

1-1-2011

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### Recommended Citation

Allan Ray, *Protecting Wood for the Woodland Caribou: Critical Habitat Considerations*, 19 *Penn St. Envtl. L. Rev.* 151 (2011).

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# Protecting “Wood” for the Woodland Caribou: Critical Habitat Considerations

Allan Ray\*

## I. INTRODUCTION

The Woodland Caribou (*Rangifer tarandus-caribou*), one of the subspecies of the Eurasian reindeer and North American caribou,<sup>1</sup> is one of the most endangered animals in the United States. Currently, there is a population of approximately forty-six individuals inhabiting the Selkirk Mountains of northern Idaho and northeast Washington.<sup>2</sup> An emergency rule listed the species as endangered under the Endangered Species Act (“Act”) on October 25, 1983.<sup>3</sup> A final rule officially listed the Woodland Caribou on February 29, 1984.<sup>4</sup> However, the United States Fish and Wildlife Service (“Service”) decided not to designate critical habitat at that time since such a designation would not be “prudent” due to the serious risk of facilitating poaching by announcing the Woodland Caribou’s known range.<sup>5</sup> In 2002 multiple environmental groups led by The Defenders of Wildlife petitioned the Service to reconsider designating the critical habitat for the Woodland Caribou.<sup>6</sup> The Service

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1. See Emergency Listing Determination, 48 Fed. Reg. 49,245, 49,245 (Oct 25, 1983); Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. § 17.11 (2010)).

2. See U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION 16 (2008), <http://www.fws.gov/easternwashington/documents/Selkirk%20Mountain%20Caribou%2005-year%20Review%2012-5-08.pdf>.

3. Emergency Listing Determination, 48 Fed. Reg. at 49,245.

4. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. at 7,390.

5. *Id.*; see 16 U.S.C. § 1533(a)(3)(2006) (establishing the “prudent” standard for designating critical habitat).

6. See *Defenders of Wildlife v. Salazar*, Stipulated Settlement Agreement, Civ. No. 09-15, slip op. at 2-3 (E.D. Wash. May 29, 2009), <http://www.defendersofwildlife.com/>

declined and cited a lack of funding.<sup>7</sup> In May 2009 the Defenders of Wildlife filed a complaint against the Service for undue delay in the critical habitat listing process.<sup>8</sup> The parties reached a settlement which stipulated that the Service would determine whether a critical habitat designation is “prudent,” and if so, would propose a final critical habitat designation by 2012.<sup>9</sup>

This comment is primarily a case study examining the Woodland Caribou. It will analyze some of the factors that go into making a critical habitat designation. The species’ current situation will be used as a vehicle to describe current national critical habitat issues. Based on recent case law and regulations, this comment will provide insight on how reviewing courts may treat the Service’s ultimate determination of whether, and to what extent, a critical habitat designation is warranted for the Woodland Caribou.

The purpose of this comment is to (1) identify some of the current issues associated with critical habitat designations; (2) review the current agency and private interactions that are occurring as the Service evaluates the factors affecting the decision; (3) analyze the current status of case law, primarily from the Ninth Circuit<sup>10</sup> regarding critical habitat designations and its effect on this particular decision to designate; and (4) consider relevant factors that may go into the analysis of the decision upon judicial review.

## II. BACKGROUND

In determining whether a critical habitat designation is warranted, a number of issues need to be assessed. First, it is important to understand the history of the Woodland Caribou, the perceived threats to it at the time of listing and the current threats affecting the species. Second, the terms of the stipulated settlement agreement that direct the Service’s future action need to be addressed. Finally, the critical habitat designation process, along with its benefits and deficiencies, will be examined. Such analysis is crucial in determining the potential effects that a critical habitat designation could have on the species.

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resources/publications/programs\_and\_policy/in\_the\_courts/woodland\_caribou\_critical\_habitat\_settlement\_agreement.pdf.

7. *See id.*, slip op. at 3.

8. *See id.*

9. *See id.*, slip op. at 4.

10. Woodland Caribou are found exclusively in Idaho and Washington, the stipulation agreement was issued in U.S. District Court of Eastern Washington. Therefore, the Ninth Circuit will be the most likely forum for any potential disputes. *See id.*

*A. Historical Range of the Woodland Caribou*

The Woodland Caribou once had a vast known range from the forested regions of southeast Alaska and British Columbia to the northern border states of Washington, Idaho, Montana, North Dakota, Minnesota, Michigan, Vermont, New Hampshire and Maine.<sup>11</sup> Due to unrestricted hunting and habitat alteration,<sup>12</sup> the Woodland Caribou disappeared from New England in the early part of the Twentieth Century and were extirpated from the Great Lake States by 1940.<sup>13</sup> The only remnant of the Woodland Caribou in the lower forty-eight contiguous states is a population of approximately forty-six individuals located primarily within federal and state owned forest lands in the Selkirk Mountains of northern Idaho and northeastern Washington (“Selkirk herd”).<sup>14</sup> The low population and risk of extirpation from the contiguous United States was brought to the Service’s attention and was what ultimately warranted the species being listed as endangered.<sup>15</sup>

*B. Threats at the Time of Listing*

At the time of listing in 1983, the Service cited several factors affecting the species. First, the Service discussed the effect of past timber management practices as a partial cause of the Selkirk herd’s decline.<sup>16</sup> The limitation of the Woodland Caribou’s main food source, moss-like arboreal lichens that grow primarily on mature trees,<sup>17</sup> was briefly discussed but was determined not to be a major factor of decline, because the Selkirk herd’s small population resulted in its forage demands being rather low.<sup>18</sup> Further, the Service did not assert that the United States Forest Service’s current management practices would be

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11. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. § 17.11 (2010)).

12. See *id.*

13. See *id.* at 7,391.

14. See U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 16.

15. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. at 7,390.

16. See *id.*

17. “Lichens are by definition symbiotic organisms composed of a fungal partner, the mycobiont, and one or more photosynthetic partners, the photobiont, that may either be green alga or cyanobacterium.” LICHEN BIOLOGY I (Thomas H. Nash ed., Cambridge University Press 1996).

18. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. at 7,390.

greatly impacted by the listing; there was already a Woodland Caribou management plan in place promoting selective logging practices and diseased tree removal to improve the species' habitat.<sup>19</sup> However, the Service did mention that further studies were needed before evaluating the success of these management practices.<sup>20</sup>

Second, the Service stated that a major cause of the Selkirk herd's decline was the overutilization of the species for legal hunting (allowed prior to 1957), and, more importantly, illegal poaching.<sup>21</sup> From 1980 to 1983, at least one reported caribou death per year was attributed to poaching.<sup>22</sup> Additionally, the Service mentioned that existing regulatory mechanisms (i.e. licensing and game enforcement) that ban poaching were doing little to prevent habitat destruction and alteration.<sup>23</sup>

Third, the Service considered that predation of Woodland Caribou by black bears and coyotes to be only minimal and occasional.<sup>24</sup> Specifically, the Service announced, "[o]ther predators, including the gray wolf, grizzly bear, and mountain lion, are at such low numbers as to have no significant effect on the caribou."<sup>25</sup>

The Service also considered other manmade and natural factors. The Service recognized that the low population size and infrequency of individual animals emigrating from other herds could lead to an inbreeding depression resulting in decreased fitness and viability which

