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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CENTER FOR BIOLOGICAL DIVERSITY, DEFENDERS OF WILDLIFE, CONSERVATION NORTHWEST, IDAHO CONSERVATION LEAGUE, SELKIRK CONSERVATION ALLIANCE, and THE LANDS COUNCIL; Plaintiffs, v. MICHAEL CARRIER, U.S. Fish and Wildlife Service Idaho State Supervisor, and U.S. FISH AND WILDLIFE SERVICE; Defendants, and IDAHO GOVERNOR C.L. "BUTCH" OTTER, KOOTENAI TRIBE OF IDAHO, and BOUNDARY COUNTY; and IDAHO STATE SNOWMOBILE ASSOCIATION, INC. and BONNER COUNTY; Defendant-Intervenors.	No. 1:13-cv-00427-ELJ **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

The Southern Selkirk Mountains population of woodland caribou is in danger of extinction, numbering less than thirty animals. Its range has contracted significantly from the time it was a viable population with more than 100 animals. Defendant U.S. Fish and Wildlife Service (FWS) and Intervenors focus on the fact that caribou no longer use much habitat in the U.S. to defend the final critical habitat rule for this caribou population. The point of critical habitat, however, is not just to protect the land the species is currently using but also to protect the land the species needs to recover. Small, isolated populations that occupy only a fraction of their historic range often must expand into unoccupied parts of their range to recover, as FWS has found in many other critical habitat rules and has consistently stated must occur for this caribou population. For such species, the occupied habitat is not sufficient for recovery and thus unoccupied lands are designated as critical habitat.

Here, FWS did not provide a rational explanation or valid scientific support for finding its very small designation of critical habitat sufficient to recover the Southern Selkirk Mountains caribou population. Instead, FWS drastically reduced the critical habitat designation shortly before issuing the final rule, relying on a new justification that had no scientific support. Because FWS did not use reasoned analysis and provide an adequate explanation for why its final critical habitat designation was sufficient to recover the Southern Selkirk caribou population, and also violated procedural notice and comment requirements, the final rule was unlawful under the ESA and APA and must be remanded to FWS.

ARGUMENT

I. FWS DID NOT PROVIDE ADEQUATE EXPLANATION AND SUPPORT TO SHOW THE FINAL CRITICAL HABITAT RULE COMPLIES WITH THE ESA.

FWS and Intervenors argue that the reduction in critical habitat between the proposed

rule and final rule related to changes in the habitat elevation cut-off and area determined to be occupied by caribou at the time of listing, which were based on comments and the best available science. Yet Plaintiffs are not challenging those aspects of the final rule. Plaintiffs' opening brief did not contest the elevation change or the determination about occupied habitat. By focusing on these angles, FWS and Intervenors avoid the true dispute in this case—whether FWS rationally explained how a designation limited to just the small amount of occupied habitat ensures the conservation of the Southern Selkirk Mountains caribou population. As explained below, FWS did not provide that explanation, in violation of the ESA and APA.

A. FWS Frequently Designates Unoccupied Habitat To Ensure Conservation of the Species.

FWS and Intervenors each attempt to undercut the designation of unoccupied areas by stating that such designation is an "onerous" procedure because it occurs only if the designation of occupied lands is "inadequate" or "insufficient" to ensure the conservation of the species. FWS Brief at 22 (citing 50 C.F.R. § 424.12(e); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 125 (D.D.C. 2004)) (ECF #51-1); Intervenor Tribe Brief at 8 (ECF # 49-1); Intervenor ISSA Brief at 7 (ECF #50). But that is exactly the situation here, and for many other species—occupied habitat is *not* sufficient to ensure recovery. That is why FWS has designated unoccupied habitat in many critical habitat rules. Indeed, in just the last few years, FWS has included unoccupied habitat in at least twelve final or proposed designations.[1]

[1] Final Critical Habitat Designations: 79 Fed. Reg. 12572, 12588-91 (March 5, 2014) (Jaguar); 78 Fed. Reg. 59556, 59558 (Sept. 26, 2013) (Fluted Kidneyshell and Slabside Pearlymussel); 77 Fed. Reg. 63604, 63623 (Oct. 16, 2012) (Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace); 77 Fed. Reg. 41088, 41090 (July 12, 2012) (Chupadera Springsnail); 77 Fed. Reg. 36728, 36748 (June 19, 2012) (Pacific Coast Population of the Western Snowy Plover); 77 Fed. Reg. 35118, 35133 (June 12, 2012) (Dusky Gopher Frog); 77 Fed. Reg. 23060, 23079 (April 17, 2012) (Three Forks Springsnail and San Bernardino Springsnail); 77 Fed. Reg. 10810, 10839 (Feb. 23, 2012) (Spikedace and Loach Minnow); 75

These rules explain that unoccupied habitat was designated because occupied habitat was not sufficient for recovery, and therefore unoccupied habitat was essential for conservation of the species. For instance, FWS has repeatedly determined that designation of only occupied habitat was not sufficient where the species' population size and distribution had declined significantly, and expansion of a species' range into historical but currently unoccupied habitat was essential for its recovery. *See* 77 Fed. Reg. at 35124-25, 35132-33 (Dusky Gopher Frog); 78 Fed. Reg. at 37333-35 (New Mexico Meadow Jumping Mouse); 78 Fed. Reg. at 59558, 59564 (Fluted Kidneyshell); 77 Fed. Reg. at 23079 (Three Forks and San Bernardino Springsnails); 77 Fed. Reg. at 63623 (Cumberland Darter); 77 Fed. Reg. at 36748 (Western Snowy Plover); 77 Fed. Reg. at 10839 (Spikedace and Loach Minnow); 78 Fed. Reg. at 5357 (Zuni Bluehead Sucker). FWS noted in one rule that the ESA requires it to "designate critical habitat that will support recovery of the species" and that, while the remaining occupied habitat "is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." 77 Fed. Reg. at 35125.

