

# OFFICE OF SPECIES CONSERVATION

**C.L. "BUTCH" OTTER**  
Governor



P.O. Box 83720  
Boise, Idaho 83720-0195

**NATHAN A. FISHER**  
Administrator

300 North Sixth Street, Suite 101  
Boise, Idaho 83702

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Delivered via E-mail

Ms. Susan Martin  
Supervisor, U.S. Fish and Wildlife Service  
Upper Columbia Fish and Wildlife Office  
11103 E. Montgomery Drive  
Spokane, WA 99206

## **RE: Notice and Request for Comments for Woodland Caribou Draft 5-year Status Review**

Dear Susan:

On behalf of the State of Idaho, the Governor's Office of Species Conservation (OSC) submits the following comments in response to your October 26, 2007 draft 5-year status review for the Woodland Caribou. The 5-year status review is an important element of the Endangered Species Act too often neglected. Idaho appreciates the U.S. Fish and Wildlife Service's (Service) commitment to carrying out this review.

In our conversations with your office, the Service indicated it would like to receive comments regarding: (1) the current biological status of the species; and (2) any comments relating to the Service's use of the distinct population segment (DPS) as the listable entity for the Selkirk woodland caribou.

With regard to the former, Idaho knows of no new biological information which calls into question the conclusions contained in the original listing. The Idaho Department of Fish and Game annually submits a Selkirk woodland caribou census. Viewed against the population at the time of listing (13-20), the Selkirk woodland caribou herd's numbers have slightly increased (the vast majority of the herd residing in Canada) since listing. That said, a review of the suspected threats at the time of listing is warranted given that most of those threats to the Selkirk population (e.g. poaching, timber harvest) have been eliminated or mitigated to a point where they no longer pose a threat to the continued viability of the species.

The latter request for comment, on the other hand, raises interesting issues when viewed under the lens of the 1996 Policy Regarding the Recognition of Distinct Vertebrate Population Segments (61 Federal Register 4722). Under the DPS Policy, a DPS must be discrete “in relation to the remainder of the species to which it belongs” and significant “to the species to which it belongs.” 61 Fed. Reg. at 4725. After a review of the factors underlying those elements, the Ninth Circuit Court of Appeals decision regarding the Arizona pygmy owls, and the March 16, 2007 Solicitor’s Opinion regarding the interpretation of “significant portion of the range,” the State of Idaho firmly believes there are serious questions regarding the use of the DPS designation as the listable entity for the Selkirk woodland caribou population because the “significance” test of the DPS policy has not been satisfied. In support of this claim, the following comments have been attached for your review and consideration.

Idaho is committed to the conservation of the caribou. We continue to analyze years of caribou/GPS data. This effort has guided our efforts to develop a conservation strategy. We look forward to working with our federal partners, both the U.S. Fish and Wildlife Service and the U.S. Forest Service, in crafting a plan to build upon the efforts made to date.

If you have any questions, please feel free to contact me or Jeff Allen (Policy Advisor) at (208) 344-2189.

Sincerely,

A handwritten signature in black ink that reads "Nathan A. Fisher". The signature is written in a cursive, flowing style.

Nathan A. Fisher

NF/JA:mer

## I. INTRODUCTION

Section 4 of the Endangered Species Act directs the Secretary by regulation to “determine whether any species is an endangered or threatened species” because of any of the five factors enumerated in the Act. Thus, the first inquiry for listing a particular species, as required by the Act, is to determine whether there is a species or listable entity to apply the statutory definitions of endangered or threatened to. The ESA defines a species as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature.” 16 U.S.C. § 1532(16).

In the 1984 final listing decision, the Service did not expressly use the terminology “distinct population segment” to list the southern Selkirk Mountain caribou herd even though the DPS term was added to the ESA during the 1978 amendments. Rather, the Service stated, “[t]he Service determines as endangered the *population* of woodland caribou (*Rangifer tarandus caribou*), sometimes known as the southern Selkirk Mountain *herd* . . .” (emphasis added) (49 Fed. Reg. 7390). The State of Idaho concludes the use of the term “population” and/or “herd” denotes the Service’s use of the distinct population segment as the listable entity for the Selkirk Mountain herd. The Service continues to reference this specific “population” as the listable entity throughout the remainder of the listing rule. As the Ninth Circuit Court of Appeals announced in *Nat’l Assn. of Home Builders v. Norton*, 340 F.3d 835, 852 (Ninth Cir. 2003), once the Service choose to promulgate the *1996 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act* (61 Fed. Reg. 4722)(DPS Policy), the Service must follow that policy. Therefore, because the Service listed the Selkirk population as a DPS, the State of Idaho requests the Service review the 1984 listing decision under the parameters established by the 1996 DPS Policy.