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19. *See id.*

20. "Currently, the U.S. Forest Service is utilizing caribou management guidelines to design timber sales in caribou habitat. These guidelines are intended to minimize the effects of logging on caribou and also to develop silvicultural prescriptions which may enhance habitat over the long run. Disease and insects, especially spruce bark beetles, are presently impacting timber stands within historic caribou habitat, thereby further complicating management. Salvage sales have taken place and others are planned to remove much of the diseased timber and reduce the spread of bark beetles. Although these sales are being designed utilizing the caribou guidelines, studies and monitoring are necessary to evaluate the actual response of the caribou. Timber harvesting may prove helpful in portions of caribou habitat by providing food and cover necessary for the survival of this population. For example, if caribou numbers eventually are limited by lack of food, and if selective tree removal could improve lichen production and availability, then moderate timber harvesting could be beneficial. However, at this time more information is necessary on the response of caribou to timber harvesting and managed timber stands. Current studies may indicate the need for a modification of the guidelines to provide for conservation and recovery. Timber harvesting, if not properly designed, can significantly impact caribou, especially in conjunction with the effects of poaching, highways, and forest roads. Listing of the caribou will place a higher priority on research regarding caribou-timber management relationships." *See id.*

21. *See id.*

22. *See id.*

23. *See* Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. at 7,390.

24. *See id.*

25. *See id.*

could be one of the Selkirk herd’s greatest threats to extinction.<sup>26</sup> Additionally, the Service deemed potential vehicle collisions a minimal threat.<sup>27</sup>

Central to the Service’s decision to not designate critical habitat was the major threat of poaching.<sup>28</sup> The Service declared that designating critical habitat would not be “prudent” since it could actually result in facilitating such illegal poaching.<sup>29</sup> “Such a designation would require publication and extensive publicity of the precise areas occupied by the [Selkirk] herd and the kind of habitat utilized,”<sup>30</sup> which the Service was concerned could lead poachers to the Woodland Caribou. Since the designation would not be “to the maximum extent prudent and determinable,” the Service’s decision to decline the designation of critical habitat was within its discretion under the Act.<sup>31</sup>

### C. *Current Threats*

Since the time of the Woodland Caribou’s listing in 1983, threats affecting the species have changed drastically. Through public education and sign-posting, the Service, along with the help of other agencies such as the United States Forest Service (“Forest Service”) and Idaho Department of Lands,<sup>32</sup> has greatly diminished the threat of poaching.<sup>33</sup> Although poaching and accidental shootings may occur to some extent, the Service does not expect it to significantly impact Woodland Caribou populations.<sup>34</sup> However, since the time of listing, the effects of other threats have been magnified.

First, as the life history of the Woodland Caribou is more fully understood, it has become apparent that the species is especially dependent on extensive tracts of old growth forests since the Woodland Caribou heavily depend on arboreal lichens which grow optimally on

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26. *See id.*

27. *See* Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. at 7,390.

28. *See id.*

29. *See id.*

30. *Id.*

31. 16 U.S.C. § 1533(a)(3) (2006).

32. *See* U.S. FOREST SERV., SITUATION SUMMARY AND MANAGEMENT STRATEGY FOR MOUNTAIN CARIBOU AND WINTER RECREATION ON THE IDAHO PANHANDLE NATIONAL FORESTS I (March 12, 2004), <http://www.fs.fed.us/kipz/library/wildlife/handouts/>.

33. *See* Defenders of Wildlife v. Salazar, Stipulated Settlement Agreement, Civ. No. 09-15, slip op. at 3 (E.D. Wash. May 29, 2009), [http://www.defendersofwildlife.com/resources/publications/programs\\_and\\_policy/in\\_the\\_courts/woodland\\_caribou\\_critical\\_habitat\\_settlement\\_agreement.pdf](http://www.defendersofwildlife.com/resources/publications/programs_and_policy/in_the_courts/woodland_caribou_critical_habitat_settlement_agreement.pdf).

34. *See* U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 23.

older trees.<sup>35</sup> The loss of this habitat results in limiting the Selkirk herd's carrying capacity due to lack of food and space.<sup>36</sup> Additionally this habitat loss affects movement and migration because of the decreased conductivity with smaller patches of habitat.<sup>37</sup> Furthermore, the loss of the old growth forest can make the Woodland Caribou more susceptible to predation because it compresses and concentrates their numbers in smaller habitat patches.<sup>38</sup> Despite the Forest Service already having a forest management program tailored to the Woodland Caribou's needs in place at the time of listing, the Forest Service has since abandoned this management plan due to concerns of altering the predator-prey dynamics of the area which could negatively affect the Woodland Caribou.<sup>39</sup>

Second, concerns with inbreeding depression still exist within the Caribou population. At the time of listing, the Service estimated that a minimum population of one hundred individuals was needed to avoid genetic defects and maintain a minimum viable population.<sup>40</sup> As an attempt to avoid the problems associated with small populations 103 Woodland Caribou have been transplanted from British Columbia to the Selkirk herd since 1987.<sup>41</sup> Despite these attempts, however, the population has remained stagnant between approximately thirty-five to forty-five individuals.<sup>42</sup>

Third, both the change in forest management practices and the lack of success in the population augmentation efforts are largely attributable to a changing predator-prey dynamic.<sup>43</sup> Although considered a minimal threat at the time of listing, predation, particularly from cougars, is currently thought to be a major cause of the decline of the Selkirk herd.<sup>44</sup> The current theory surmises that logging has caused an increase in shrub and understory growth particularly conducive to the foraging needs of

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35. *See id.* at 22.

36. *See* DEBORAH CICHOWSKI, TREVOR KINLEY & BRIAN CHURCHILL, CARIBOU, RANGIFER TARANDUS. THE IDENTIFIED WILDLIFE MANAGEMENT STRATEGY VERSION 2004: ACCOUNTS AND MEASURES FOR MANAGING IDENTIFIED WILDLIFE, B.C. MINISTRY OF WATER, LAND AND AIR PROTECTION 15-21 (2004), [http://www.env.gov.bc.ca/wld/frpa/iwms/documents/Mammals/m\\_caribou.pdf](http://www.env.gov.bc.ca/wld/frpa/iwms/documents/Mammals/m_caribou.pdf).

37. *See id.*

38. *See id.*

39. *See* U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 22.

40. *See* Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. § 17.11 (2010)).

41. *See* *Defenders of Wildlife v. Martin*, 2007 U.S. Dist. LEXIS 13061, at \*2 (E.D. Wash. 2007).

42. *See id.*

43. *See* U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 23.

44. *See id.*

other ungulates like elk, moose, and deer.<sup>45</sup> In response to the increased prey populations, cougar populations have boomed.<sup>46</sup> The Woodland Caribou of the Selkirk herd make for easy targets because of their extreme dependence on shrinking patches of old growth stands, and their increased concentration within these areas.<sup>47</sup> In a recent study of thirteen declining Woodland Caribou subpopulations across British Columbia, the decline of eleven subpopulations was attributed to increased predation.<sup>48</sup>

In sum, the threats considered at the time of listing are vastly different from the current threats facing the Woodland Caribou. At the time of listing, poaching was a major concern and predation was not expected to have a significant impact on the Woodland Caribou population.<sup>49</sup> Now poaching, the factor that most influenced the Service’s decision not to designate critical habitat, is a nonfactor, and predation, indirectly propelled by forest management practices, is widely thought to be the major contributor to the continued decline of the Selkirk herd.<sup>50</sup> Although the threat of inbreeding depression remains, the specific causes attributable to it have changed since the time the species was listed.