The bull trout critical habitat rule likewise stated that "[o]ne of the greatest conservation benefits of critical habitat is the designation of unoccupied habitat that is essential to the conservation of the species. . . . For example, nearby occupied habitats could currently be in an imperiled status, but by restoring bull trout in adjacent unoccupied habitat, the overall recovery potential in that area could be improved." 75 Fed. Reg. at 63903. The bull trout rule noted that "bull trout habitat and population loss over time necessitates reestablishing bull trout in currently

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Fed. Reg. 77962, 77972 (Dec. 14, 2010) (Santa Ana Sucker); 75 Fed. Reg. 63898, 63933-34 (Oct. 18, 2010)(Bull Trout). Proposed Critical Habitat Designations: 78 Fed. Reg. 37328, 37339 (June 20, 2013) (New Mexico Meadow Jumping Mouse); 78 Fed. Reg. 5351, 5357 (Jan. 25, 2013) (Zuni Bluehead Sucker).

unoccupied habitat areas to achieve recovery." 75 Fed. Reg. at 63933.

Even where a species used habitat that was mostly within a foreign country, FWS has designated unoccupied critical habitat in the U.S. where that habitat contributed to the species' persistence in the U.S. by allowing for expansion of its range and connectivity to core habitat in the foreign nation, which was essential for the species' conservation. 79 Fed. Reg. at 12582, 12589 (Jaguar). Thus, simply because a species primarily uses habitat in another country does not render U.S. habitat non-essential for recovery. This is particularly true for the caribou, which is also declining in Canada and at risk of extirpation. AR 3424, 74019.

FWS recently reemphasized that the function of designating critical habitat is to provide for the *recovery* of species. 79 Fed. Reg. 27060, 27061-62 (May 12, 2014) (proposed rule to define destruction or adverse modification of critical habitat). FWS stated specifically that the definition of "destruction or adverse modification of critical habitat" must "reflect the purpose for which the critical habitat was designated—the recovery of the species." *Id.* at 27062. The Ninth Circuit has also held that critical habitat is meant to ensure recovery of species, not just survival. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.,* 378 F.3d 1059, 1070 (9th Cir. 2004); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.,* 616 F.3d 983, 989 (9th Cir. 2010); *Arizona Cattle Growers Ass'n v. Salazar,* 606 F.3d 1160, 1166 (9th Cir. 2010).

Thus, if FWS is going to limit a critical habitat designation to occupied habitat, it must rationally determine that such a designation is sufficient to ensure the recovery of the species. FWS failed to do so here. Simply because occupied habitat has the essential physical and biological features the species needs to survive does not mean that it alone is sufficient for recovery, as FWS tries to assert. FWS Brief at 22. As discussed in the many critical habitat rules cited above, unoccupied habitat is essential if a species must expand its range to recover.

Here, FWS did not adequately explain how a designation limited to the very small area of occupied habitat is sufficient to recover the Southern Selkirk Mountains caribou population.

B. FWS Did Not Rationally Explain Its Substantial Reduction in Critical Habitat or Show How the Final Designation Will Ensure Recovery.

FWS's decision to reduce the caribou critical habitat designation by 90% was made without reasoned analysis or adequate explanation, and contradicted the best available science. The record shows that FWS abruptly made its decision in the last weeks of the rulemaking process, well after it had analyzed public comment and determined that far more land was essential for recovery of the species; and then searched for a rationale and information to justify its decision. FWS and Intervenors argue that an agency is not bound by prior determinations or internal deliberations, FWS Brief at 10, 26; Intervenor Tribe Brief at 20, but an agency still must use "reasoned analysis" and adequately explain and support its change in position. *River Runners for Wilderness v. Martin,* 593 F.3d 1064, 1075-76 (9th Cir. 2010); *Humane Soc'y of the U.S. v. Locke,* 626 F.3d 1040, 1049-51 (9th Cir. 2010). Here, that reasoned analysis and adequate explanation is missing.

1. FWS Arbitrarily Selected One Recovery Objective While Ignoring Other Relevant Objectives.

In their opening brief, Plaintiffs described the recovery objectives for the Southern Selkirk Mountains caribou population, including objectives contained in the Recovery Plan. Pl. Opening Brief at 15-17 (ECF #38-1). FWS and Intervenors try to paint the Recovery Plan as a stale document that has no binding effect on the agency. FWS Brief at 23-24; Intervenor Tribe Brief at 17-18. However, despite the supposed staleness of the Recovery Plan, FWS continued to rely on a single objective from that Plan to support its final decision that designation of just the small occupied area in the U.S., combined with certain lands in Canada, would be sufficient

to recover the caribou population. AR 26. FWS never explained why it was reasonable to rely on that lone objective from the Recovery Plan while ignoring other goals in the Plan.

