



**EARTHJUSTICE**

*Because the earth needs a good lawyer*

## International Program

March 22, 1999

The Honorable Bruce Babbitt  
Secretary of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

The Honorable William M. Daley  
Secretary of Commerce  
Herbert C. Hoover Building  
14<sup>th</sup> Street and Constitution Avenue, N.W.  
HCHB-5854  
Washington, D.C. 20230

Re: Petition for Certification of Canada Pursuant to 22 U.S.C. § 1978 for Failing to Adopt Endangered Species Legislation

Dear Secretary Babbitt:

On behalf of the Northwest Ecosystem Alliance and Defenders of Wildlife, we submit this petition for certification of Canada, pursuant to the Pelly Amendment to the Fisherman's Protective Act of 1967,<sup>1</sup> for Canada's failure to enact legislation which protects endangered species and their habitat.

### I. INTRODUCTION

Under the Pelly Amendment, the Secretary of the Interior must certify a country if its nationals are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species.<sup>2</sup> Canada's failure to enact legislation which protects endangered species and their habitat clearly meets these conditions. First, the continued destruction of habitat and hunting of endangered species in Canada constitutes a taking under the Pelly Amendment. Second, Canada's failure to stop this taking by enacting an endangered species act diminishes the effectiveness of an international program for endangered or threatened species -- the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere ("Western Hemisphere Convention" or "WHC").

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<sup>1</sup> 22 U.S.C. § 1978, as amended by Pub. L. No. 95-376, 92 Stat. 714 (Sept. 18, 1978).

<sup>2</sup> *Id.* § 1978(a)(2).

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Accordingly, this petition seeks certification of Canada pursuant to the Pelly Amendment and your recommendation to the President that he direct the Secretary of the Treasury to prohibit the importation of Canadian products into the United States until Canada has enacted legislation which protects endangered species and their habitat. To avert such a certification, we ask you to urge Canada to enact legislation that fully protects endangered species and their habitat-- particularly the many species that are shared with the U.S.

## II. THE PELLY AMENDMENT

The United States Congress enacted the Pelly Amendment in 1971 in response to concerns about the harmful effect of international salmon fishing on the high seas, and in recognition that international agreements often lack the necessary enforcement provisions to conserve species effectively. Under the Pelly Amendment, if the Secretary of the Interior determines that “nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of an international program for endangered or threatened species,” the Secretary must certify that fact to the President of the United States.<sup>3</sup> An “international program for endangered or threatened species” is defined as “any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to protect endangered or threatened species of animals.”<sup>4</sup>

1992 revisions to the Pelly Amendment define the term “taking” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or to “attempt” to engage in any such conduct.<sup>5</sup> This definition tracks the definition of “take” in the United States Endangered Species Act (“ESA”), 16 U.S.C. § 1532. The U.S. Supreme Court has upheld regulations issued by the Department of Interior which construe this definition to prohibit “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”<sup>6</sup>

To implement the Pelly Amendment, the Secretary of Interior must periodically monitor the activities of foreign nationals that may affect international endangered and threatened species programs and must promptly investigate activities that may be cause for a Pelly certification.<sup>7</sup> The Secretary’s duties are mandatory; he or she must conduct the prescribed monitoring and investigations and certify countries when the statutory criteria are met.<sup>8</sup> Upon receipt of a Pelly certification, the President may direct the Secretary of the Treasury to prohibit the importation

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<sup>3</sup> *Id.* § 1978(a)(2).

<sup>4</sup> *Id.* § 1978(h)(5).

<sup>5</sup> *Id.* § 1978(h)(7).

<sup>6</sup> 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

<sup>7</sup> 22 U.S.C. § 1978(a)(3).

<sup>8</sup> *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986).

into the United States of any products from the offending country for any duration the President deems appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade ("GATT").<sup>9</sup> Within 60 days of certification, the President must notify Congress of any action taken pursuant to the certification.<sup>10</sup>

### III. CANADA'S FAILURE TO ENACT LEGISLATION PROTECTING ENDANGERED SPECIES AND THEIR HABITAT WARRANTS CERTIFICATION UNDER THE PELLY AMENDMENT

#### A. The Western Hemisphere Convention

The Western Hemisphere Convention – negotiated under the auspices of the Organization of American States – entered into force with respect to the United States in 1942. The Preamble to the Convention begins by stating:

The Governments of the American Republics, wishing to protect and preserve in their natural habitat representatives of all species and genera of their native flora and fauna, including migratory birds, in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control . . . .

At the outset, the Convention calls on the contracting parties to establish national parks, national reserves, nature monuments, and wilderness reserves, in part to protect living species of flora or fauna.<sup>11</sup> The Convention also seeks to promote this goal by requiring countries to adopt measures to protect wildlife. Four such requirements are relevant here.

First, the contracting governments agree “to adopt, or to propose such adoption to their respective appropriate law-making bodies, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries, but not included in the national parks, national reserves, nature monuments, or strict wilderness reserves.”<sup>12</sup>

Second, the Convention obligates governments to “adopt appropriate measures for the protection of migratory birds of economic or aesthetic value.”<sup>13</sup> “Migratory birds” are defined as “[b]irds of those species, all or some of whose individual members, may at any season cross any of the boundaries between the American countries.”<sup>14</sup>

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<sup>9</sup> 22 U.S.C. § 1978(a)(4).

<sup>10</sup> *Id.* § 1978(b).

<sup>11</sup> Articles I-IV.

<sup>12</sup> Article V(1).

<sup>13</sup> Article VII.

<sup>14</sup> Article I(5).

Third, the Convention directs countries “to adopt appropriate measures . . . to prevent the threatened extinction of any given species.”<sup>15</sup>

Fourth, the Convention calls for the creation of an annex identifying species whose protection is “of special urgency and importance.”<sup>16</sup> Species listed in the annex are to be protected “as completely as possible,” and their hunting, killing, capture, or taking is allowed only with governmental permission, to be given only in special circumstances.<sup>17</sup> The annex lists several species that migrate or range between the United States and Canada, including woodland caribou, sea otters, trumpeter swan, whooping crane, Eskimo curlew, and Hudsonian godwit.