Due to the change in conditions and change in the perceived threats affecting the Woodland Caribou (particularly the Selkirk herd’s small population size with its associated peril), it became apparent to the conservation community that the designation of critical habitat should be reconsidered.

#### D. *The Action*

On December 6, 2002 a coalition of environmental groups headed by the Defenders of Wildlife petitioned the Service to designate critical habitat for the Woodland Caribou.<sup>51</sup> In that petition the Defenders of

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45. *See id.* at 22.

46. *See id.*

47. *See id.*

48. Heiko U. Wittmer, Anthony R. Sinclair & Bruce McLellan, *The Role of Predation in the Decline and Extirpation of Woodland Caribou*, 144 *OECOLOGIA* 257, 257 (2005).

49. *See* Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. § 17.11 (2010)).

50. *See* U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 22-24.

51. *See* Defenders of Wildlife v. Salazar, Stipulated Settlement Agreement, Civ. No. 09-15, slip op. at 3 (E.D. Wash. May 29, 2009), [http://www.defendersofwildlife.com/resources/publications/programs\\_and\\_policy/in\\_the\\_courts/woodland\\_caribou\\_critical\\_habitat\\_settlement\\_agreement.pdf](http://www.defendersofwildlife.com/resources/publications/programs_and_policy/in_the_courts/woodland_caribou_critical_habitat_settlement_agreement.pdf) [hereinafter Stipulated Settlement Agreement].



Wildlife argued that the original rationale for not designating habitat, a threat of facilitating poaching, was no longer a risk and therefore, it was now “prudent” to designate critical habitat.<sup>52</sup> The Service responded to the petition in 2003 citing its insufficient financial resources that were necessary to evaluate and address the petition.<sup>53</sup> After a period of perceived inaction, the Defenders of Wildlife inquired into the status of the petition in 2009, and the Service responded once again that it lacked the funding to address the petition.<sup>54</sup> The Defenders of Wildlife then filed a complaint that the Service had unreasonably delayed the decision on their petition in violation of the Administrative Procedure Act.<sup>55</sup> The Defenders of Wildlife and the Service reached a settlement in which the Service would determine whether critical habitat was “prudent,” submit a proposed critical habitat rule by November 20, 2011 and issue a final critical habitat designation within a year;<sup>56</sup> however, the stipulated settlement imposes no substantive directives issued towards the Service in making their determination.<sup>57</sup> Thus, the decision to designate critical habitat is still largely within the Service’s discretion.

#### *E. The Critical Habitat Designation Process*

In order to understand the issue of designating critical habitat currently facing the Service, it is important to understand its process and context within the Act. Congress enacted the Endangered Species Act in 1973 with three objectives: (1) “to provide a means whereby the ecosystems upon which endangered species and threatened species may be conserved;”<sup>58</sup> (2) “to provide a program for the conservation of such endangered and threatened species;”<sup>59</sup> and (3) to advance the purposes of existing international environmental treaties and agreements.<sup>60</sup> In accordance with the first objective to conserve the ecosystems which listed species are dependent upon, the Act provides for the designation of

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52. *Id.*

53. *See id.*

54. *See id.*

55. *See id.* (referring to 5 U.S.C. § 555(b) and § 706(1)).

56. *See* Stipulated Settlement Agreement, slip op. at 4.

57. *See id.* The settlement agreement does not restrict the Service’s discretion in making their final determination whether critical habitat should be designated.

58. 16 U.S.C. § 1531(b) (2006).

59. *Id.*

60. The international agreements furthered by the Act are “(A) migratory bird treaties with Canada and Mexico; (B) the Migratory and Endangered Bird Treaty with Japan; (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; (D) the International Convention for the Northwest Atlantic Fisheries; (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean; (F) the Convention on International Trade in Endangered Species of Wild Flora and Fauna; and (G) other international agreements.” *Id.* § 1531(a)(4)(A)-(G).

a listed species’ “critical habitat.”<sup>61</sup> Critical habitat is defined as the specific areas within the geographical area occupied by the species at the time of listing “on which are found those physiological or biological features (i) essential to the conservation of the species and (ii) that may require special management considerations or protection.”<sup>62</sup> Critical habitat also includes areas unoccupied by the species but that are nonetheless “essential to the conservation of the species.”<sup>63</sup> In determining whether an area is essential, the factors considered are whether there is: (1) “[s]pace for individual and population growth;”<sup>64</sup> (2) a sufficiency of “physiological requirements”<sup>65</sup> such as food, water, light, and minerals; (3) adequate “[c]over or shelter;”<sup>66</sup> (4) availability of “[s]ites for breeding, reproduction, rearing of offspring;” and (5) protection “from disturbance or representative of the historic geographical and ecological distributions of a species.”<sup>67</sup> Therefore, critical habitat is not limited solely to the areas that a species inhabits, and in fact some of these areas may not be included in the designation; additionally, the critical habitat designation may extend to areas that the species does not currently occupy.<sup>68</sup> Thus, the determination of the designation somewhat flexible.

The Act requires that the Secretary of the Department of the Interior designate critical habitat concurrently with the listing of the species “to the maximum extent prudent and determinable . . . based solely on the best scientific and commercial data available.”<sup>69</sup> While the determination of a species’ threatened or endangered status is based solely on biological factors,<sup>70</sup> the Secretary will only designate critical habitat “after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat”<sup>71</sup> and “may exclude any area from critical if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.”<sup>72</sup>

In determining whether designating critical habitat would be “prudent and determinable,”<sup>73</sup> there are several explicit situations

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61. *Id.* § 1533(a)(3)(A).

62. 50 C.F.R. § 424.02 (2010).

63. *Id.*

64. *Id.* § 424.12.

65. *Id.*

66. *Id.*

67. 50 C.R.F. § 424.12.

68. *Id.* § 424.02.

69. 16 U.S.C. § 1533(a)-(b) (2006).

70. *Id.* § 1533(b)(1).

71. *Id.*

72. *Id.*

73. *Id.* § 1533(a)(3).

provided where a designation would not be appropriate.<sup>74</sup> Designation of critical habitat is not considered “prudent” when the designation would lead to increased threat of takings of the species or a designation would provide no benefit to the species.<sup>75</sup>

In the instance of the Woodland Caribou, the perceived threat of poaching caused the Secretary to deem the designation of critical habitat “not prudent.”<sup>76</sup> The second exception to the mandate of designating critical habitat is the “not determinable” standard.<sup>77</sup> This exception is invoked when there is insufficient data to perform the balancing of impacts of the designation or when the biological needs of the species are unknown.<sup>78</sup>

The Secretary must propose the area to be designated if there is no available exception and the potential designation is deemed “prudent and determinable.”<sup>79</sup> The Secretary may only go on to balance the biological benefits versus the economic impacts of such a designation through an impact analysis “after proposing designation of such an area.”<sup>80</sup> In his impact analysis, the Secretary may specify portions of habitat that will be excluded from the designation if the “the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat.”<sup>81</sup>

The true bite of critical habitat designations are in the Act’s Section VII consultation, which requires federal agencies to consult with the Secretary in order to have any agency action authorized to proceed within a listed species’ designated critical habitat.<sup>82</sup> During Section VII consultation, the Secretary must examine whether the federal agency’s particular activity is likely to result in the “destruction or adverse modification” of critical habitat.<sup>83</sup> The Secretary determines whether the federal agency action (defined broadly as “any action authorized, funded or carried out by such agency,”) <sup>84</sup> will violate the Act, and whether there are any “reasonable and prudent alternatives” to the action proposed.<sup>85</sup> After the consultation, the Secretary must provide the federal agency

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74. 50 C.F.R. § 424.12(a) (2010).