At the time the Recovery Plan was revised in 1994, the Southern Selkirk Mountains caribou population had about fifty animals found in northern Idaho, northeastern Washington, and southeastern B.C. AR 3179. The Plan noted the need to maintain an increasing population that must be distributed over a wider area. AR 3179, 3217. It established a Recovery Area of 1.4 million acres, with about 53% in the U.S. and 47% in B.C., and identified 443,360 acres of potential habitat in the Selkirk ecosystem, with 331,150 acres (75%) in the U.S. and 112,210 acres (25%) in B.C. AR 3186, 3203. The Plan also included an objective to secure, enhance, and manage at least 443,000 acres of caribou habitat in the Selkirks to support a self-sustaining population. AR 3179, 3217. For the final rule, FWS chose to rely solely on the 443,000-acre habitat objective while disregarding the rest of the Recovery Plan. AR 23-27.

FWS made this choice despite reiterating the need to increase the size and distribution of the caribou population to achieve recovery in its proposed rule, 2008 status review, and a 2008 biological opinion. *See* AR 28773 (proposed rule stating: "[t]he recovery plan also states that for recovery, woodland caribou in the Selkirks must be distributed over a wider area than at present (USFWS 1994, p. 36). Optimally, this would include habitat in both B.C. and the U.S."); AR 3445 (2008 status review stating: "the contracting range of the South Selkirk population, the small number of animals in the population, and the limited genetic exchange between the South Selkirk population and adjacent populations threaten population viability"); AR 3536, 3561 (2008 biological opinion stating that first conservation need was to expand the size and distribution of the existing population, and that the recovery plan objective to manage for an increasing caribou population that is well distributed throughout the recovery area was still

applicable). While the objectives to increase the size and distribution of the population may not be "binding" on the agency, FWS Brief at 23, FWS did not explain why they were no longer relevant while the objective to secure and enhance 443,000 acres of land did remain relevant. Selectively choosing certain objectives over others without a rational explanation is arbitrary and capricious. *Natural Res. Def. Council v. U.S. Dep't of Interior,* 113 F.3d 1121, 1125 (9th Cir. 1997) (agency must consider all relevant factors and articulate rational connection between facts found and choice made).

Furthermore, as FWS notes, the stale information in the Recovery Plan relates to the "biology of the species and its habitat," not to the need to expand the population size and distribution for recovery. FWS Brief at 8, 24 (quoting final rule at AR 24). In fact, the proposed rule contained the same statement as the final rule about outdated biological information in the Plan, yet also stated that the "recovery plan establishes the actions and conservation objectives needed to recover the southern Selkirk Mountains population of the woodland caribou." AR 28772. In addition, it referred to the statement in the Plan about the need to expand the distribution of the population for recovery, and used the entire recovery area to help refine the critical habitat boundary. AR 28773, 28778. The final rule does not explain why the outdated biological information suddenly negated these other aspects of the Recovery Plan.

Moreover, the Recovery Plan was clear that habitat in the U.S. was important for recovery of the caribou by establishing more than half of the 1.4 million acre Recovery Area in the U.S. and identifying 75% of the potential caribou habitat in the Selkirk ecosystem in the U.S. AR 3186, 3203. The proposed rule continued to use the Recovery Area boundary to identify critical habitat, noted that more than half of the suitable and potential habitat in the Recovery Area occurs in the U.S., and emphasized the importance of increasing distribution in the U.S.

AR 28772, 28773, 28777, 28778. Yet to meet the 443,000 acre objective from the Recovery Plan, FWS relied upon lands primarily in Canada in the final rule, again ignoring its previous conclusion that land in the U.S. was important for *recovery* of the caribou. AR 26.

Although recovery objectives may not be binding on the agency, FWS's arbitrary selection of one objective to support its final rule, while ignoring the need to expand the population size and its distribution for recovery, showed that FWS did not use reasoned analysis and its decision was without substantial basis in fact and thus was unlawful. *River Runners,* 593 F.3d at 1075-76; *Arizona Cattle Growers,* 606 F.3d at 1163.

2. FWS's Explanation that Caribou No Longer Use Habitat in the U.S. Is Not a Valid Reason to Deem Those Lands Unnecessary for Recovery.

The final critical habitat rule relies on information indicating that caribou no longer use much area in the U.S. to justify its very small critical habitat designation, and both FWS and Intervenors argue that justification was reasonable. AR 25-27; FWS Brief at 24-25; Intervenor Tribe Brief at 19-22. Yet this justification is a product of circular logic: the more a species shrinks in size and range, the less critical habitat is essential for recovery. In fact, however, as demonstrated in the critical habitat rules cited above, species whose size and range have contracted significantly often must expand into unoccupied habitat to recover. FWS never explained why that is not true here when up until the final rule the agency consistently stated that the Southern Selkirk Mountains caribou population must expand its size and range to recover.

FWS and Intervenors rely on statements that (1) caribou range has shifted northward and the species is now primarily dependent on lands in Canada, (2) the U.S. is not "independently" capable of conserving caribou, and (3) transplant efforts have not been successful. FWS Brief at 24, 28; Intervenor Tribe Brief at 19, 22. These statements do not prove that lands in the U.S. are not essential for recovery. The fact that the current at-risk herd of fewer than thirty animals

primarily uses land in Canada says nothing about what the population needs to grow larger and recover. In fact, when the population was at a viable size of more than 100 animals, it used a much larger area in the U.S., as described in the proposed rule. AR 28769-70.