B. Canada’s Failure to Pass Endangered Species Legislation Undermines the Western Hemisphere Convention and Canada’s Commitments under Other International Agreements

*1. Canada has Acknowledged its International Obligation to Enact Endangered Species Legislation*

Canada has acknowledged its obligation to enact endangered species legislation pursuant to another international agreement--the United Nations Convention on Biological Diversity (“Biodiversity Convention”)--which reinforces and supplements the requirements of the Western Hemisphere Convention. The Biodiversity Convention, which Canada has ratified, obligates its signatories to “develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.”<sup>18</sup> In a unanimous 1993 report, the Canadian Parliament’s Standing Committee on Environment acknowledged that Article 8(k) of the Biodiversity Convention obligates Canada, “working with the provinces and territories . . . [to] take immediate steps to develop an integrated legislative approach to the protection of endangered species, habitat, ecosystems and biodiversity in Canada.”<sup>19</sup>

In October 1996, Canada’s federal and provincial/territorial wildlife ministers signed the National Accord for the Protection of Species at Risk in Canada, committing to a national approach for the protection of species at risk. The goal of the National Accord is “to prevent species at risk in Canada from becoming extinct as a consequence of human activity.” In signing the National Accord, the federal, provincial and territorial ministers responsible for wildlife specifically agreed to establish complementary legislation and programs that provide for effective protection of species at risk throughout Canada. Moreover, the 1996 endangered

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<sup>15</sup> Article VII.

<sup>16</sup> Article VIII.

<sup>17</sup> *Id.*

<sup>18</sup> Article 8(k).

<sup>19</sup> Standing Committee on Environment, *A Global Partnership: Canada and the Conventions of the United Nations Conference on Environment and Development* at 30 (April 1993).

species bill introduced by the Canadian government (which did not pass, as discussed below) specifically stated in the preamble that “providing legal protection for wildlife species at risk will in part meet Canada’s commitments under [the Biodiversity] Convention.”<sup>20</sup>

2. *Canada has Documented Numerous Species and their Habitat in Need of Legislative Protection*

The Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") was formed in 1977 as the result of a recommendation of a Federal-Provincial Wildlife Conference. COSEWIC arose from the identified need for an official, scientifically sound listing of wildlife species, subspecies and separate populations at risk. COSEWIC’s mandate is to determine the status of each of these species and populations at the national level.

COSEWIC is composed of representatives from each provincial and territorial government wildlife agency, four federal agencies (Canadian Museum of Nature, Canadian Parks Service, Canadian Wildlife Service, and Department of Fisheries and Oceans), and three national conservation organizations (Canadian Nature Federation, Canadian Wildlife Federation and World Wildlife Fund Canada).

In addition to the Committee representatives, subcommittees address the following biological groups: birds; terrestrial mammals; fish and marine mammals; amphibians and reptiles; and vascular plants, nonvascular plants (mosses and lichens), and invertebrates (mollusks and butterflies and moths). These subcommittees are responsible for reviewing the quality of scientific “status reports,” which provide the basis for determining the status of a candidate species. Status reports may be provided by COSEWIC member jurisdictions or individuals, or may be commissioned by COSEWIC. All status determinations for species at risk are based on these reports, which include a description of species distribution, abundance, and population trends. Currently, no legal protection is afforded species at risk that have been placed on a COSEWIC list.

According to COSEWIC, Canada has a serious and growing endangered species problem. Canada is home to 285 endangered, threatened or vulnerable species of wildlife, including the grizzly bear, whooping crane, and woodland caribou.<sup>21</sup> And at least 22 species already have become extinct or extirpated in Canada. The main cause of species’ extinction in Canada is destruction of the habitat needed for the species to survive. Habitat loss represents a primary threat to almost 90 percent of Canada’s species at risk as evidenced by COSEWIC’s status reports. These numbers are especially alarming given that Canada, because of its northern latitude, has a far lower diversity of species than is found in areas closer to the equator.

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<sup>20</sup> Bill C-65, *The Canadian Endangered Species Protection Act*, first reading, October 31, 1996.

<sup>21</sup> COSEWIC does not have the resources to assess all species suspected of being at risk. Accordingly, the actual number of species at risk in Canada is much higher.

3. *Canada has Failed to Enact Legislation Protecting Endangered Species and their Habitat.*

At present, Canada has no federal legislation designed to protect endangered species, and only six of Canada's twelve provinces and territories have endangered species legislation – Manitoba, Quebec, Ontario, Prince Edward Island, Nova Scotia and New Brunswick. Some provinces (e.g., British Columbia) have specifically indicated that they will not pass such legislation. Although the Canadian government acknowledged its international obligation to adopt legal protections for endangered species in 1993, it waited three years, until October 31, 1996, before finally introducing an endangered species bill (Bill C-65) in Parliament. Even then, the Canadian federal government made little effort to move this legislation in Parliament, despite ample opportunity to do so. After going through committee hearings, the Bill received only a few token hours of debate on April 24, 1997 – three days before a federal election was called (thus disbanding the Parliament). The Bill died without even receiving a second reading.

Even if Bill C-65 had passed, however, it still would not have provided effective protection to most endangered species and their habitat. In particular, the Bill would have done very little to protect the many endangered species that migrate or range across the Canada-U.S. border (“transboundary species”). The Bill prohibited *direct harm* to transboundary species or their nests, but did not prevent destruction of their *habitat* – which is the main threat facing these species. The Bill only provided for habitat protection on *federal lands*, which make up less than 5 percent of Canada (excluding the northern territories, where few endangered species live); even on federal lands, habitat protection was discretionary.