75. *See id.* § 424.12(a)(1).

76. Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. § 17.11 (2010)).

77. 50 C.F.R. § 424.12 (a)(2).

78. *Id.*

79. *Id.* § 424.19.

80. *Id.*

81. *Id.*

82. *See* 16 U.S.C. § 1536(a)(2) (2006).

83. *Id.*

84. *Id.*

85. *See id.* § 1536(b)(4).

with the predicted impact of the proposed action’s effects on any endangered species, and must specify any “reasonable and prudent alternatives” to minimize the effects of the proposed action.<sup>86</sup> However, if there are no “reasonable and prudent alternatives” available to minimize the impact of the proposed action, the federal agency may not go forward with the proposed action.<sup>87</sup>

Although critical habitat designations and Section VII consultations only directly regulate current federal agency activities, private parties can be indirectly affected if there is federal nexus, a link from the private activity to the federal agency, within the critical habitat designation.<sup>88</sup> Federal licensing, permitting, and contracting with private parties are common examples of a private activity that would create a federal nexus through the agency.<sup>89</sup> The impact of critical habitat on licensed (or potentially licensed) private parties is included in the economic analysis used to determine whether the biological benefits outweigh the economic burdens.<sup>90</sup>

Using the potential critical habitat designation of the Woodland Caribou may help explain the Section VII enforcement mechanism. As previously mentioned, a significant portion of the Woodland Caribou’s habitat exists on federally owned land.<sup>91</sup> Therefore, if the Forest Service wanted to contract with a private company to log a track of timber within the Woodland Caribou’s critical habitat, the agency would first have to consult with the Secretary.<sup>92</sup> Only after the Forest Service shows that the logging contract will not “result in the destruction or adverse modification” of the Woodland Caribou’s critical habitat or offers any “reasonable or prudent alternatives” will the Secretary authorize the action.<sup>93</sup> This would be an extremely difficult, if not impossible, burden to meet in a case where the species is dependent upon mature trees. The agency action would likely be denied, and the logging company, through its federal nexus of the contract, would be prevented from logging.<sup>94</sup>

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86. *Id.*

87. See DAVID BERNHARDT, SOLICITOR OF DEPARTMENT OF THE INTERIOR ON THE SECRETARY’S AUTHORITY TO EXCLUDE AREAS FROM A CRITICAL HABITAT DESIGNATION UNDER SECTION 4(b)(2) OF THE ENDANGERED SPECIES ACT 11 (Oct. 3, 2008), <http://www.doi.gov/solicitor/opinions/M-37016.pdf>.

88. *See id.*

89. *See id.*

90. *See id.*

91. See U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2.

92. See 16 U.S.C. § 1536(a)(2) (2006).

93. *See id.* § 1536(a)-(b).

94. This type of loss would factor into the Secretary’s “consideration [of] the economic impact, and any other relevant impact” when contemplating the initial designation of critical habitat. *See id.* § 1533(b)(2).

Thus, Section VII consultations provide critical habitat designations with an enforcement mechanism facially only applicable to federal agencies but with an indirect effect upon private parties.

*F. Benefits and Deficiencies of Critical Habitat*

The designation of critical habitat generally has four major benefits. First, as previously mentioned, it protects areas currently unoccupied by the species, but “nonetheless essential to the conservation of the species.”<sup>95</sup> This helps ensure that upon recovery, which is the primary goal of the Service,<sup>96</sup> there will be sufficient area for the species. Additionally, protection of currently uninhabited areas ensures adequate corridors for seasonal movement and migration.

Second, some scholars have suggested that when critical habitat is designated, overall enforcement of the Act is enhanced because courts are more likely to find “takes”<sup>97</sup> occurring.<sup>98</sup> The rationale is that because the definition of critical habitat as an area “essential to the conservation of the species,”<sup>99</sup> courts will likely conclude that modification of those areas will result in “takes” through actual killing or injuring of a species.<sup>100</sup>

Third, critical habitat designations provide a more definitive notice to federal agencies and private parties that their action may affect an endangered species.<sup>101</sup> It intuitively follows that where the habitat of a species is clearly delineated, knowledge of the species presence and associated regulations will be more widely known.

Finally, species with critical habitat designations are more than twice as likely to have increasing populations than those without.<sup>102</sup> A critical habitat designation affords more resources to a species which generally correlates with the species’ success in survival and recovery.

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95. 50 C.F.R. § 424.02 (1984).

96. *Id.* § 424.11(d)(2).

97. “‘Take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The Act further makes it “unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or territorial sea of the United States.” *Id.* § 1538.

98. “In the same way, critical habitat may also influence courts in declaring habitat destruction to be a taking under Section 9. Section 9 prohibits the taking of a listed species, and the taking of a species may include destruction of its habitat.” Jack McDonald, *Critical Habitat under the Endangered Species Act: A Road to Recovery?* 28 ENVTL. L. 671, 690 (1998).

99. 50 C.F.R. § 424.02.

100. See McDonald, *supra* note 98, at 690; see also 16 U.S.C. § 1532(19).

101. See McDonald, *supra* note 98, at 688.

102. Martin F.J. Taylor, Kieran F. Suckling & Jeffrey J. Rachinski, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BIOSCIENCE 360, 362 (2005).

In spite of the benefits of critical habitat designations, it also has several serious deficiencies. As previously mentioned, there must be a federal nexus to the area in order for critical habitat to have any effect on private parties.<sup>103</sup> Many of the public lands acquired by the Bureau of Land Management, the Forest Service and the Park Service were not acquired with biodiversity interests in mind.<sup>104</sup> Rather, the motivation behind their acquisition was their scenic beauty, recreation activities or the potential for resource extraction.<sup>105</sup> For the most part, fertile, low elevation lands tend to be more populated by humans and are less likely to be federally owned. Thus, certain species dependent upon these areas are the least protected by the Act due to private ownership with no federal nexus.<sup>106</sup>

In addition to the need for a federal nexus, the required economic analyses for critical habitat designations are very costly as well. “The resources required to designate a critical habitat typically are ten times what would be required to list a backlogged candidate species.”<sup>107</sup> As such, requiring the designation for just a couple of species would deplete the Service’s entire annual listing budget.<sup>108</sup> Furthermore, the critical habitat determination can be scientifically inadequate; the critical habitat designation process sometimes overlooks habitat elements that are essential to the species, and does not account for source-sink populations and metapopulation dynamics.<sup>109</sup>

Finally, critical habitat designations are controversial.<sup>110</sup> “When lines are drawn on a map, opposition becomes galvanized. Critical habitat designation can inflame local interests, and trigger congressional pressure on the [federal] agency.”<sup>111</sup> Local dissent and opposition can

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103. See BERNHARDT, *supra* note 87, at 11.