Furthermore, simply because habitat in the U.S. cannot independently conserve caribou does not mean that more habitat in the U.S., combined with habitat in Canada, is not necessary to recover the caribou. FWS recently designated critical habitat for a species that primarily occupied habitat in Mexico and used habitat in the U.S. infrequently, but would need to expand its range more into the U.S. to recover. 79 Fed. Reg. at 12582, 12589 (Jaguar). *See also Ctr. for Biol. Diversity v. Kempthorne,* 607 F. Supp. 2d 1078, 1089-91 (D. Ariz. 2009) (FWS improperly focused on survival and not recovery when concluding that no habitat in U.S. was essential for jaguar). Finally, transplants of animals may not succeed for many reasons. For example, FWS admitted that the second caribou transplant occurred during a time of high mountain lion populations and heavy predation. AR 28772. The transplant efforts occurred in the 1980's and 1990's, yet up through the 2011 proposed rule FWS continued to maintain that expansion of the population's range and the U.S. portion of the Recovery Area were important.

Indeed, the best available science used for the critical habitat rule recognized that this caribou population is very small and its range has shrunk, but also acknowledged that potential habitat and movement corridors exist throughout the U.S. portion of the Selkirk ecosystem, and that this caribou population must expand its current size and range to recover. *See* FWS Brief at 12 (citing science considered for rule); AR 3445 (2008 status review noting that contracting range, small number of animals, and limited genetic exchange with other populations threaten viability of Southern Selkirk Mountain population); AR 2456, 2503 (Canadian reports showing South Selkirk population at low viability level and high risk of extirpation); AR 28666, 28714

(Recovery Action Plans stating that goal for viable population is 125 caribou); AR 3179, 3217 (Recovery Plan stating need to increase population and expand its distribution); AR 3536, 3542, 3561 (2008 biological opinion stating that primary conservation need is to "[e]xpand the size and distribution of the existing population" and showing movement corridors throughout Selkirks in Idaho); AR 1927-32, 4028 (maps showing caribou habitat and corridors throughout Selkirk ecosystem); AR 28772, 28773 (proposed rule discussing dwindling population and contracting range and noting need to expand distribution for recovery, optimally in both U.S. and B.C.). Thus, the best available science recognized the current small size and range of this caribou population, and that this population must *increase in size and range to recover.*

FWS never explained in its final rule why *only* the area occupied by a small, isolated population of caribou that is at risk of extirpation is sufficient for recovery. As explained above, the purpose of critical habitat is to recover a species, not simply maintain survival of a population that is below a viable level. *See* 79 Fed. Reg. at 27061-62; 77 Fed. Reg. at 35125; *Gifford Pinchot Task Force,* 378 F.3d at 1070; *Home Builders Ass'n of N. Cal.,* 616 F.3d at 989. Where FWS fails to explain how its designation of occupied habitat will achieve recovery, rather than merely promote survival of the species, its designation is unlawful. *Ctr. for Biol. Diversity v. U.S. Fish & Wildlife Serv.,* 2011 WL 73494, at *9 (C.D. Cal. Jan. 8, 2011); *Alliance for the Wild Rockies v. Lyder,* 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010); *Ctr. for Biol. Diversity v. U.S. Army Corps of Eng'rs,* No. 03-29-M-DWM, Order at 18 (D. Mont. May 25, 2005) (attached to Plaintiffs' opening brief).

FWS has stated in numerous critical habitat rules that unoccupied habitat is essential for species that must expand into historic habitat to recover. *See supra* pp. 2-3 & n.1. The need to expand into unoccupied habitat is particularly relevant for species with small, isolated

populations whose range has contracted greatly. *See* 77 Fed. Reg. at 35132-34 (11 of 15 critical habitat units were unoccupied where range of species "has been severely curtailed, occupied habitats are limited and isolated, and population sizes are extremely small and at risk of extirpation,"); 77 Fed. Reg. at 10839 (designating unoccupied areas where species current distribution was 10-20% of historical range because expanding the geographic distribution was "essential for species that occur in only a fragment of their former range"); 78 Fed. Reg. at 59564 (expansion of range into historic habitat was essential for recovery where species had severely curtailed range and small and isolated populations); 79 Fed Reg. at 19311 (99% of proposed critical habitat was currently unoccupied but essential for recovery where populations were small and isolated and recovery required expanding into currently unoccupied areas).

Indeed, FWS believed that same reasoning applied here until just before completing the final rule. In its draft final rule, FWS stated that even if all areas were not occupied, they still would be deemed essential for conservation of the species. AR 698. Yet, a few weeks later when FWS decided to change the determination of what areas were occupied at the time of listing, it also suddenly decided the areas that were now deemed unoccupied were no longer essential for recovery. AR 23396-401. FWS and Intervenors assert that the draft final rule was part of internal deliberations and therefore was not binding on the agency. FWS Brief at 26-27; Intervenor Tribe Brief at 20. Regardless of whether it was binding, however, it shows that FWS did not use reasoned decision-making or support its change of course with a rational explanation as to why lands in the U.S. were no longer essential for the species to recover.

3. FWS's Reliance on Lands in Canada Was a Post Hoc Explanation That Had No Scientific Basis and Did Not Rationally Support the Final Designation.

The only quasi-explanation FWS offered in the final rule as to why the final critical

habitat designation is sufficient is that when it is combined with acres in Canada protected from timber harvest, it "meets the amount of habitat recommended to be secured and enhanced in the 1994 Recovery Plan (443,000 ac, 179,000 ha) to support a recovered population." AR 26; FWS Brief at 28. Reliance on this factor to support the final rule was not reasonable for many reasons.