The DPS Policy sets out two tests for a valid DPS: (1) the DPS must be discrete “in relation to the remainder of the species to which it belongs; and (2) the DPS must be significant “to the species to which it belongs. The following reflects the State’s conclusions regarding the application of these two tests to the listing of the southern Selkirk Mountain herd.

## II. DISCRETENESS

With regard to the discreteness test, the Policy outlines two criterion to determine whether the population is discrete: (1) “it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological or behavioral factors”; or (2) “it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.” It is apparent given the boundaries outlined in the final listing rule that criterion (2) would be met because the population is delimited by the Canadian border. That said, the State of Idaho encourages the Service to review the differences in conservation status between the United States and Canada to determine whether criterion (2) can still be met.

### III. SIGNIFICANCE

According to the DPS Policy, if a population is deemed discrete, the Service is then asked to consider the biological and ecological significance of the population to the taxon to which it belongs. As stated in the DPS policy the purpose of the significance element is “to carry out the expressed congressional intent that this authority [to list DPSs] be exercised *sparingly* as well as to concentrate conservation efforts undertaken under the Act on avoiding important losses of genetic diversity.” (emphasis added) (*See* 61 Fed. Reg. at 4724, 4725). The Policy outlines the following non-exclusive factors to determine the significance of a discrete population:

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
2. Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,
3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

The October 26, 2007 draft fails to address one of the four non-exclusive factors. We found no effort to address the “evidence that the loss of the discrete population segment would result in a significant gap in the range of the taxon.” Furthermore, this draft does not mention or analyze the effect the March 16, 2007 Solicitor’s Opinion on significant portion of the range would have on the Service’s DPS determination. The state feels strongly the Solicitor’s Opinion provides valuable insights with regard to analyzing current versus historic range.

It is understood the four factors are not exclusive however we do believe each factor does merit consideration and analysis. The aforementioned draft relies exclusively on a non-enumerated factor, the importance of the Selkirk caribou population to the long-term persistence of the mountain caribou. The draft then explains how peripheral populations may have significant population value. The draft further lists how peripheral populations can play important roles but fails to show how those potential roles are in fact carried out by the Selkirk population.

As we did previously, the state will share its thoughts regarding the four non-exclusive factors. Since the 1996 DPS Policy was not promulgated at the time of listing, the State’s comments will address each factor in turn.

#### 1. *The First Significance Factor (Persistence)*

Our review of the listing decision and subsequent U.S. Fish and Wildlife Service decisions including the 1994 Recovery Plan did not produce evidence the Selkirk Mountain Woodland Caribou exists in an unusual or unique ecological setting compared to the other mountain “ecotype” of woodland caribou that exist in eastern British Columbia and western Alberta.

## 2. *The Second Significance Factor (Significant Gap)*

In conformity with the Ninth Circuit's interpretation of this factor as declared in *Nat'l Assn. of Home Builders* (Arizona pygmy owl), the issue is whether the loss of the discrete Idaho caribou population would create a gap in the range of its taxon and that such a gap would be significant. 340 F.3d at 845. The Ninth Circuit interpreted this factor to include two inquiries (as adapted to our current situation): (1) whether the loss of the Idaho caribou population would cause a "gap" in the range of the taxon; and (2) whether that gap would be "significant."

As to the first inquiry, the Ninth Circuit's pygmy owl opinion provides helpful guidance for defining the term "gap." The Court agreed with the Service's interpretation that "[e]ven the loss of a peripheral population, however small, would create an empty geographic space in the range of the taxon." *Id.* at 846. Returning to the caribou situation, even though the actual habitat or range of the woodland caribou in Idaho/Washington is extremely small, the loss of that discrete population would nonetheless constitute a "gap" in the taxon's range.