104. Susan Harrison, *Biodiversity and Wilderness: The Need for Systematic Protection of Biological Diversity*, 25 J. LAND RESOURCES & ENVTL. L. 53 (2005) (historical acquisition of public land based of natural resource availability and/or scenic beauty).

105. See *id.*

106. Lacking a federal nexus, these privately owned lands are not subject to the ESA § 7 consultation requirement. Therefore, little additional protective effect is afforded to the species regardless of whether they occupy an area designated as critical habitat. See 16 U.S.C. § 1536(a)-(b) (2006); see also BERNHARDT, *supra* note 75, at 11.

107. Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871, 31,873 (June 14, 1999).

108. See *id.*

109. Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 CONSERVATION BIOLOGY 399, 403 (2006).

110. See McDonald, *supra* note 98, at 691.

111. *Id.*

often put a species in greater peril.<sup>112</sup> This may have been one of the Service's implicit concerns when it declined to designate critical habitat at the time of listing.<sup>113</sup>

The benefits and deficiencies of critical habitat do affect the frequency of its application and responsiveness. While all the pros and cons are not at play in the case of the Woodland Caribou, it is likely that some will be considered in the Service's final determination.

### III. ANALYSIS

In order to analyze the issues surrounding the potential critical habitat designation for the Woodland Caribou, the following factors will be discussed: (1) potential local and regional economic dissatisfaction with the proposed designation; (2) the Service's historical and current use of critical habitat designations; (3) current agency interactions; and (4) how courts, particularly within the Ninth Circuit, treat these factors in reviewing whether a critical habitat designation is warranted. Insight on the likelihood and extent of designation will be discussed in conclusion.

#### A. *Economic Effects and Local Dissatisfaction Associated with a Critical Habitat Designation for the Woodland Caribou*

The current range of the Woodland Caribou is primarily composed of state and federally owned lands,<sup>114</sup> with the majority of animals residing in the Idaho Panhandle National Forest ("INPF").<sup>115</sup> Between 1991 and 2006, 16 million to 235 million board feet of lumber were harvested from the IPNF annually.<sup>116</sup> In addition to the economic benefits of the resource extraction, local communities are further

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112. See Jonathon H. Adler, *Anti-Conservation Incentives*, 30 REGULATION 54, 54-56 (2008) (discussing land owners in North Carolina harvesting timber stands after proposed regulations showing distribution of the red-cockaded woodpecker appeared on their land and mentioning accelerated development in Tucson, AZ after critical habitat was proposed for the Cactus Ferruginous pygmy owl).

113. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. § 17.11 (2010)).

114. See U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 3; see also U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE WOODLAND CARIBOU IN THE SELKIRK MOUNTAINS 21 (Mar. 3, 1994), [http://ecos.fws.gov/docs/recovery\\_plan/940304.pdf](http://ecos.fws.gov/docs/recovery_plan/940304.pdf).

115. See *Defenders of Wildlife v. Martin*, 2007 U.S. Dist. LEXIS 13061, at \*9 (E.D. Wash. 2007).

116. See U.S. FOREST SERV., IDAHO PANHANDLE NATIONAL FORESTS FOREST PLAN: MONITORING AND EVALUATION REPORT 2005 AND 2006 4 (2007), [http://fs.usda.gov/Internet/FSE\\_DOCUMENTS/fsm9\\_018605.pdf](http://fs.usda.gov/Internet/FSE_DOCUMENTS/fsm9_018605.pdf).

influenced by the SRS Act.<sup>117</sup> The SRS Act authorizes the Forest Service to provide grants proportional to the fiscal year’s timber sales to county governments for public education and wildfire protection purposes.<sup>118</sup> As a result, from 1991 and 2006 the Forest Service has distributed \$3.1 to \$8.6 million annually to counties reporting timber harvests.<sup>119</sup> Therefore, local communities would likely oppose the designation of critical habitat for the Woodland Caribou due to the potential decrease in timber harvests and associated federal funding.

The presumption of local resistance to designating critical habitat for the Woodland Caribou can also be posited from prior dissension of communities in regards to the current protective mechanisms.<sup>120</sup> The Greater Bonners Ferry Chamber of Commerce has twice petitioned to delist the Woodland Caribou.<sup>121</sup> Although both petitions’ arguments were largely grounded in insufficient biological support for the initial listing,<sup>122</sup> there is an undercurrent of economic concern fueling these petitions. Additionally, a local organization has opposed more restrictive regulations on snowmobiling, a popular winter recreation activity within the IPNF, despite the snowmobiling being found to stress Woodland Caribou in their weakened winter state.<sup>123</sup> Although these concerns are important since they will ultimately be considered by the Secretary when he determines whether or not to designate critical habitat for the Woodland Caribou,<sup>124</sup> the Secretary will need to take into account many potential factors, economic and otherwise, when performing the impact analysis.

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117. 16 U.S.C. §§ 7101-7153 (2006).

118. *Id.*

119. See U.S. FOREST SERV., IDAHO PANHANDLE NATIONAL FORESTS FOREST PLAN: MONITORING AND EVALUATION REPORT, *supra* note 116, at 4.

120. See 90-Day Finding for a Petition to Delist the Woodland Caribou, 65 Fed. Reg. 65,287 (Nov. 1, 2000); see also Notice of 90-Day Finding on Petition to Delist the Selkirk Mountains Woodland Caribou, 58 Fed. Reg. 62,623, 62,623 (Nov. 29, 1993).

121. See 90-Day Finding for a Petition to Delist the Woodland Caribou, 65 Fed. Reg. at 65,287; see also Notice of 90-Day Finding on Petition to Delist the Selkirk Mountains Woodland Caribou, 58 Fed. Reg. at 62,623.

122. See 90-Day Finding for a Petition to Delist the Woodland Caribou, 65 Fed. Reg. at 65,287; see also Notice of 90-Day Finding on Petition to Delist the Selkirk Mountains Woodland Caribou, 58 Fed. Reg. at 62,623.

123. See generally *Defenders of Wildlife v. Martin*, 2007 U.S. Dist. LEXIS 13061 (E.D. Wash. 2007) (granting injunction restricting snowmobiling in the Idaho Panhandle National Forest).

124. See 16 U.S.C. §1533(b)(2) (2006).



*B. Fish and Wildlife Service's Historical Use of Critical Habitat as a Conservation Mechanism*

Despite the mandatory language of the Act requiring the designation of critical habitat to occur simultaneously with the listing of a species,<sup>125</sup> only 523 of the 1,317 currently listed species have critical habitat designated.<sup>126</sup> The Service's avoidance of designating critical habitat is grounded in the expense a designation requires through extra procedures and analysis.<sup>127</sup> In listing a species, the Service need only consider five factors,<sup>128</sup> which are based primarily on the biological needs of the species.<sup>129</sup> However, when designating critical habitat, the Service must not only determine the occupied and unoccupied areas essential to survival and recovery of a species, but must also account for "[t]he economic impact, and any other relevant impact, of specifying any particular area as critical habitat."<sup>130</sup> The economic analyses required to make this determination are very costly and can be in excess of \$500,000 which comes out of an annual listing budget of several million dollars.<sup>131</sup> As a result, the Service has intentionally avoided critical habitat designations in the past.<sup>132</sup>

A definitions section of a 1986 regulation contributed to the Service's reluctance to designate critical habitat, because it provided a less expensive alternative for protecting an endangered species' habitat.<sup>133</sup> Even without critical habitat designated, agencies are prohibited from "jeopardizing" a listed species.<sup>134</sup> "Destruction or adverse modification"<sup>135</sup> of critical habitat was defined as an "alteration that appreciably diminishes the value of critical habitat for both the

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125. "The Secretary shall, *concurrently* with making a determination under paragraph (1) that species is an endangered or threatened species, designate any critical habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A) (emphasis added).