FWS asserts it "properly considered" that one particular objective from the Recovery Plan to determine that no unoccupied land in the U.S. was essential for recovery. FWS Brief at 29. In other words, according to FWS, it was reasonable to consider the overall acreage of habitat the Recovery Plan recommended be secured and managed for caribou but ignore the fact that the Recovery Plan considered habitat in the U.S. to be important for recovery and that the population had to expand its current distribution. AR 3179, 3186 (53% of Recovery Area in U.S.), 3203 (75% of potential caribou habitat in Selkirk ecosystem in the U.S.), 3217 (for recovery, caribou must be distributed over wider area than at present). Such a selective use of the Recovery Plan is arbitrary. Again, the fact that the small caribou population that exists now primarily uses habitat in Canada does not establish that Canadian lands are the only habitat essential for *recovery*. *See* 79 Fed. Reg. at 12582, 12589 (Jaguar critical habitat rule).

Moreover, FWS admitted just one month before issuing the final rule that it did not know the scientific basis for the 443,000-acre figure. An October 2012 memo assessing the Recovery Plan noted that the recovery strategy was to secure and manage at least 443,000 acres of suitable and potential habitat in the Selkirk Mountains to support a self-sustaining caribou population. AR 662 (citing AR 3206). Then the memo stated: "although the recovery strategy recommends securing and managing at least 443,000 acres, *the basis for that number is uncertain*." *Id.* (emphasis added); *see also* AR 23144 (email stating it was not clear how 443,000-acre number was derived). Yet despite admitting that there was no scientific basis to support the proposition

that 443,000 acres of habitat was sufficient to recover this caribou population, FWS continued to rely on this single recommendation from the Recovery Plan in the November 2012 final rule.

The record further shows that FWS did not engage in reasoned analysis to complete the final rule. FWS drafted a final rule in August 2012 designating 227,100 acres of critical habitat, in which it stated that all of that habitat was essential for recovery even if it was not all occupied habitat. AR 698. Then just a few weeks later, it decided to significantly cut the critical habitat designation by deeming most of the land in the U.S. not occupied *and* not essential for recovery of the caribou. AR 23396-401. It recognized that it must explain how its drastically reduced designation would still achieve recovery, and thus sought out information about Canadian lands that could fulfill the 443,000-acre recommendation to justify the decision it had already made and allow it to quickly revise the rule. AR 23397, 23182-83, 23164-65, 23148.[2]

FWS claims in its brief that it was already aware of Canadian efforts to manage caribou and thus it was reasonable to seek out more detail after making its decision. FWS Brief at 30-31. The record indicates otherwise, however, showing that FWS did not have enough information about management of Canadian lands to justify its decision and quickly searched for more. AR 23164-65, 23148-49. FWS also argues in its brief that it had to finish the rule quickly to meet a deadline, but meeting a deadline does not excuse unlawful post-hoc rationalizations or reliance on a factor the agency knew had no scientific support. FWS Brief at 30.

FWS also did not provide any support to show that the mere fact that logging is banned on these Canadian lands means they are sufficient to recover the caribou. First, despite FWS's claim in the final rule that 135,908 acres of Nature Conservancy lands helped meet the 443,000

[2] FWS sought and received the information on Canadian land management from Canadian biologist Leo DeGroot. AR 23148. Mr. DeGroot was also one of the peer reviewers, who had stated that he found the proposed rule very thorough and accurate and had no comments. AR 22435. Mr. DeGroot never stated that lands in the U.S. were not essential for recovery.

acre objective, the record indicates that less than half of that land is actually caribou habitat. AR 26, 23148 (Canadian biologist DeGroot stating that "maybe 30-40%" of those lands are caribou habitat). Second, FWS admitted that timber harvest is only one threat to caribou, and that roads and recreation that facilitate vehicle access and disturbance are other threats. FWS Brief at 4, 14; AR 30, AR 3530-34. Yet the final rule states only that logging is prohibited on these Canadian lands and provides no information about protection from other threats. AR 26.

In fact, management efforts in Canada have not resulted in an improvement in caribou status. The Southern Selkirk Mountains caribou population has primarily been using habitat in Canada, yet its population size and distribution have not increased. AR 23122. Canada considers this population to be at a low viability level and high risk of extirpation. AR 2456, 2503. Thus, the record has no evidence to show that management of Canadian lands is sufficient to recover this caribou population.

FWS and Intervenors point to a new proposed rule that would combine the Southern Selkirk caribou population with other mountain caribou populations into the Southern Mountain Caribou Distinct Population Segment (DPS) to try and suggest the caribou population is not in such dire straits. FWS Brief at 4, n.3; Intervenor Tribe Brief at 2. However, this proposed rule only strengthens Plaintiffs' argument. The population of the entire Southern Mountain Caribou DPS has declined significantly over the past two decades, its range has contracted 40%, and local populations at the southern end of the DPS are becoming increasingly fragmented and isolated, with several likely to be extirpated in the future. 70 Fed Reg. 26504, 26514-15, 26528 (May 8, 2014). Threats to this DPS continue to occur, particularly in the southern extent of the DPS, and existing regularly mechanisms are not sufficient to ameliorate these threats. *Id.* at 26522, 26527. Due to its decline, FWS proposed to list the entire DPS as threatened under the ESA while

Canada considers it to be endangered. *Id.* at 26528; COSEWIC Wildlife Species Assessment (May 2014), *available at* http://www.cosewic.gc.ca/rpts/detailed_species_assessments_e.html.

