of a species."); *Sw. Ctr. for Biological Diversity v. Babbitt*, 980 F. Supp. 1080, 1085 (D. Ariz. 1997) ("The ESA *does not* refer to the listing of DPSs of *subspecies* [T]he statute reads 'any distinct population segment of any species.'").

⁴ See 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996) (establishing the elements of "[d]iscreteness of the population segment in relation to the remainder of the species to which it belongs" and "significance of the population segment to the species to which it belongs").

The consideration of a more broad population—a subspecies rather than a metapopulation—led the Service to conclude that downlisting was appropriate. This suggests that performing the analysis at the species level would further reduce the need for the population’s listing and protection. The Service should perform the proper analysis and, if the population doesn’t satisfy the DPS policy at the species level, delist it.

II

THE SERVICE MUST CONSIDER THE SEVERE ECONOMIC IMPACTS ON LOCAL COMMUNITIES, SMALL BUSINESSES, AND INDIVIDUALS BEFORE EXTENDING THE TAKE PROHIBITION TO THIS NEW DPS AND DESIGNATING CRITICAL HABITAT

Bonner County and ISSA have lost revenue and recreational opportunities as a result of snowmobile trail closures to benefit the caribou. In addition, Bonner County residents and businesses have been harmed by these restrictions. Two years ago, when the Service was designating critical habitat for the Southern Selkirk Mountains population, Bonner County and ISSA commissioned a study of the impacts of trail closures on the region’s tourism and recreation-focused economy.⁵ That study reported the sweeping impact that continued regulation may have.

The study found that an existing injunction, based on the improper listing, had a significant impact on the recreation economy around Priest Lake. The economists estimated that trail closures caused the loss of between 8% and 25% of winter jobs in the area, with 25% identified as the more accurate estimate. 77% of the snowmobile dealers in the region went out of business. Across the region, nearly 900 winter recreation jobs were lost, representing \$21.5 million in earnings. Additionally, the study found less severe, though significant, impacts on the timber industry. The burdens on timber have a spillover effect on local schools, as revenues from this industry are a significant source for the state’s School Endowment Fund.

Contra the McKetta & Green Study, a Service-commissioned study found only minimal impacts.⁶ However, the Service’s very low estimate was not founded on a disagreement with any of McKetta & Green’s findings. Rather, the Service performed an incremental analysis, limited to administrative costs, of the impacts of designating critical habitat. The vast majority of impacts identified in the McKetta & Green Study were attributed by the Service to the listing and regulation of take. The

⁵ See Attachment (hereinafter McKetta & Green study).

⁶ See Becky Kramer, *Snowmobiler-commissioned study disputes caribou impact*, The Spokesman-Review (June 14, 2012), available at <http://www.spokesman.com/stories/2012/jun/14/snowmobiler-commissioned-study-disputes-caribou/>.

downlisting from endangered to threatened invalidates this rationale, however, because the ESA does not make the regulation of a take a consequence of a threatened listing.

The ESA only regulates purely private behavior when it affects those species facing an immediate risk of extinction, *i.e.*, endangered species.⁷ The legislative history explains that this was intentional.⁸ The ESA's "most stringent prohibition" against take was an innovation that Congress deemed necessary for endangered species.⁹ But for threatened species, Congress chose not to prohibit take. Rather, it gave the Service the authority to selectively do so, on an individual species basis, provided that the Service determined it "necessary and advisable."¹⁰ The Senate Report adopted this interpretation explicitly.¹¹

In the proposal to list the Southern Mountain Caribou as threatened, the Service gives no indication that it has determined that extending the prohibitions of Section 9 is necessary and appropriate. In light of the impacts of existing regulations and trail closures, the Service should decline to exercise its authority to extend the take prohibition to this threatened species, or only do so to the extent that it determines that regulating private activity is necessary and appropriate to conserve the caribou.

In the past,¹² the Service has inverted the ESA's standard, only *reducing* regulatory burdens where it determines that the liberalization is necessary and appropriate to conserve a threatened species. This reversal of the statutory scheme is inappropriate and should not be done here.

As a consequence of Congress' decision not to regulate the take of threatened species, it would be inappropriate to designate critical habitat for a threatened species based on only an incremental analysis of economic impacts. The Service has explained that it performs an incremental analysis

⁷ 16 U.S.C. § 1538(a).

⁸ Congressional Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, 197 (statement of Rep. Gooding) (hereinafter Legislative History).

⁹ *Id.* at 357 (statement of Sen. Tunney).

¹⁰ 16 U.S.C. § 1533(d).

¹¹ Legislative History at 307 (Senate Report).

¹² *See, e.g.*, Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158, 46,159 (Aug. 2, 2012).

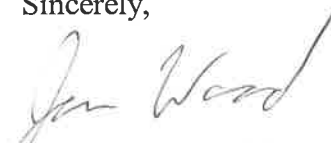
because it considers other impacts to be attributable to the independent protections triggered by an ESA listing.¹³ But the ESA doesn't impose any protections for threatened species other than the protection of critical habitat.¹⁴

Although the Service proposes to list the Southern Mountain Caribou, a new entity, as threatened, the Service has not proposed a fresh critical habitat designation, as the ESA requires.¹⁵ Instead, it proposes to "reaffirm" the critical habitat designation for the admittedly improperly listed Southern Selkirk Mountains population.¹⁶ This is inappropriate because the earlier critical habitat designation was based on a different listed entity. Due to the Southern Selkirk Mountain population's endangered status, the ESA independently restricted private activity that affected it through the take prohibition. Not so with this new, threatened entity. Therefore, the Service should reconsider the critical habitat for the Southern Mountain Caribou and properly consider the cumulative economic impacts that the designation will have.

CONCLUSION

The ESA carefully identifies what entities may be listed as either endangered or threatened, and what the consequences of each category are. The proposed listing of the Southern Mountain Caribou DPS violates the ESA in multiple respects. First, the DPS is not a listable entity. Second, the Service has not considered the severe economic consequences that result from prohibiting take and designating critical habitat. With respect to threatened species, Congress directed the Service to consider these costs at two stages: when determining whether regulating private activity that affects the particular species is "appropriate;" and when designating critical habitat. However, the proposed listing indicates that the Service does not intend to consider these impacts at either stage.

Sincerely,



JONATHAN WOOD
Attorney

Enclosure

¹³ See Final Rule Revising the Regulations for Impact Analyses of Critical Habitat, 78 Fed. Reg. 53,058 (Aug. 28, 2013).

¹⁴ 16 U.S.C. § 1538(a)(1).

¹⁵ 16 U.S.C. § 1533(a)(3).

¹⁶ 79 Fed. Reg. at 26,532-33.