126. See U.S. FISH & WILDLIFE SERV., CRITICAL HABITAT: WHAT IS IT? 1 (May 2009), [http://www.fws.gov/endangered/factsheets/critical\\_habitat.pdf](http://www.fws.gov/endangered/factsheets/critical_habitat.pdf).

127. See Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. 31,871, 31,873 (June 14, 1999).

128. The factors considered for listing are: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1)(A)-(E).

129. *Id.*

130. *Id.* § 1533(b)(2).

131. See Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation, 64 Fed. Reg. at 31,873.

132. *Id.* at 31,872.

133. 50 C.F.R. § 402.02 (2010).

134. 16 U.S.C. § 1536(a)(2).

135. 50 C.F.R. § 402.02.

survival and recovery of a listed species.”<sup>136</sup> The “jeopardy” standard was considered virtually identical to the “destruction or adverse modification” standard of critical habitat, and was defined as “to reduce appreciably the likelihood of both the survival and recovery of a listed species.”<sup>137</sup> Because critical habitat designations and their restrictions appeared largely duplicative of the “jeopardy” standard that applies to all listed species regardless of critical habitat designation, the Service thought of critical habitat as an expensive burden that imposed additional unnecessary obligations on the Service.<sup>138</sup> Despite the Service’s interpretation of an overlap, many courts in the past decade, including the Ninth Circuit, have invalidated the adverse modification standard as being inconsistent with the legislative intent of the Act.<sup>139</sup> As a result, critical habitat designations are becoming more prevalent and, like the situation faced here with the Woodland Caribou, there has been an increase in citizen suits attempting to compel such designations.<sup>140</sup>

### C. *Current Agency Interactions*

Due to the cross-jurisdictional nature of the Woodland Caribou’s range, there are a number of interactions between state and federal agencies such as the Idaho Department of Fish and Game, Idaho Department of Lands, Washington Department of Wildlife, U.S. Forest Service, U.S. Fish and Wildlife Service, and the British Columbia Ministry of the Environment.<sup>141</sup> The different caribou management activities of these state and federal agencies are organized through the collaborative International Mountain Caribou Technical Committee (“IMCTC”), which is directed by a group of upper level agency managers from each organization.<sup>142</sup> The purpose of the IMCTC is to guide and coordinate the efforts of the individual organizations in order to further commonly held policy and management prerogatives in the

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136. *Id.*

137. *Id.*

138. *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 439-45 (5th Cir. 2001).

139. *See generally* *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.* 378 F.3d 1059, 1069-70 (9th Cir. 2004); *id.*; *N.M. Cattle Growers Ass’n. v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1282-85 (10th Cir. 2001); *Conservation Council v. Babbitt*, 24 F. Supp. 2d 1074 (D. Haw. 1998). These cases invalidated the adverse modification standard as being contrary to legislative intent.

140. David Sunding, Aaron Swoboda & Jonathon Terhost, *Federal Land Use Controls and the Planning Anticommons*, \*2-3 (July 15, 2007), <http://are.berkeley.edu/~sunding/FederalLandUse.pdf> (citizen suits compelling 6.9 million acres for spotted owl, 1.2 million acres for Canada Lynx, and 20,360 stream miles for salmon and steelhead).

141. *See* U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE WOODLAND CARIBOU IN THE SELKIRK MOUNTAINS, *supra* note 114, at 20.

142. *See id.*

Service's Recovery Plan for the Woodland Caribou ("Recovery Plan").<sup>143</sup>

The Recovery Plan proposed establishing "a self-sustaining population of caribou that is well-distributed throughout the Selkirk ecosystem."<sup>144</sup> The objectives listed in order to achieve this were to (1) maintain the existing Selkirk herd; (2) establish a new herd in Washington; (3) maintain an increasing population; and (4) secure and enhance 179,000 hectares of habitat in the Selkirk ecosystem.<sup>145</sup> As of the most recent five-year review conducted in 2008, the Service found that the majority of these objectives had not been met.<sup>146</sup>

Despite the joint efforts of the state and federal agencies involved, the Service stated that the existing populations of Woodland Caribou in Idaho were dwindling and that they fluctuated greatly in the past two decades.<sup>147</sup> Despite the earlier decreases in population, there was a seven percent increase between 2003 and 2008.<sup>148</sup> The Service attempted to create an additional herd in Washington between 1996 and 1998 through a population augmentation of 43 animals;<sup>149</sup> however, the new herd never took hold.<sup>150</sup> The Service concluded that the additional individuals either assimilated into the existing Selkirk herd or were lost to predation due to the high concentration of cougars in the areas where the augmented species were relocated.<sup>151</sup>

Finally, the Service discussed the goal of securing the 179,000 hectares of suitable caribou habitat.<sup>152</sup> The Service stated that, at the time the Recovery Plan was drafted, the extent of the Woodland Caribou's dependence on old growth timber was unknown, and that at present, the primary threat to the caribou was the ongoing harvesting of old growth timber stands and subsequent habitat fragmentation.<sup>153</sup> The Service also stated that the timber management practices of the Forest Service had improved since the Recovery Plan was drafted and that these practices were consistent with the objective of securing the desired area

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143. *See id.*

144. *See id.* at 27.

145. *Id.* at 27-28.

146. *See* U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 15-17.

147. *See id.* at 15.

148. *See id.* at 16.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See* U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 16.

153. *See id.* at 17.

as suitable habitat. In addition, the Service found that the areas in British Columbia were also adequately managed to the objective’s standards.<sup>154</sup>

The Service’s greatest concern over securing the desired 179,000 hectares of suitable habitat was that state and privately owned lands lacked the regulatory controls required to preserve the old growth timber stands.<sup>155</sup> The Service believed that this lack of regulation could potentially increase habitat fragmentation in these areas.<sup>156</sup> The Service’s concern may show that the interagency action prescribed by the Recovery Plan and executed by the IMCTC is ineffective.<sup>157</sup>

The Recovery Plan’s lack of success may be an important factor for the Secretary to consider when determining whether critical habitat should be designated. Additionally, the Recovery Plan’s failure could signal that greater protective measures are needed.<sup>158</sup> On the other hand, scholars have inferred that the language that requires the Secretary’s critical habitat designation decision to account for not only the economic impact, but also “any other relevant impact,”<sup>159</sup> may require consideration of the potentially chilling effects upon federal-state relationships.<sup>160</sup> This would come into play where the Service proposes federal measures which supersede existing state conservation measures. Thus, the ineffectiveness of state cooperation with the current federal Recovery Plan could cut both ways when determining whether to designate critical habitat.