After having decided the loss of the discrete population would create a gap, the key amongst all of the significance factors for determining the validity of this DPS is whether the gap would be "significant." In deciding whether to uphold the Service's designation of the Arizona pygmy owl population as a DPS, the Service advanced four principal arguments to the Court; namely that the loss of the AZ pygmy owl population would: (1) decrease the genetic variability of the taxon; (2) reduce the current range of the taxon; (3) reduce the historic range of the taxon; and (4) extirpate the western pygmy owls from the United States. *Id.* at 846.

Taking each argument in turn, as applied to our current situation, the first pygmy owl argument is irrelevant as our discussion of the fourth significance factor illustrates no genetic differentiation between this population and the remainder of the taxon. This reduces the relevant analysis to three principal arguments.

### a. CURRENT RANGE ARGUMENT

As part of this argument, the Service argued to the Ninth Circuit that previous listing rules established two ways in which the loss of a discrete population could reduce the current range of its taxon: (1) the loss of a discrete population could reduce the geographic size of the taxon's range; and (2) the loss of a discrete population that is numerous and constitutes a large percentage of the total number of taxon members. *Nat'l Assn. of Home Builders*, 340 F.3d at 848.

The Ninth Circuit found this argument unpersuasive with regards to the Arizona pygmy owls because the listing decision stated that the AZ population only represented "a small percentage" of the total range of the western pygmy owls. *Id.* Similarly, in *Defenders of Wildlife v. Martin*, 05-248-RHW (E.D. Wash. 2006), the Court noted the following findings of fact that "although no critical habitat had been designated for the "population" of woodland caribou, the 1985 and revised 1994 recovery plan described the recovery area as 'encompass[ing] approximately 2200 square miles in the Selkirk Mountains of northern Idaho, northeastern Washington, and southern British Columbia. About 53 percent of the recovery area is within the United States . . . ' *Id.* Upon inquiry by email, Wayne Wakkinen of Idaho Fish and Game and Leo DeGroot of the

British Columbia Ministry of Environment stated that there are approximately 1,500 square kilometers of caribou habitat in the southern Selkirk Mountains on the Canadian side, and from Idaho Fish and Game's census flight maps, Mr. DeGroot approximated about the same amount of habitat in Washington and Idaho. Thus, comporting with the Court's above finding. In comparison with the total amount of Mountain caribou habitat, which is approximately 64,291 square kilometers, the southern Selkirk Mountain population only comprise of 4.7% of the total habitat (*See* attached email). With the Idaho/Washington portion of current habitat only comprising of 2.35% of the total, clearly this argument is equally as unpersuasive as it was in the pygmy owl case.

With regard to the second current range argument, the Ninth Circuit declared that the Service itself did not find "that the loss of these 20 to 40 individuals would significantly curtail the western pygmy-owl's current range." *Nat'l Assn. of Home Builders*, 340 F.3d at 848. Again, in *Defenders of Wildlife v. Martin*, the Court noted that "[o]nly a few caribou are likely to be found anywhere south of the Canadian border—the Idaho Fish and Game Department has found only one to three caribou in several different areas of the Selkirk Mountains during surveys of northern Idaho over the last five years." *Id.* at 4. Even in comparison to the population of the mountain "ecotype" taxon (1700) as a whole, the loss of the one to three drifters found in Idaho/Washington cannot constitute a "significant curtailment." Thus, when viewed against the remainder woodland caribou population, the miniscule Idaho/Washington population does not amount to the level contemplated by the DPS Policy to constitute a "significant gap."

#### b. HISTORIC RANGE ARGUMENT

In the pygmy owl situation, the Service argued to the Ninth Circuit that the gap would be significant because the loss of the Arizona pygmy-owls would reduce the historical range of its taxon. The 1984 listing rule echoed this sentiment by stating "[e]arly records suggest that in the 19th century, caribou were plentiful in the mountains of northeastern Washington, northern Idaho, and northwestern Montana . . ." 49 Fed. Reg. at 7390. Additionally, the 1996 Recovery Plan claimed caribou in Idaho historically occurred as far south as the Salmon River. Recovery Plan for Woodland Caribou in the Selkirk Mountains, 1994, page 3. Clearly, if the assertion from page 3 of the Recovery Plan is accurate, the loss of the Idaho population would represent a gap larger than the loss of the current range of the species. The question is whether the increased gap is "significant."