This information only reaffirms the evidence in the record showing that the range of mountain caribou in Canada has declined, the entire global population of mountain caribou is below a viable level and at risk of extirpation, and all but a few of the local populations are declining or extirpated. AR 3424-25. This decline has been particularly evident in the southern portion of the range, and loss of the South Selkirk caribou population would have serious implications for the conservation of mountain caribou. *Id*. This evidence does not support FWS's conclusion that management of Canadian lands combined with a very small area of critical habitat in the U.S. is sufficient to recover the Southern Selkirk caribou population.

Courts have ruled that other management plans or habitat protections do not negate the need for critical habitat designations. *Natural Res. Def. Council,* 113 F.3d at 1127; *Ctr. for Biol. Diversity v. Norton,* 240 F. Supp. 2d 1090, 1100-03 (D. Ariz. 2003). That holding is particularly relevant here where FWS has not shown that the management of Canadian lands is the functional substitute for critical habitat and will promote recovery of the caribou. Because FWS has not articulated a rational connection between the facts in the record and the conclusion that the limited critical habitat designation will promote recovery, the final critical habitat designation is arbitrary and capricious and contrary to the ESA, and must be remanded to FWS. *Natural Res. Def. Council,* 113 F.3d at 1124; *Arizona Cattle Growers,* 606 F.3d at 1163.

II. FWS DID NOT PROVIDE ADEQUATE NOTICE AND COMMENT ON THE FINAL CRITICAL HABITAT DESIGNATION.

In addition to the legal violations discussed above, FWS's final critical habitat rule also violated requirements under the ESA and APA to provide adequate public notice and comment when issuing such rules. 16 U.S.C. § 1533(b)(4), (b)(5); 5 U.S.C. § 553(b)-(c); 50 C.F.R. §

424.16(c). FWS and Intervenors claim that the final critical habitat rule for the Southern Selkirk Mountains caribou population was a "logical outgrowth" of the proposed rule and that Plaintiffs could have anticipated a reduction in critical habitat because comments on the proposed rule critiqued the area occupied by caribou at the time of listing and the habitat elevation threshold. FWS Brief at 31-34; Intervenor Tribe Brief at 12-15; Intervenor ISSA Brief at 3-5.

FWS and Intervenors again skirt the real change between the proposed rule and final rule that is at issue in this case: the extreme reduction in area that FWS determined was necessary for *recovery* of the caribou. FWS significantly shrunk the area it deemed essential for conservation of the Southern Selkirk Mountains woodland caribou—a 90% reduction, and provided a wholly new explanation for why such a small area was supposedly sufficient, and neither change was foreshadowed in the proposed rule or comments on the proposed rule. Thus, FWS failed to provide adequate notice and opportunity for comment on those substantial changes to the rule.

A. The Significantly Smaller Area Deemed Sufficient for Caribou Recovery in the Final Rule was Not a Logical Outgrowth of the Proposed Rule.

To determine whether a final rule is a logical outgrowth of a proposed rule, the "essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft [proposal]." *Natural Res. Def. Council v. EPA,* 279 F.3d 1180, 1186 (9th Cir. 2002). If an agency's change in position is not "foreshadowed in proposals and comments advanced during the rulemaking," and clearly catches parties by surprise, the agency must provide additional notice and comment on those changes. *Id.* at 1188 (internal quotations omitted). In other words, if the final rule deviates sharply from the proposal and is a fundamental change rather than simply a natural drafting evolution, additional notice and comment is required. *Id.* Importantly, when determining the adequacy of notice and comment, courts do not defer to the agency's own opinion of the adequacy of the notice and comment

opportunities it provided. *Id.*; *Citizens for Better Forestry v. U.S. Dep't of Agric.,* 482 F. Supp. 2d 1059, 1072 (N.D. Cal. 2007).

In *Natural Resources Defense Council v. EPA,* the Ninth Circuit held that EPA had not provided adequate notice and comment where it had redefined the area subjected to Clean Water Act permit requirements between the proposed and final permits. 279 F.3d at 1186-89. The court stated that this change in position was not foreshadowed in proposals and comments and that interested parties could not have anticipated this fundamental shift in the permit. *Id.* at 1188. Notably, the court held that EPA's notice and comment procedure was inadequate because it did not afford interested parties the opportunity to comment on whether the change in the permit "conformed to the substantive requirements" of the law. *Id.* at 1186. "Because the public could not have reasonably anticipated that the final permit would embrace an entirely different standard … the public's ability to comment on whether the proposed permit complied with water quality standards was compromised." *Id.* at 1189. Given that the final rule "deviated sharply" from the proposal, EPA erred in not affording notice and soliciting further comments. *Id.* at 1188 (quoting *Natural Res. Def. Council v. EPA,* 863 F.2d 1420, 1429 (9th Cir. 1988)).

The same is true here. The public and peer reviewers never had the opportunity to comment on whether the substantially smaller critical habitat designation "satisfies the requirements" of the ESA, specifically the requirement that critical habitat designations provide for a species' recovery. *Id.* at 1189. Although the comments on the proposed rule may have foreshadowed a change in the elevation threshold and the area determined to be occupied by the species at the time of listing, the true fundamental shift in the rule was the change in FWS's determination that 375,562 acres in the United States were essential for recovery of the species to its determination that only 30,010 acres were essential. AR 28777, 27.