#### *D. Current Case Law Concerning Critical Habitat Designations*

The designation of critical habitat is a federal agency decision. However, once the Secretary’s action deciding whether to designate critical habitat becomes final, it can then be reviewed.<sup>161</sup> The Act provides a citizen suit provision that grants standing to any person and authorizes a suit in particular for “a failure of the Secretary to perform any act or duty . . . which is not discretionary with the Secretary.”<sup>162</sup> The Secretary’s action (or inaction) can then be analyzed under the

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154. *See id.*

155. *See id.*

156. *See id.*

157. *See* U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE WOODLAND CARIBOU IN THE SELKIRK MOUNTAINS, *supra* note 114, at 19-20.

158. *See* 16 U.S.C. § 1533(a)(1)(D)(2006) (accounting for the “inadequacy of existing regulatory mechanisms”).

159. *Id.* § 1533(b)(2).

160. Ronny Millan & Christopher L. Burdett, *Critical Habitat in the Balance: Science, Economics, and Other Relevant Factors*, 7 MINN. J. L. SCI. & TECH. 227, 267 (2005).

161. *See* 16 U.S.C. § 1540.

162. *Id.* § 1540(g).

Administrative Procedure Act's standard of review of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>163</sup> Further, the Secretary's decision whether or not to designate is challengeable from both the environmentalist and industrialist perspective since the Supreme Court has held that the citizen suit provision stating that "any person may commence a civil suit" is extraordinarily broad and extends not only to environmentalists, but to those opposing environmental regulations as well.<sup>164</sup> Over the years, many cases have clarified not only the judicial reviewability of the Secretary's decisions, but also the requisite specificity needed in order to maintain a valid critical habitat designation.

The seminal case in the Ninth Circuit regarding the "not prudent" exception to designating critical habitat is *Natural Resource Defense Council v. United States Department of Interior*.<sup>165</sup> In that case, the Natural Resource Defense Council argued that the Secretary had violated the Act by failing to designate critical habitat for the California gnatcatcher.<sup>166</sup> Although the Secretary recognized that the habitat loss was a significant threat to the continued existence of the gnatcatcher, he declined to designate critical habitat and invoked the "not prudent" exception.<sup>167</sup> The Secretary justified the exception on the grounds that a critical habitat designation would increase public awareness of the species, thus indirectly spurring landowners to destroy suitable habitat.<sup>168</sup> The Secretary argued that such a designation would have no appreciable benefit since most of the gnatcatcher's habitat was on private land outside the scope of Section VII's consultation requirement.<sup>169</sup>

The court concluded that although the Secretary had provided evidence of eleven occasions where landowners had destroyed gnatcatcher habitat, it failed to show that "the benefits of exclusion outweigh the benefits of specifying such area as part of critical habitat" as required by the Act.<sup>170</sup> Simply citing instances where landowners had destroyed habitat was deemed insufficient because there was no corroborating evidence suggesting that a critical habitat designation would increase the destruction of habitat.<sup>171</sup>

As to the Secretary's argument that designating critical habitat would not be beneficial to the species since the majority of habitat was

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163. See 5 U.S.C. § 706(2)(a) (2006).

164. *Bennett v. Spear*, 520 U.S. 154, 166 (1997).

165. 113 F.3d 1121 (9th Cir. 1997).

166. See *id.* at 1123.

167. *Id.*

168. See *id.*

169. See *id.*

170. *Natural Res. Def. Council*, 113 F.3d at 1125.

171. See *id.*

on private land and lacking the federal nexus required to trigger the Section VII consultation process, the court gave it little weight stating that the “not prudent” exemption for lack of benefit could only be used when the designation would not benefit the species as a whole.<sup>172</sup> Relying on legislative history to attest to “[t]he fact that Congress intended the imprudence exception to be a narrow one,”<sup>173</sup> the court held that the argument that a designation would have no benefit for “most of the species” was an insufficient justification for the “not prudent” exception.<sup>174</sup> Because approximately twenty percent of the gnatcatcher’s habitat occurred on federally owned lands and was thus subject to consultation requirements in the event of a potentially adverse activity, the court reasoned it would be impossible to conclude that a critical habitat designation would not be beneficial to the species.<sup>175</sup>

The Secretary made the final argument that the critical habitat designation would not be beneficial to gnatcatcher because there was already a “far superior” state conservation program in place.<sup>176</sup> The court reasoned that regardless of how comprehensive a state plan was, it cannot be considered an adequate substitute since it is incapable of triggering the mandatory federal consultation associated critical habitat designations.<sup>177</sup> Thus, the court found the Secretary’s decision declining to designate critical habitat was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>178</sup>

District courts within the Ninth Circuit have remained consistent with the holding of *Natural Resource Defense Council*, and successfully argued “not prudent” exceptions to critical habitat are virtually nonexistent.<sup>179</sup> However, even when the Secretary has designated critical habitat for a species it may still be challenged.

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172. *Id.*

173. “The committee intends that in most situations the Secretary will . . . designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.” *Id.* at 1126 (citing H.R. REP. NO. 95-1625, at 17 (1978)).

174. *Id.*

175. *See Natural Res. Def. Council*, 113 F.3d at 1126.

176. *See id.*

177. *See id.* at 1127.

178. *Id.*

179. *See Ctr. for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1091 (D. Ariz. 2009) (holding lack of information of critical habitat elements for the jaguar did not warrant the “not prudent” exception to designating critical habitat); *Conservation Council for Haw. v. Babbitt*, 24 F. Supp. 2d 1280, 1288 (D. Haw. 1998) (holding that the imprudence exception for 245 plant species was arbitrary and capricious). *But see Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 936 (9th Cir. 2005) (holding that the 1982 amendments to the Act containing mandatory commands do not

Successful challenges to critical habitat designations have taken multiple forms and have been initiated by both environmentalists and developers. Recent case law has shown that a critical habitat designation can be remanded to the Service for insufficiently supporting the economic analysis in the administrative record,<sup>180</sup> failure to identify economic impacts of the designation,<sup>181</sup> failure to define what biological and physiological features are essential to a species survival and recovery,<sup>182</sup> and failure to identify what federally regulated activities will be affected by the designation.<sup>183</sup> Even where the Secretary has been compelled to designate critical habitat, nothing but the most accurate and well articulated critical habitat designations will be accepted.<sup>184</sup>

For instance, in 2001 the Secretary was compelled to designate critical habitat for fifteen vernal pool species of shrimp and plants.<sup>185</sup> After two separate notice and comment periods and economic impact statements, the final rule designating critical habitat was challenged by both pro-development and environmental groups.<sup>186</sup> Once again, the critical habitat designation was rejected and remanded to the Service for failing to explain why some tracts were excluded over others<sup>187</sup> and to explain the standard of recovery.<sup>188</sup>

Finally, even where there may be considerable conservation plans already in place, such plans have been considered insufficient substitutes for critical habitat designations.<sup>189</sup> Simply stated, those courts found that alternative conservation measures do not provide the mandatory Section VII consultation which is the governing regulatory principle of critical habitat designations.<sup>190</sup>

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retroactively apply to a species with critical habitat pending prior to their enactment and designation was permissive decision left to the Service's discretion).

180. See *Middle Rio Grande Conservancy v. Babbitt*, 206 F. Supp. 2d 1156, 1168 (D.N.M. 2000).

181. See *id.* at 1178.

182. See *id.*

183. See *id.* at 1191.

184. See *Homebuilders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 2006 WL 3190518 (E.D. Cal. 2006).

185. See *id.* at \*1; *Butte Env'tl. Council v. White*, 145 F. Supp. 2d 1180, 1185 (E.D. Cal. 2001) (setting aside the "not prudent" exception and compelling critical habitat designation).