Canada is planning to introduce a similar endangered species bill this year, and the government again has indicated that it does not intend to protect the habitat of transboundary species, or to provide any habitat protection for species outside federal lands. Indeed, the government is under considerable pressure from the provinces and certain commercial interests to further weaken even the minimal protections found in the previous bill. To provide meaningful protection to threatened and endangered species, Canada must protect the habitat of those species.

Canada's failure to enact endangered species legislation clearly diminishes the effectiveness of the Western Hemisphere Convention. Canada's continued destruction of species and their habitat violates the Convention's stated purpose of protecting and preserving representatives of all species in their natural habitat in sufficient numbers and over areas extensive enough to prevent them from becoming extinct. Canada's failure to enact endangered species legislation also clearly violates the Convention's requirements that contracting governments adopt, or propose for adoption, suitable laws and regulations for the protection and preservation of flora and fauna within their national boundaries; adopt appropriate measures for the protection of migratory birds of economic or aesthetic value; adopt appropriate measures to prevent the threatened extinction of any species; and protect as completely as possible those

species listed in the Convention's annex. Canada's failure to enact endangered species legislation, therefore, warrants certification under the Pelly Amendment.

C. Canada's Failure to Enact Endangered Species Legislation Undermines the Effectiveness of the Western Hemisphere Convention and Impedes United States Species Protection Initiatives

Canada's lack of legal protection for endangered species and their habitat is not simply a Canadian problem. Nearly 80 percent of the species at risk in Canada either migrate or have a range extending across the Canada-United States border. Transboundary threatened and endangered species, such as the grizzly bear, woodland caribou, whooping crane, and piping plover, and their habitat receive strong legal protection under the U.S. Endangered Species Act, but lose that protection when they cross the Canadian border. Canada's failure to protect such species and their habitat not only undermines the millions of dollars spent by the U.S. government on endangered species protection and recovery programs but constitutes a de facto subsidy to Canadian landowners and enterprises which are not required to bear the costs of mitigating the harm caused to endangered species by their activities. By failing to enact legislation protecting such species, Canada is undermining the Western Hemisphere Convention's purpose of providing continent-wide protection over extensive enough areas to prevent extinction. The following species, which represent only a small fraction of those species adversely affected by Canada's failure to pass an endangered species act, illustrate how Canada's inaction is impeding the goals and flouting the mandates of the Western Hemisphere Convention.

*1. The Grizzly Bear*

A symbol of American wilderness and one of the largest land mammals in North America, the grizzly or brown bear once had one of the greatest natural distributions of any terrestrial mammal. Today, in the lower-48 states, the grizzly bear occupies only two percent of its former range and its numbers have plummeted from over 50,000 to fewer than 1,000 bears.

In Canada, grizzly bear populations are located in Alberta, British Columbia, the Yukon and the Northwest Territories. Because grizzly bears have very large home ranges and move extensive distances, they cannot be classified as "Canadian" grizzly bears or "United States" grizzly bears. Grizzly bears are not constrained by provincial, territorial, or national boundaries. They are truly an international species and their conservation requires international efforts.

In 1975, the U.S. Fish and Wildlife Service ("FWS") listed the grizzly bear as threatened in the lower-48 states. FWS has identified five grizzly bear ecosystems in the lower-48 states, four of which extend across the border into Canada. Yellowstone is the only ecosystem with grizzly bears in the United States that are isolated from Canada. The Northern Continental Divide Ecosystem extends from Montana to British Columbia and Alberta and contains the

largest number of grizzly bears south of Canada. The Cabinet-Yaak Ecosystem in Northwestern Montana, northern Idaho and adjacent British Columbia supports fewer than 15 grizzly bears. The Selkirk Ecosystem of northwestern Idaho, northwestern Washington and southeastern British Columbia supports a small grizzly bear population. Finally, the North Cascades Ecosystem supports a small population of bears that travel across the border between northern Washington and southern British Columbia. The U.S. Fish and Wildlife Service has determined that two of these populations, the Cabinet-Yaak and the North Cascades, have such low numbers that a reclassification to full endangered status is warranted, though such reclassification has thus far been precluded by other listing priorities. With respect to the Selkirk population, a federal judge has twice rejected the U.S. Fish and Wildlife Service's finding that reclassification as endangered is not warranted.

COSEWIC's status report recognizes that, except for Yellowstone, viable grizzly bear populations cannot be maintained in the United States without also maintaining their populations and habitat in Canada. Unfortunately, populations of grizzly bears in Canada have declined and will continue to decline because of habitat destruction and the legal and illegal killing of grizzly bears. Agriculture, logging, mining, oil drilling, dams and roads all adversely affect the productivity and integrity of grizzly bear habitat. Roads and excessive road densities have serious adverse impacts on the security of grizzly bear habitat. Excessive road building and associated human access result in increased mortality, increased habituation (which ultimately results in increased mortality), habitat loss and fragmentation, and displacement of grizzly bears.

The starkest consequence of Canada's failure to enact endangered species legislation is the allowance of grizzly bear hunting in Canada in contrast to the flat prohibition of hunting under the U.S. ESA. Endangered U.S. grizzly bears that roam across the border into Canada can be, and are, legally hunted. Evidence strongly suggests that local populations of grizzly bears in Canada are being harvested at an alarming rate. In recent years, the annual female kill has been extremely high for most jurisdictions. Because sexual maturation of females is late, litter size is small, and the interval between births high, grizzly bear populations have little capacity to compensate for increased mortality.

