



PACIFIC LEGAL FOUNDATION

June 2, 2017

SENT VIA U.S. POSTAL SERVICE

Mr. Ryan Zinke
Secretary of the Interior
United States Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Mr. Jim Kurth
Director, United States Fish & Wildlife Service
1849 C. Street, N.W.
Washington, DC 20240

Ms. Robyn Thorson
Regional Director, Pacific Region
United States Fish & Wildlife Service
911 Northeast 11th Avenue
Portland, OR 97232

Re: 60-Day Notice of Intent To Bring a Citizen Suit Under the Endangered Species Act To
Compel A Final Rule Regarding the Proposed Reclassification of the Southern Selkirk
Mountains Population of Woodland Caribou (*Rangifer tarandus caribou*)

Dear Mr. Zinke, Mr. Kurth, & Ms. Thorson:

For decades, citizens of Bonner County, Idaho, and members of the Idaho State Snowmobile Association (ISSA) have endured profound negative effects from the Service's listing of the Southern Selkirk Mountain caribou population. Winter recreational activities—on which the local economy heavily depends—are significantly limited by trail closures related to the caribou. Over three years ago, the Service finally acknowledged that this caribou listing is illegal. But the illegal caribou listing remains in effect because the Service has never acted on its acknowledgment—more than two years after the deadline required by the Endangered Species Act. The Service's failure to follow the law means that these damaging restrictions remain in place. Scores of small local businesses have been forced to shutter, leading to substantial job and revenue losses.

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Pursuant to Section 11(g) of the Endangered Species Act (ESA)¹, this letter provides notice of intent to commence civil litigation for continued violation of Section 4(b)(6)(A) of the ESA.² Section 4(b)(6)(A) requires the Service to reach a final determination on a species reclassification proposal within one year. On May 8, 2014, the Service published a proposed rule acknowledging that the current listing violates the ESA and proposing to withdraw it.³ However, the Service has yet to act on that proposed rule.⁴ Bonner County and ISSA, represented by attorneys with Pacific Legal Foundation, intend to file suit after 60 days if the Secretary and Service continue to violate the statutory requirement to act on their acknowledgement that the listing is illegal.

INTERESTS OF PARTIES

Bonner County, its 40,000 residents, and local businesses depend on income generated by winter recreation, including activities on lands designated as habitat for the caribou. Through agreements with state and federal agencies, Bonner County maintains snowmobile trails, including on federal lands. As a result of the caribou's listing, the county's ability to maintain these trails, and for visitors to use them, has been restricted. Tourism and recreation constitute as much of 25% of the local economy.⁵ Trail closures has caused 77% of snowmobile dealers in the region to close. Nearly a thousand jobs were lost—\$21.5 million in earnings.

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.

Bonner County and ISSA, represented by Pacific Legal Foundation, submitted the petition that led to the Service's proposed rule acknowledging that the current listing violates the ESA.⁶ In addition to the petition, the organizations have filed two lawsuits⁷ aimed at compelling the Service to follow the law, and submitted comment letters⁸ urging the Service to delist the caribou. ISSA has also participated in

¹ 16 U.S.C. § 1540(g).

² 16 U.S.C. § 1533(b)(6)(A).

³ 81 Fed. Reg. 22,961.

⁴ The Service subsequently reopened the comment period. 81 Fed. Reg. 22,961.

⁵ Charles McKetta & Dan Green, *Proposed Woodland Caribou Habitat Designation in Idaho: Estimated Local Economic Effects* (May 31, 2012), <http://blog.pacificlegal.org/wp/wp-content/uploads/2014/06/Caribou-impacts-report-060412-final-draft.pdf>.

⁶ See 79 Fed. Reg. 26,504, 26,506.

⁷ *Bonner Cnty. v. Salazar*, No. 2:12-CV-00567 (D. Idaho, Nov. 15, 2012), <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/11/1-1413-Caribou-Complaint.pdf>; *Bonner Cnty. v. Jewell*, No. 2:14-CV-00100 (D. Idaho, Mar. 12, 2014), <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2014/03/Caribou-complaint.pdf>.