186. See *Homebuilders*, 2006 WL 3190518, at \*3.

187. See *id.* at \*23.

188. See *id.* at \*32.

189. See *Natural Res. Def. Council v. U.S. Dep't of Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997) (declaring that state conservation plan are insufficient alternatives due to inability to trigger Section 7 consultations); *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1102-03 (D. Ariz. 2003) (declaring that existing Forest Service plan deemed inadequate substitute).

190. See *generally* 16 U.S.C. § 1536(b)(4) (2006) (providing the mechanism and procedures of the consultation).

*E. Application of Case Law to the Woodland Caribou*

In light of the past decade of Ninth Circuit case law, a decision declining to designate critical habitat for the Woodland Caribou based on the “not prudent” exception would likely be unsuccessful. The Service itself has recognized that poaching, the greatest perceived threat at the time of listing and justification for the “not prudent” exception,<sup>191</sup> is no longer a significant threat to the Woodland Caribou.<sup>192</sup> Further, it would be difficult for the Secretary to argue that a critical habitat designation would provide no benefit to the species since the majority of the Woodland Caribou’s range occurs on federal land.<sup>193</sup> In any event, it is likely that the Secretary will not cite the “not prudent” exception and will designate critical habitat.

In determining which areas should be included and excluded from the critical habitat designation, previous challenges to designations make it clear that such a designation will have to be as clear and precise as possible.<sup>194</sup> All economic impacts will have to be accounted for.<sup>195</sup> This will be duly challenging since there are competing federal statutes rewarding resource extraction in areas which will potentially be designated as critical habitat.<sup>196</sup> Further, the Secretary will likely be required to explain and justify his decision to exclude some areas while including others in the critical habitat designation.<sup>197</sup>

Since the Woodland Caribou has been listed for over twenty-five years, the Service does have the advantage of decades of research and monitoring data for the species.<sup>198</sup> This existing data provides the

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191. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. § 17.11 (2010)).

192. See U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 22-24.

193. See *Natural Res. Def. Council v. U.S. Dep’t of Interior*, 113 F.3d 1121 (9th Cir. 1997) (holding that the occurrence of twenty percent of the gnatcatchers habitat of federal land was sufficient for a critical habitat designation to be beneficial to the species as a whole); U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 17.

194. See *Middle Rio Grande Conservancy v. Babbitt*, 206 F. Supp. 2d 1156, 1178 (D.N.M. 2000).

195. See *id.*

196. See U.S. FOREST SERV., IDAHO PANHANDLE NATIONAL FORESTS FOREST PLAN: MONITORING AND EVALUATION REPORT, *supra* note 116, at 4.

197. See *Homebuilders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 2006 WL 3190518, at \*23 (E.D. Cal. 2006).

198. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. 7,390, 7,390 (Feb. 29, 1984) (codified at 50 C.F.R. §17.11 (2010)); U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE WOODLAND CARIBOU IN THE SELKIRK MOUNTAINS, *supra*



Service with information needed to identify essential habitat elements, which is a challengeable aspect of a final rule for critical habitat designation.<sup>199</sup> For example, this may include the Woodland Caribou's dependence on old growth forests and arboreal lichens.<sup>200</sup> Additionally, years of management have provided the Service with recovery goals and plans based on conservation and the minimum viable population needed to avoid genetic depression.<sup>201</sup>

Finally, the Service will need account for how it will treat existing agency and international conservation plans.<sup>202</sup> As case law has shown, despite the comprehensiveness of any alternative plan, critical habitat designations will not be excluded on these grounds, because critical habitat offers what no other plan can: mandatory Section VII consultations.<sup>203</sup> Some scholars have argued that in designating critical habitat the Secretary must not only account for economic issues, "but any other relevant impact,"<sup>204</sup> including the risk of alienating participating agencies and other entities.<sup>205</sup> They argue that those risks should be accounted for in the weighing of benefits when considering exclusion.<sup>206</sup> However, it is unlikely that the Service will add the risk of alienability of others to its list of factors. The principle is untried and would contribute additional factors to be considered in an already complex and easily challengeable procedure.

When making its final critical habitat designation, the Secretary needs to be aware that the final rule will likely be challenged for being over-inclusive, under-exclusive or both. The citizen suit provision of the Act coupled with recent developments in case law have made critical

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note 114, at 20.; U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 1-37.

199. See *Homebuilders*, 2006 WL 3190518, at \*23.

200. See U.S. FISH & WILDLIFE SERV., SOUTHERN SELKIRK MOUNTAIN CARIBOU POPULATION: 5-YEAR REVIEW SUMMARY AND EVALUATION, *supra* note 2, at 16.

201. See Determination of Endangered Status for the Population of Woodland Caribou Found in Washington, Idaho, and Southern British Columbia, 49 Fed. Reg. at 7,390; see also U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE WOODLAND CARIBOU IN THE SELKIRK MOUNTAINS, *supra* note 114, at 20.

202. See U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE WOODLAND CARIBOU IN THE SELKIRK MOUNTAINS, *supra* note 114, at 20.; see also U.S. FOREST SERV., SITUATION SUMMARY AND MANAGEMENT STRATEGY FOR MOUNTAIN CARIBOU AND WINTER RECREATION ON THE IDAHO PANHANDLE NATIONAL FORESTS, *supra* note 32, at 1.

203. See *Natural Res. Def. Council v. U.S. Dep't of Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997) (state conservation plan deemed insufficient alternative due to inability to trigger Section 7 consultations); see also *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1102-03 (D. Ariz. 2003).

204. 16 U.S.C. §1533(b)(2) (2006).

205. See Millan & Burdett, *supra* note 160, at 267.

206. See *id.*

habitat designations a more frequently contested and an easily challengeable source of litigation.

#### IV. CONCLUSION

Critical habitat designations have benefits and deficiencies. They provide protection not only for areas currently occupied by the species but also for those areas that the species will grow into. Further, they increase the probability of enforcement and provide definitive notice of a species potential presence. Most importantly, critical habitat is empirically proven to promote a species success, which the goal that lies at the core of the Act. At the same time, critical habitat designations are costly exercises of federal control over local government. It requires a connection to the federal government to have any substantial effect on the activities private parties.

Despite these contentions, in recent years the courts within the Ninth Circuit have recognized the mandates of the Act and have revived the designation of critical habitat. However as cases within the Ninth Circuit have shown, critical habitat designations have become hot beds for litigation and are easily challengeable.

Since the factors affecting the Woodland Caribou at the time of listing are vastly different than the current effects and the justification for invoking the "not prudent" exception no longer exist, the Secretary will have to account for a plethora of factors in his impact analysis in deciding whether or not to designate critical habitat. Not only will the economic effects of reduced resource extraction and recreation have to be accounted for, but the Secretary may have to also consider concomitant chilling effects with local communities and interacting agencies.

In addition, case law has demonstrated that even when critical habitat is designated, the extent and justifications thereof are challengeable as well. Due to the high stakes surrounding the instance of the Woodland Caribou, extirpation of the last remaining population from the lower forty-eight states and the livelihood of local communities, the Secretary will have the task of compiling any extremely comprehensive, water tight justification for his decision. This task may be impossible to achieve.