Due to the continued decline in Canadian populations as well as the continued destruction of habitat, grizzly bears have been extirpated from 24 percent of their historic Canadian range. COSEWIC has found them to be at risk and has classified them as vulnerable in their remaining range in Canada. COSEWIC has recommended that every effort be made to ensure that those grizzly bear zones currently designated as vulnerable do not, in the future, warrant a designation of threatened. British Columbia's Grizzly Bear Conservation Strategy, issued by the Province of British Columbia in 1995, however, is woefully inadequate. A team of independent biologists who reviewed the strategy concluded that it "is very likely to reduce grizzly populations into islands of habitat . . . which may not be large enough to maintain populations over time." Horejsi, *et al.* at v. Indeed, even under full implementation of the strategy, the area of British Columbia in which grizzly bears are extinct is expected to increase

by over 200 percent. The B.C. government acknowledges that grizzlies are extirpated or declining throughout the southern portion of their range which borders on the U.S.

The future of the grizzly bear will not be secure without legal protection in Canada. Both the B.C. and Alberta governments have stated that they do not intend to pass endangered species legislation. Accordingly, without federal legislation protecting both grizzly bears and their habitat, Canada will continue to undermine the WHC.

**Key Supporting Documents:**

Vivian Banci, COSEWIC, *Status Report on the Grizzly Bear: Ursus arctos horribilis* (1991).

Province of British Columbia Ministry of Environment, Lands and Parks, *Conservation of Grizzly Bears in British Columbia, Background Report* (May 1995).

Brian L. Horejsi, Barrie K. Gilbert, and F. Lance Craighead, *British Columbia's Grizzly Bear Conservation Strategy, An Independent Review of Science and Policy* (1998).

Carlton v. Babbit, 900 F. Supp. 526 (D.C. Cir. 1995).

Vivian Banci, Dennis A. Demarchi, and W. Ralph Archibald, *Evaluation of the Population Status of Grizzly Bears in Canada*, 9(1) Int. Conf. Bear Res. and Manage 129-142 (1994).

Mark Clayton, *Bears in the Canadian Rockies May be Fighting a Losing Battle*, Christian Science Monitor.

Paul Paquet and Arlin Hackman, *Large Carnivore Conservation in the Rocky Mountains, A Long-Term Strategy for Maintaining Free-Ranging and Self-Sustaining Populations of Carnivores* (World Wildlife Fund, May 1995).

## 2. *Woodland Caribou*

As the only major ungulate in North America specifically adapted to life in mature, lichen-rich, coniferous forests, woodland caribou fill a niche occupied by no other species. Humans and woodland caribou have enjoyed a special relationship in North America for many thousands of years.

In Canada, the caribou's historic range has been dramatically reduced. Woodland caribou are now absent from their original ranges south and east of the St. Lawrence River and south of the Great Lakes except for a small relict herd on the Gaspé Peninsula. From Quebec to British Columbia, the caribou range has been substantially reduced along its southern peripheries, and the southernmost herds tend to be small, isolated, and scattered. Woodland caribou have been extirpated in Canada's Maritime Provinces as well as in the New England and Great Lakes areas. The related, little known, caribou of the Queen Charlotte Islands of British Columbia has been extinct for at least four decades.

Woodland caribou live in lichen-rich mature forests, open muskegs and bogs, and high tundra. Their home ranges are large – usually about 50 square miles per individual animal. During the late 1800's and early 1900's, much of the caribou's habitat in Canada, especially in

the south and southeast, was destroyed or fragmented by logging, mining, roads, and encroaching settlement. Caribou populations are easily isolated by highways, railroads, and other linear developments, particularly if such development is accompanied by logging, settlement, or agriculture. The winter ranges are especially sensitive because of the caribou's need for an adequate food supply and for calving areas protected from predators and insects.

Woodland caribou in western Canada range across the Canada-U.S. border to the north into Alaska and to the south into northeastern Washington and northwestern Idaho. The Selkirk's mountain herd, at the border of British Columbia, Washington, and Idaho, contains the only indigenous caribou remaining in the United States south of Alaska. In 1964, this herd consisted of approximately 100 individuals, and its range may have reached Montana. This herd is now believed to number only about 25 to 30 animals. Its range has been severely damaged by logging and fire, and the herd's movement corridors have been interrupted by a major highway as well as numerous industrial roads. This population's survival depends on transplanting caribou from other herds in British Columbia, but widespread destruction of caribou habitat in British Columbia now threatens the survival of the Selkirk herd.

In 1984, FWS listed the Selkirk herd as endangered under the U.S. ESA. In the same year, COSEWIC listed the western population of woodland caribou (including the Selkirk herd), as "vulnerable". The annex to the Western Hemisphere Convention specifically lists the woodland caribou as a species of special urgency and importance, thereby obligating contracting countries to protect woodland caribou as completely as possible and to prohibit their hunting, killing, capture, or taking except in special circumstances. In blatant defiance of the Convention's mandates, the hunting of woodland caribou is allowed throughout most of Canada. Caribou are especially vulnerable to hunting because of their very low reproductive levels and their gregarious and curious nature. Woodland caribou receive little or no habitat protection, because of Canada's lack of endangered species legislation.

A key remaining British Columbia caribou herd is threatened by extensive clearcut logging in the Itcha Ilgachuz mountains. The high elevation portion of this caribou range is protected as a provincial park, but the lower elevation forests where the caribou feed and roam in the winter are outside the park's habitat protections. After years of deliberations, a committee of government foresters and wildlife biologists developed a plan that would allow limited logging of winter caribou habitat at a level that would place the local caribou population at "moderate risk." Reacting to timber industry arm-twisting, however, the provincial government jettisoned this plan and opened vast portions of the most critical winter caribou habitat to clearcutting. A second committee of government experts found that the increased logging of important caribou habitat will place unacceptable risks on the herd and make it impossible to assure stable caribou habitat. The clearcutting will cause the woodland caribou's favored food – lichens – to disappear and will make it harder for the caribou to evade predators. The B.C. government acknowledges that woodland caribou are extirpated or declining throughout the southern portion of their range, which borders on the U.S.

Canada is undermining the Western Hemisphere Convention's specific mandate to protect species listed in the annex as well as the Convention's more general direction to enact legislation to prevent the threatened extinction of species and to protect flora and fauna in areas not included in national parks.