For instance, even after determining that a smaller area was occupied at the time of listing and only habitat above 5,000 feet was essential for caribou, FWS could still have designated unoccupied habitat to satisfy the ESA's requirement to recover the species, as it has done in many other critical habitat rules. *See supra* pp. 2-3 & n.1 (citing designations of unoccupied habitat). Indeed, in the draft final rule, FWS had changed the elevation threshold to 5,000 feet and the resulting critical habitat was still 227,100 acres. AR 790-91. FWS noted that even if all of that area was not occupied at the time of listing, all of it was essential to the conservation of the species and thus must be designated as critical habitat. AR 698. Accordingly, the change in elevation cut-off and change in occupied area did not cause the drastic 90% reduction in critical habitat, as FWS and Intervenors try to assert. It was the change in FWS's determination about how much area was essential for the recovery of the Southern Selkirk Mountains caribou that led to the substantial deviation in the final rule from the proposed rule. The public and peer reviewers never had an opportunity to comment on that fundamental change and whether the final designation would ensure compliance with the recovery mandate of the ESA.

Furthermore, the public could not have reasonably anticipated that FWS would slash the critical habitat designation in this way. In the proposed rule, FWS noted numerous times the purpose of the critical habitat designation is to provide for the conservation of the species, and that it can designate unoccupied habitat if occupied habitat is inadequate to ensure caribou recovery. AR 28768, 28773, 28777, 28780. The proposed rule discussed the Recovery Plan, noting that it established the actions and conservation objectives needed to *recover* the Southern Selkirk Mountains population of caribou, and quoted the statement that "for recovery, woodland caribou in the Selkirks must be distributed over a wider area that at present," which would optimally "include habitat in both B.C. and the U.S." AR 28772, 28773. The proposed rule

stated that more than half of the suitable and potential caribou habitat identified as the Recovery Area in the Recovery Plan occurs within the U.S., and used the Recovery Area, to help identify proposed critical habitat. AR 28772, 28778; *see also* AR 28777 (noting that proposed designation "generally follow[s] the recovery areas identified in the recovery plan"); FWS Brief at 15 (acknowledging that proposed designation was "consistent with recovery-area boundary").[3] The proposed rule also showed the historic range of the caribou extending as far south as the St. Joe and Clearwater Rivers in Idaho. AR 28769-70.

All of this information in the proposed rule indicated that FWS thought a large area in the U.S. that corresponded closely with the Recovery Area was essential for conservation of the Southern Selkirk Mountains caribou population. Simply because FWS solicited comments on what unoccupied areas, in addition to the 375,562 acres it considered occupied, are essential for the conservation of the species did not foreshadow the decision to slash the large area it had considered essential in the proposed rule. *See* FWS Brief at 32; Intervenor Tribe Brief at 15.

Contrary to FWS's and Intervenors' arguments, neither the peer reviewers nor public comments suggested that an area 90% smaller than the proposed designation would be sufficient to *recover* the species or that caribou only needed habitat in Canada. *See* FWS Brief at 32-34, Intervenor Tribe Brief at 12-15, Intervenor ISSA Brief at 3-5. Instead, the comments cited by FWS and Intervenors focused on the habitat elevation cut-off and what areas were actually occupied at the time of listing rather than what habitat is necessary for recovery of the population. *Id.*[4] In fact, the peer reviewers indicated that the Recovery Area in the U.S. was an

[3] The proposed rule also cited the Kinley and Apps habitat model, which shows caribou habitat throughout the Recovery Area. AR 28778, 1927-32 (Kinley and Apps habitat maps).
[4] Intervenor ISSA appears to believe Plaintiffs are challenging the lack of notice and comment just on the change in habitat elevation between the proposed and final rule, which is not the case. Intervenor ISSA Brief at 4-6. Furthermore, ISSA cites no Ninth Circuit cases and relies instead

appropriate foundation for the critical habitat designation. *See* AR 22457 (referencing factors to consider within "recovery zone boundary" to identify critical habitat); AR 22427-28, 22431 (suggesting using habitat priority areas and travel corridors mapped throughout Recovery Area to refine proposed critical habitat). After reviewing these comments, FWS continued to consider a large geographic area to be essential for the conservation of the caribou. *See* AR 22462-75 (alternatives for the final designation based on comments), AR 698 (draft final rule stating that 227,100 acres were essential for conservation). Thus, the substantially reduced geographic area designated in the final rule was not a logical outgrowth of the proposed rule or public comments.

B. FWS Based Its Substantial Reduction in Area Deemed Sufficient For Recovery on Reasoning and Data Not Provided in the Proposed Rule.