The basis of this "historical range" argument and whether it equates to a finding of "significant" rested with another Ninth Circuit Court of Appeals case, *Defenders of Wildlife v. Norton* (flat-tailed horned lizard). The Court noted that although the "significant gap in the range" analysis is not the same as "the significant portion of the range" issue presented in the flat-tailed horned lizard case, the two analyses are similar and the decision in *Defenders of Wildlife* provides instructive guidance. *Nat'l Assn. of Home Builders*, 340 F.3d at 849. While this would be an intriguing analysis for the situation at hand, the March 16, 2007 Solicitor Opinion regarding the interpretation of the phrase "significant portion of the range" alters the analytical landscape. On page 7 of the Opinion, the Solicitor states, "[t]he phrase 'is in danger' denotes a present-tense condition of being at risk of a future, undesired event. Hence, to say a species 'is in danger' in an area where it no longer exists—i.e., in its historical range—would be inconsistent with

common usage. Thus, “range” must mean “current range,” not “historical range.” This Opinion distances the Service from relying on the *Defenders Test* and therefore greatly reduces the persuasive value of the “historic range” range argument to establish “significance of the gap.”

c. EXTIRPATION IN THE UNITED STATES

The Ninth Circuit rejected this argument because it “misconstrues the second significance factor.” *Nat’l Assn. Home Builders*, 340 F. 3d at 849. The Court commented in designating a DPS under the DPS Policy, the Service must find that a discrete population is significant to its taxon as a whole, not to the United States. In other words, the loss of the Idaho/Washington caribou population has to create some “additional significance” to the whole taxon in order to meet the significance of gap test. As the figures above illustrates, 2.35% of the habitat and 2-3 animals hardly qualifies as some “additional significance.”

Therefore, having addressed the relevant arguments advanced by the Service in defense of its unsuccessful analogous pygmy owl population situation, the State is unconvinced a compelling case can be made for the “significance” of the potential gap that would be created by the loss of the Idaho/Washington population.

**3. *The Third Significance Factor (Only Surviving Natural Occurrence)***

While augmentation efforts have played a significant role in the recovery efforts directed at the Selkirk Mountain Woodland Caribou population, we found no reference to an introduction effort elsewhere that would make the Selkirk population the “the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range.” In fact the opposite may be true. Absent the relocation of over 100 caribou over 11 years (some of which were northern “ecotype” woodland caribou), the Selkirk population may very well be smaller than it is today. Relocation of caribou from more robust Canadian herds was cited as a strategy in the Service’s 1994 Recovery Plan. The 1994 Recovery Plan further states “there is a concern whether a single isolated population can be recovered as specified under the ESA. Population viability is questionable because of potential inbreeding and unpredictable catastrophic events. To maintain long-term population viability, periodic reintroductions of caribou may be necessary to compensate for potential inbreeding. Such a program would require a ready source of caribou for transplant and intrusive population management.” Given the size of the Canadian herds of mountain caribou (mountain caribou are an “ecotype” of the woodland caribou of which there are an estimated 18,200 in Canada—mountain caribou are distinguished from other ecotypes by their behavioral and ecological characteristics, rather than by genetics), an estimated 1700 animals living in multiple herds, one cannot conclude the Selkirk is the only surviving natural occurrence.

**4. *The Fourth Significance Factor (Genetic Characteristics)***

According to the Service’s 90-day finding in response to a petition to delist by the Greater Bonners Ferry Chamber of Commerce:

“Regarding the issue of “woodland” versus “mountain” caribou, woodland caribou occur in two distinct ecotypes (a locally adapted population of a widespread species): The northern ecotype and mountain ecotype. In woodland caribou, ecotypic differentiation is based on habitat use and behavior patterns. The endangered Selkirk *population* is the mountain ecotype. Both ecotypes are within the *same subspecies*; there is no *genetic distinction* between caribou inhabiting the northern ecotype and those inhabiting the mountain ecotype (Service 1994) (emphasis added).”

Thus, the fourth criterion cannot be used to justify the significance of the Selkirk population in relation to the taxon as a whole.

#### **IV. CONCLUSION**

Based on the foregoing, the State concludes the Service’s use of the distinct population segment of woodland caribou in the southern Selkirks, as interpreted by the 1996 DPS Policy, is unpersuasive. For example, the draft exclusively relies on a non-enumerated factor and fails to analyze one of the enumerated factors. Without correcting these shortcomings the state cannot support the Service’s status quo determination.