**Key Supporting Documents:**

John P. Kelsall, COSEWIC, *Status Report on Woodland Caribou: Rangifer tarandus caribou* (1984).

WWF Guide to Endangered Species, *Woodland Caribou*.

David Lee, *Caribou and You*, American Forests (July/August 1995).

Rick Bass, *The Woodland Caribou*, Audubon (May/June 1995).

R. Farnell, R. Florkiewicz, G. Kuzyk, & K. Egli, *The Status of Rangifer tarandus caribou in Yukon, Canada*, Special Issue No. 10, *Rangifer*, 131-137 (1998).

E. Janet Edmonds, *Population Status, Distribution, and Movements of Woodland Caribou in West Central Alberta*, 66 *Can. J. Zool.* 817-826 (1988).

3. *The Whooping Crane*

The whooping crane, found only in North America, is the tallest bird on the continent. With a wing span of seven feet, it stands five feet tall and derives its name from its shrill, bugle-like, trumpeting call.

Whooping cranes are extremely shy and intolerant of human disturbance. Once very close to extinction, the whooping crane population is slowly increasing, although the total number of whooping cranes is still dangerously low. It has been estimated that approximately 1,300 to 1,400 whooping cranes inhabited North America in 1870. About 90 percent of this population was lost between 1870 and 1900, primarily due to hunting and habitat destruction. By 1942, the migratory population had been reduced to only 16 birds. The last surviving individual of the small, non-migratory population in Louisiana was taken into captivity in 1950. Today, however, thanks to United States conservation efforts over the last few decades, approximately 300 whooping cranes exist, counting both those in the wild and those in captivity.

In the United States, the whooping crane was designated as an endangered species in 1967 (under the law that preceded the Endangered Species Act of 1973). As a result, FWS initiated a whooping crane recovery program, relying on an extensive captive breeding effort. Currently, facilities in Maryland and Wisconsin captively rear whooping cranes for reintroduction into the wild. Flocks have been reintroduced into the wild in Idaho and Florida. Since 1992, 18 whooping cranes have been transferred from the United States to Canada to establish a third captive flock. The U.S. Fish and Wildlife Service's whooping crane recovery program has become a model for other countries seeking to breed and reintroduce other species of threatened cranes.

The whooping crane's breeding range originally extended from central Illinois northwestward, through Iowa, Minnesota, North Dakota, Manitoba, Saskatchewan and Alberta. Increased human settlement, however, has converted much of the whooping crane's habitat to pasture and agricultural lands, forcing the species to retreat northward to its current, suboptimal breeding ground in northern Canada. The breeding range is now restricted to an area of approximately 25 square kilometers within the boundaries of the Wood Buffalo National Park. The bulk of the flock is concentrated on the breeding grounds from early May to early September. From November to early April, the flock winters primarily at the Aransas National Wildlife Refuge in Texas. During the remainder of the year, the flock is spread along a 2,400-mile migration corridor through Texas, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, Saskatchewan, Alberta, and possibly southwestern Manitoba.

The present breeding grounds are too small to enable the whooping crane to recover. Given that increasing human activity and resource development in Canada's north continue at a rapid pace, the species' recovery is in jeopardy. In 1978, COSEWIC assigned the whooping crane endangered status. In addition, the whooping crane is specifically listed on the WHC annex of species of special urgency and importance, which calls for efforts to protect this species as completely as possible. Despite this, Canada has failed to pass an endangered species act which protects the whooping crane and its habitat.

**Key Supporting Documents:**

- M.A. Gollop, COSEWIC, *Status Report on the Whooping Crane: Grus americana* (1978).
- U.S. Fish and Wildlife Service, *Wildlife Species Information: Whooping Crane* (Endangered Species)(1997).
- Whooping Crane: Description, History and Population* (extracted from 61 Fed. Reg. 4394-4401 (Feb. 6, 1996)).
- Information on the Whooping Crane from the Nebraska Game and Parks Commission Website Home Page.
- Peter L. May and J. David Henry, *A Whooping Crane Reintroduction Project on the Canadian Prairies: Identifying Relevant Issues Using Expert Consultation*, 12(7) Endangered Species Update (1995).

4. *Salmon*

Salmon's place in our history, culture, economy and environment make it a true symbol of the Pacific Northwest. From earliest times, aboriginal peoples have relied on salmon for food and ceremonial purposes -- for sustenance of body and spirit. Today, native anadromous Pacific salmonids are at a crossroads; the habitat of these once wide-ranging fishes is severely curtailed, many stocks are extinct, and many remaining stocks face a variety of threats.

The Pacific Salmon Treaty attests to the mutual dependence of Canada and the United States on this shared resource. United States fisherman, particularly in Alaska, have long

depended on chinook, coho and steelhead stocks that spawn in British Columbia. Of the chinook and sockeye caught in southeast Alaska, over 60 percent are of Canadian origin.

Unfortunately, British Columbia is not adequately protecting stream habitat needed for salmon spawning, rearing, and migration to sea. Vital stocks of British Columbia coho, chinook, sockeye, and steelhead have dropped to seriously low levels. A 1996 study by the American Fisheries Society found that over 140 salmon stocks in British Columbia have gone extinct and 624 are at high risk of extinction. A recent report by the B.C. government accepts that these numbers are accurate. Between 1970 and 1988, the number of wild coho returning to spawn declined by 60 percent in Strait of Georgia streams and by 30 percent in Fraser River streams. The genetically unique coho of the Thompson River are "on the brink of extinction," according to a biologist with the Canadian Department of Fisheries and Oceans. The Canadian and British Columbia governments acknowledge the precarious plight of the salmon, but have failed to take adequate measures to protect them.