⁸ Comment of Bonner County, ISSA, and PLF Re: Petition to Delist the Southern Selkirk Mountains Population of Woodland Caribou and Amend Listing, Docket No. FWS-R1-ES-2012-0097 (June 24, 2014), <http://blog.pacificlegal.org/wp/wp-content/uploads/2014/06/PLF-Comments-June-24-2014.pdf>; Comment of Bonner County, ISSA, and PLF Re: Petition to Delist the Southern Selkirk Mountains Population of Woodland Caribou and Amend Listing, Docket No. FWS-R1-ES-2012-0097 (May 18, 2016), <http://blog.pacificlegal.org/wp/wp-content/uploads/2016/05/PLF-Comments-May-18-2016.pdf>.

litigation concerning critical habitat designation for the caribou.⁹

LEGAL CHALLENGE

The Service listed the southern Selkirk Mountains woodland caribou as endangered in 1984.¹⁰ Twenty-eight years later, the Service designated approximately 37,562 acres of critical habitat for the southern Selkirk Mountain population of woodland caribou.¹¹

In May, 2012, Bonner County and ISSA filed a petition to delist the Southern Selkirk Mountains woodland caribou.¹² It argued that the listing was illegal because the Endangered Species Act only authorizes listing distinct population segments of species, but the Southern Selkirk population was evaluated only in relation to the mountain ecotype or metapopulation of the woodland caribou subspecies. The Service did not respond to the petition by the mandatory 90-day deadline, so the parties filed suit in November, 2012.¹³ In December, 2012, the Service issued a positive initial finding on the petition, but did not make a final determination within twelve months, as required by the Endangered Species Act. In March 2014, Bonner County and ISSA again filed suit to compel the Service to comply with the law.¹⁴

In June, 2014, the Service acknowledged that this particular population is not a listable entity under the ESA, because it is not a species, subspecies, or distinct population segment.¹⁵ In addition to acknowledging that the current listing is illegal, the Service proposed to list the larger Southern Mountain DPS of woodland caribou—comprised of all caribou in North America—and classifying this new DPS as threatened, while maintaining the same critical habitat designation. The Service has extended and reopened the comment period in the three years since publishing this proposed rule, primarily to discuss issues related to its proposal to list the Southern Mountain DPS, but it has never acted on its acknowledgment that the current listing violates the ESA. To this day, more than two years after acknowledging that it had violated the ESA, it continues to do so and impose significant burdens on Bonner County and ISSA.

The Service has therefore violated Section 4(b)(6)(A) of the ESA, and unlawfully withheld or unreasonably delayed required agency action in violation of the Administrative Procedures Act (APA).¹⁶

⁹ *Center for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193 (D. Idaho 2015).

¹⁰ 48 Fed. Reg. 49,245.

¹¹ 77 Fed. Reg. 71,041.

¹² Petition of Bonner County, Idaho, and The Idaho State Snowmobile Association To Delist The Southern Selkirk Mountain Caribou Population Under The Endangered Species Act

<http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/05/cariboudelistingpetitionfinal1.pdf>

¹³ *Bonner Cnty. v. Salazar*, No. 2:12-CV-00567 (D. Idaho, Nov. 15, 2012),

<http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/11/1-1413-Caribou-Complaint.pdf>.

¹⁴ *Bonner Cnty. v. Jewell*, No. 2:14-CV-00100 (D. Idaho, Mar. 12, 2014), <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2014/03/Caribou-complaint.pdf>.

¹⁵ 79 Fed. Reg. 26,504.

¹⁶ 5 U.S.C. § 706(1).

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The Endangered Species Act not only provides for the protection of threatened or endangered species, but also for the downlisting, delisting, or reclassifying of those entities if the current form of protection is inappropriate or not in accordance with the law. The Secretary's duty to issue a final determination after a proposed reclassification within one year is mandatory and nondiscretionary under 16 U.S.C. § 1533(b)(6)(A). Bonner County and ISSA intend to seek judicial relief if the Service continues to ignore its obligation to act on its acknowledgment that the current listing violates the ESA.

The Secretary and Service have a duty to ensure that entities listed under the ESA are properly designated. This duty protects the interests of species, as well as of citizens like the residents of Bonner County and members of ISSA whose livelihoods are impacted by the listing of the Southern Selkirk Mountains population. The continued listing of this population, despite the Service's acknowledgment of its illegality more than three years ago, imposes unnecessary economic burdens on affected citizens. Therefore, unless the Secretary publishes the required final determination on the Southern Selkirk Mountains caribou population's status within 60 days, the parties intend to file suit to compel the Service to perform its duties under the ESA.

Sincerely,



JOHANNA B. TALCOTT

Attorney