FWS's subsequent determination that 90% of the area proposed as critical habitat was not actually essential for the recovery of the caribou population was based on a brand new explanation put forth in the final rule. As explained above, FWS claimed for the first time in the final rule that it no longer considered essential for recovery all of the area it had initially identified as such within the U.S. because the population's size and range had contracted and now it mostly used land in Canada. AR 26. FWS stated instead that a much smaller designation in the U.S. *combined with the amount of caribou habitat protected from logging in Canada* would meet the *amount* of habitat recommended to be protected in the Recovery Plan and thus was sufficient for the critical habitat designation. *Id.* The final rule included new information about the number of acres of Crown Lands and Nature Conservancy of Canada lands that were protected from further timber harvest, none of which was mentioned in the proposed rule. *Id.*

The inclusion of Canadian lands was the only explanation given in the final rule as to how a 90% reduction in critical habitat in the U.S. would still meet the requirement to ensure the

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on a Seventh Circuit case and District of Columbia cases in its discussion of this claim, making its argument particularly unavailing. Intervenor ISSA Brief at 3-5.

conservation of the species. *Id.* FWS tries to disclaim this explanation as the basis for reaching its final decision, FWS Brief at 35, but the final rule is clear that inclusion of Canadian lands was critical to support the conclusion that the final designation somehow met the recovery requirement of the ESA. AR 26. Because the heavy reliance on Canadian lands to support FWS's decision was not found at all in the proposed rule, and in fact contradicted the proposed rule's reliance on the U.S. portion of the Recovery Area, the change in the final rule was a fundamental shift the public could not have reasonably anticipated rather than a natural drafting evolution. *Natural Res. Def. Council,* 279 F.3d at 1188. "[W]here … the proposal makes no mention of an important component of the final rule enacted, the final rule is not the 'logical outgrowth' of the proposal." *Citizens for Better Forestry,* 481 F. Supp. 2d at 1073 (citing *Earth Island Inst. v. Pengilly,* 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005)).

FWS states that Canadian efforts to protect caribou habitat were well-known and included in the record, but FWS's cites to the record do not establish that the U.S. portion of the Recovery Area is no longer necessary to recover caribou. FWS Brief at 34. Indeed, it is clear from the record that FWS did not even consider the Canadian lands explanation and seek out information on those lands until just before the final rule was drafted. AR 23182-83, 23164-65, 23148. Thus, the public never had an opportunity to comment on whether the reliance on these lands was appropriate and would ensure the conservation of the caribou population, as required to comply with the ESA. *Natural Res. Def. Council,* 279 F.3d at 1189. Because the proposed rule did not even mention Canadian lands protected from logging as part of its rationale, the inclusion of this reasoning in the final rule, without affording interested parties the opportunity to comment on it, violated the APA. *Citizens for Better Forestry,* 481 F. Supp. 2d at 1076; *Jones v. Rose,* 2005 WL 2218134, at *14 (D. Or. 2005) (holding notice and comment opportunity

inadequate where final permit included information that was not within proposed permit).

Furthermore, FWS's failure to provide the public with the management plans for these Canadian lands prior to issuing the final rule also violated the APA. An agency must identify and make available for comment technical information that it has used in reaching its decision to issue a rule. *Kern County Farm Bureau v. Allen,* 450 F.3d 1072, 1076 (9th Cir. 2006). While an agency may use supplementary data that expands on and confirms information contained in its proposed rulemaking without reopening the comment period, it cannot rely on new information to alter justifications or conclusions vital to its decision without providing that information for public comment. *Id.* at 1076-80 (no additional comment period needed where new studies "were not used to introduce a new premise, to justify independently the final decision, or to reach a different conclusion," and Final Rule discussed virtually identical factors as Proposed Rule); *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1403-04 (9th Cir. 1995) (comment period necessary for new study on which FWS largely relied in final rule and was critical to FWS's decision); *Ober v. EPA,* 84 F.3d 304, 314-15 (9th Cir. 1996) (comment period necessary for new information provided by State where information did not merely expand on prior information but provided new justification relied on and critical to agency's final decision); *Ctr. for Biol. Diversity v. Norton,* 240 F. Supp. 2d 1090, 1106-08 (D. Ariz. 2003) (failure to provide land management plan for public comment violated ESA and APA where FWS relied heavily upon plan to justify critical habitat designation).

Here, FWS relied heavily upon Canadian lands protected from timber harvest to justify its decision in the final rule that lands in the U.S. were not essential for caribou conservation and thus that new information was a vital part of its final critical habitat designation. AR 26. The information about Canadian lands did not merely expand on and confirm information in the

proposed rule but, rather, was an entirely new justification offered to reach a very different conclusion in the final rule: that most land in the U.S. was no longer essential for recovery of the Southern Selkirk Mountains caribou population.

Yet FWS did not provide the management plans for these Canadian lands to the public for comment, despite acquiring information on them prior to issuance of the final rule. AR 663-64, 23148. Intervenors note that these plans were available to the public on the internet, Intervenor Tribe Brief at 16-17, but the public never had an opportunity to comment on their use as a justification to avoid designating more critical habitat in the U.S. because the first time these Canadian lands were even mentioned was in the final rule. AR 26. And as noted above, FWS's cites to the record about Canadian efforts to manage caribou provided little detail about management of the Crown and Nature Conservancy Lands relied upon in the final rule. FWS Brief at 34. By failing to provide the public with an opportunity to review and comment on the management plans for the Canadian lands relied upon to justify its final rule, FWS violated the procedural requirements of the ESA and APA. *Idaho Farm Bureau,* 58 F.3d at 1403-04; *Ober,* 84 F.3d at 314-15; *Ctr. for Biol. Diversity,* 240 F. Supp. 2d at 1106-08.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment and remand to FWS the final critical habitat rule for the Southern Selkirk Mountains population of woodland caribou.

Dated: September 15, 2014

Respectfully submitted,

/s/ Lauren M. Rule
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2014, I electronically filed the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT, with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the counsel of record listed below:

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