Canada has been charged with failing to enforce its Fisheries Act with respect the hydropower operations of B.C. Hydro. Hydropower operations often block fish passage and modify in-river habitat in ways that are inhospitable to fish, forming reservoirs of slack water in place of swift flows. Temperatures in these shallow reservoirs can be lethal to salmon, and slow moving currents leave migrating smolts exposed to predators for lengthy periods of time.

The North American Commission on Environmental Cooperation ("NACEC") recently decided to conduct an investigation of Canada's failure to enforce environmental laws to curtail harmful alterations of fish habitat from B.C. Hydro's hydropower operations. The submission that precipitated the NACEC investigation contrasted Canada's failure to require modifications of hydropower operations to protect fish habitat with the United States' adaptation of hydropower operations to incorporate measures to protect fish passage.

Logging operations are another leading cause of habitat degradation. Extensive clearcut logging in British Columbia has devastated critical salmon spawning and rearing habitat. Increased landslides and erosional processes introduce excessive sediment into streams; alteration of drainage and snowmelt patterns changes stream channel shape and flow regimes; and removal of shade-producing riparian canopy increases water temperatures to levels that threaten salmon survival. In April 1997, the provincial government acknowledged significant problems with stream protection under the Forest Practices Code and made ten recommendations to improve logging practices around riparian areas. None of the recommendations has been implemented. Recent audits reveal that in cut-blocks harvested in British Columbia in 1996, 83 percent of all streams were clear-cut right down to the stream banks. Companies routinely felled trees into sensitive riparian habitat and dragged logs through stream beds.

The no-logging buffers legislated in British Columbia are embarrassingly small when compared to those required on streams across the border in the United States. Without

endangered species legislation protecting salmon and their habitat, the WHC's species protections will be undermined and these important species, as well as the Canadian and U.S. fishing industries that depend on them, will continue to decline.

**Key Supporting Documents:**

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Government of Canada, *Rebuilding the Resource: A New Approach to Salmon Habitat* (June 1998).

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Greenpeace, *Broken Promises: The Truth About What's Happening to British Columbia's Forests*.

Sierra Legal Defence Fund, Sierra Club of British Columbia, Silva Forest Foundation, B.C. Environmental Network, and Forest Caucus, *British Columbia: Forestry Report Card* (1997-98).

*Strait of Georgia Coho Salmon Resource Status and Management Planning Process, Interim Report* (March 1991).

5. *The Piping Plover*

The piping plover is a fragile shorebird that uses increasingly threatened habitat throughout its annual migratory cycle. It is a small and stocky bird, resembling a sandpiper. The bird's call is a plaintive "peep-lo" whistle and, like other plovers, it runs in short starts and stops. Piping plovers breed in spring and summer on Atlantic beaches from North Carolina to Newfoundland, along rivers, lakes and wetlands of the U.S. and Canadian Great Plains, and on a few Great Lakes beaches. During the winter, the birds are distributed from North Carolina beaches to Jamaica and across the Gulf Coast to the Laguna Madre of Texas and northern Mexico.

Much of the piping plover's habitat has been disturbed or destroyed by development, dams, and other water control structures. Piping plovers are extremely sensitive to human disturbance, which often causes the parent birds to abandon their nests. As a result, much of the coastal beach habitat traditionally used by piping plovers for nesting has been lost to commercial, residential, and recreational development. Inland nesting habitat along bodies of fresh water has, in many instances, been degraded or destroyed by dams and other water control structures which alter natural water levels. Too much water in the spring floods the plovers' nests. Too little water over a long period of time allows grasses and other vegetation to grow on the prime nesting beaches, making these sites unsuitable for successful nesting.

In 1985, COSEWIC assigned the piping plover endangered status in Canada. In 1986, the United States listed the Great Lakes population of the piping plover as endangered and the Northern Great Plains and Atlantic Coast populations as threatened. In both countries, habitat loss is the main cause of the species' decline. FWS recovery efforts have focused on directing human traffic around fragile nest sites on beaches, erecting fencing around nests to keep out predators, and requiring water level management on large bodies of water. As a result, it appears that the number of birds, although still dangerously low, may be slowly increasing in the United States. A census conducted in 1996 counted 5,913 adult birds throughout the breeding range in the U.S. and Canada, indicating an eight percent overall increase in the piping plover population over the previous census carried out in 1991. Substantial population gains along the U.S. Atlantic coast, where recovery efforts have been intensive, were responsible for most of this increase. Populations in the Canadian Prairie and U.S. Great Plains actually declined by five percent during this period. There were also declines in the Atlantic Provinces in Canada. According to Anne Hecht, FWS Atlantic Piping Plover Recovery Team Leader in Sudbury, Massachusetts, "We think the increases on the Atlantic coast are due to intense efforts to mitigate nest predation and human disturbance and maintain natural habitat formation processes." Pilssner, *Imperiled Shorebird Struggles for Recovery* at 1.

Conservation of the piping plover, however, is an international problem. According to Dr. Jonathan Plissner of the Forest and Rangeland Ecosystem Science Center in Corvallis, Oregon, "[t]hese birds do not recognize political boundaries, and those concerned about the fate of this species realize that success in one country depends upon their status across borders." *Id.* at 2. An estimated 36 percent of the total population resides in Canada during the breeding season.

In Saskatchewan, several water development projects are causing population declines. At Lake Diefenberger, for example, the largest concentration of piping plovers on the continent (276 pairs in 1991) is jeopardized by sudden increases in water levels during the spring breeding season water levels during the spring breeding season due to the operation of a provincially-owned dam. Government studies show that, on average, about 50 percent of the plover nests are flooded each spring due to provincial reservoir management decisions. In two of the past seven years, the dam-induced flooding was so bad that *none* of the nesting plovers on this important breeding Lake was able to reproduce successfully.

In Manitoba, increased recreational use and artificially high water levels on Lakes Winnipeg and Manitoba have contributed to a decrease in the piping plover population. Large dunes at Grand Beach on Lake Winnipeg, which have been important nesting areas in the past, are no longer available to birds due to summer recreational use. Similar patterns have been documented at other sites on Lake Winnipeg. The remnants of a once stable breeding population on Lake Manitoba are expected to disappear within the next few years.

In Ontario, the species has been virtually extirpated by changes in water levels, predators, and recreational activity. Only three individuals were counted in 1996. On Prince Edward Island, human disturbances including off-road-vehicle use are high on many beaches. The census count fell from 110 in 1991 to only 65 in 1996. In Nova Scotia, the piping plover population has dropped sharply since 1975. The population in New Brunswick decreased by over 25 percent between 1991 and 1996.

According to COSEWIC status report, if piping plovers are to survive, a long-term commitment must be made throughout North America to monitor and protect the species. Despite COSEWIC's recommendations and the ongoing population declines and destruction of piping plover habitat in Canada, the Canadian government has failed to pass endangered species legislation to protect the piping plover.

**Key Supporting Documents:**

Susan Haig, COSEWIC, *Status Report of the Piping Plover: Charadrius melodus* (1985).

Jonathan H. Plissner, U.S. Geological Survey, Biological Resources Division, Forest and Rangeland Ecosystem Science Center, *Imperiled Shorebird Struggles for Recovery*.

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U.S. Fish and Wildlife Service, *Piping Plover (charadrius melodus), Atlantic Coast Population, Revised Recovery Plan* (1995)(excerpt).

Stephen P. Flemming, *The 1991 International Piping Plover Census in Canada*, Occasional Paper, Number 82, Canadian Wildlife Service

Susan M. Haig and Jonathan H. Plissner, *Distribution and Abundance of Piping Plovers: Results and Implications of the 1991 International Census*, 95 *The Condor* 145-156 (1992).

United States v. Town of Plymouth, 6 F. Supp. 2d 81 (D. Mass. 1998).

6. *The Marbled Murrelet*

The marbled murrelet is a shy, robin-sized seabird that nests in old-growth and mature coastal forests along the north Pacific coast from the Aleutian Islands and southern Alaska south to central California. The murrelet spends most of its time feeding and resting at sea and comes inland, sometimes as far as 50 miles from the ocean, for nesting purposes only. It does not construct nests, but uses large limbs, natural deformations, and other structures characteristic of old-growth trees as nesting platforms. Murrelets exhibit high site fidelity; that is, the same birds return to the same forest stands to nest year after year. Murrelets have difficulty moving to new areas if their established nesting stands are destroyed.

The marbled murrelet is extremely secretive during its inland flights. Almost 100 years ago, Alaska natives reported that "wonderful, strangely colored birds . . . fly high over mountains

and islands [to] raise their young in hollow trees high on the mountain side, just below the snow line; but nobody has ever reached them.” The murrelet relies on stealth, speed, and the concealment provided by a closed forest canopy to protect its nests from avian predators. For these reasons, it has been extremely difficult for human researchers and observers to locate actual murrelet nests.

The most serious threat to the marbled murrelet is the rapid removal of old-growth nesting habitat. Due to extensive logging of old-growth, the murrelet has already lost 90 to 95 percent of its original onshore nesting and breeding habitat. Clear-cut logging practices, which predominate in British Columbia, and proposed 80-100 year rotation periods remove virtually all potential nesting habitat. The present rate of habitat destruction in British Columbia under the province’s policy of liquidating old-growth forests represents a severe threat to marbled murrelets. A study of murrelets in Clayoquot Sound found that the population there declined by 50 percent between 1982 and 1993.

In 1990, COSEWIC assigned the marbled murrelet threatened status, identifying habitat destruction as the primary cause of decline. In 1992, the FWS added the Washington, Oregon, and California populations of the murrelet to the U.S. list of threatened species, primarily because of the destruction and fragmentation of the species’ nesting habitat from logging. Despite the murrelet’s threatened status, Canada continues to destroy its habitat, particularly through large-scale logging. In fact, British Columbia authorized clearcutting an area in its provincial forest in the Bunster Range containing the largest known concentration of murrelet nests (30 identified nests). Canada’s failure to pass endangered species legislation to protect the murrelet threatens the continued existence of this unique bird and undermines the provisions of the Western Hemisphere Convention.

**Key Supporting Documents:**

Michael S. Rodway, COSEWIC, *Status Report on the Marbled Murrelet: Brachyramphus marmoratus* (1990).

Harry R. Carter, U.S. Fish and Wildlife Service Marbled Murrelet Recovery Team, *The Marbled Murrelet: How Did These Little-Known Seabirds Become a Symbol for Saving Old-Growth Forests?* (1997).

The Seabird Bycatch Project, *Protection of the Marbled Murrelet in the Pacific Northwest: The Political and Legal Controversy* (1997).

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C. John Ralph, George L. Hunt, Jr., Martin G. Raphael, & John F. Piatt, “Ecology and Conservation of the Marbled Murrelet in North American: an Overview” in U.S. Forest Service, Pacific Southwest Research Station, *Ecology and Conservation of the Marbled Murrelet*, General Technical Report PSW-GTR-152 (February 1995).

Alan E. Burger, “Marine Distribution, Abundance, and Habitats of Marbled Murrelets in British Columbia” in U.S. Forest Service, Pacific Southwest Research Station, *Ecology and Conservation of the Marbled Murrelet*, General Technical Report PSW-GTR-152 (February 1995).

## 7. *The Northern Spotted Owl*

The northern spotted owl is a highly territorial, long-lived, monogamous bird that depends on mature and old-growth forests for its survival and returns to the same site each year for nesting. It lives in southwestern British Columbia, western Washington and Oregon, and northwestern California.

The owl's numbers, distribution, and welfare are closely tied to old-growth forests. Indeed, United States forestry agencies have long considered the owl an indicator species for predicting and assessing the health of old-growth forest ecosystems. Logging, clearing land for agriculture, and urban development have diminished the owl's habitat, precipitating a sharp decline in the species' numbers and distribution. Spurred by litigation, the U.S. Fish and Wildlife Service listed the northern spotted owl as threatened in 1990.

In the United States, most old-growth forest has been removed from private lands. Federal agencies manage nearly 90 percent of the remaining owl habitat. Litigation against the federal forest management agencies revealed "a remarkable series of violations of environmental laws," including the U.S. Endangered Species Act. Seattle Audubon Society v. Evans, 771 F. Supp. 1081, 1089 (W.D. Wash.), aff'd, 952 F.2d 297 (9<sup>th</sup> Cir. 1991).

To resolve this litigation, the U.S. Forest Service and Bureau of Land Management reformed their forestry plans and practices. Previously, these agencies had established a network of isolated spotted owl habitat areas, each capable of supporting one to three pairs of owls. Population viability experts, including those comprising a blue ribbon governmental committee, soundly rejected this strategy as "a prescription for the extinction of spotted owls." *A Conservation Strategy for the Northern Spotted Owl* at 39. The Fish and Wildlife Service concurred, characterizing the isolated patches as "clearly not an effective way to guarantee the persistence of a predator that relies upon thousands of acres of the forest environment for its year-round survival" and concluding that "it is inherently very risky to reduce a geographically widespread species to a constellation of habitat islands." David R. Anderson, *et al.* at 55.

The President's Northwest Forest Plan, put in place in 1994, preserves large blocks of habitat capable of supporting multiple pairs of owls, with habitat blocks spaced sufficiently close together to facilitate owl dispersal between blocks. In these reserves, logging is limited to thinning and other practices designed to promote old-growth forest characteristics. Clearcut logging and other practices involving the wholesale removal of old-growth forests are prohibited. State and private forestry practices have also been modified to preserve spotted owl habitat. Even with all of these protections in place, some scientists believe that appreciable risks to the U.S. owl population persist under the Plan.

In 1986, COSEWIC designated the northern spotted owl as endangered in British Columbia and identified logging of old growth forest habitat as the primary threat to the species'

survival. The ill-fated recovery efforts for the spotted owl vividly illustrate the problems with Canada's lack of endangered species legislation. After the spotted owl was listed by COSEWIC, a federal-provincial "recovery team" was established, and efforts were made to develop a "recovery plan" (these plans have no legal force, but are supposed to be developed under an informal recovery process called "RENEW"). While efforts were being made to develop a recovery plan, the spotted owl's critical habitat areas – including actual nesting trees – continued to be logged. As a result, spotted owl populations in British Columbia have plummeted; fewer than 100 pairs are left. Today, 13 years after the spotted owl was listed, there still has been no agreement on a recovery plan, mostly due to the unwillingness of the province and logging companies to provide the required habitat protection (and the lack of federal legal authority to require such protection). In 1996, instead of a recovery plan, the government of British Columbia issued a Spotted Owl "Management" Plan. This Plan allows for extensive logging in identified critical owl habitat areas and precludes the protection of any additional habitat areas, which are necessary to allow for the species to recover to a viable population size. The RENEW recovery team predicts that this management plan will result in the continued decline of the spotted owl. Similarly, a recent assessment of that Plan by two independent scientists at the University of California concluded that it provides much less protection to the owl than the Northwest Forest Plan. Indeed, they concluded that under the British Columbia management plan "there is an appreciable chance of regional extinction of the owl." Hodum *et al.* at 2.

Despite the owl's precarious status, logging on British Columbia provincial lands within the owl's range continues apace, with only the most meager protections for known nesting sites. The forestry practices in British Columbia are a throw-back to those former U.S. practices dubbed a "prescription for the extinction of spotted owls."

Canada's failure to enact endangered species legislation imperils the continued viability of this species that the U.S. has devoted such extensive resources toward saving, and undermines the Western Hemisphere Convention.

**Key Supporting Documents:**

*Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9<sup>th</sup> Cir. 1991).

*A Conservation Strategy for the Northern Spotted Owl*, Report of the Interagency Scientific Committee on the Conservation of the Northern Spotted Owl (April 1990) (excerpt).

David R. Anderson, *et al.*, U.S. Fish and Wildlife Service, *1990 Status Review, Northern Spotted Owl* (April 30, 1990).

*Record of Decision for Amendments to Forest Service and BLM Planning Documents Within the Range of the Northern Spotted Owl and Accompanying Standards and Guidelines* (April 1994) (excerpt).

British Columbia, *Spotted Owl Management Plan, Summary Report* (April 1997).

Peter Hodum and Susan Harrison, University of California, *Ecological Assessment of the British Columbia Spotted Owl Management Plan*.

#### IV. OTHER TRANSBOUNDARY ENDANGERED SPECIES

The above-noted species are just seven examples of transboundary endangered species. In total, the Canadian Wildlife Service acknowledges that over 80 percent of the 285 listed 'species at risk' in Canada migrate across or have a range extending across the Canada-U.S. border. Many of these transboundary species are listed under the U.S. ESA, including species such as the black-footed ferret, swift fox, peregrine falcon, kirtland's warbler, leatherback turtle, sea otter (which is listed for special protection under the Western Hemisphere Convention) and many other species of birds, whales, fish and plants.

These species and their habitat receive legal protection under the U.S. ESA, yet they lose that legal protection when they wander, swim or fly into Canada. Canada's lack of endangered species legislation undermines U.S. efforts to protect and recover these shared species (including legal protection and tens of million dollars of spending), and "diminishes the effectiveness" of the Western Hemisphere Convention. Moreover, the last Canadian endangered species bill, even if passed, would have done almost nothing to address this problem, primarily because it failed to provide habitat protection for transboundary endangered species.

#### V. CONCLUSION

These species overviews only touch the surface. Nonetheless, they illustrate the many ways in which Canada's failure to enact an endangered species act has harmed and continues to harm threatened and endangered species and their habitat, including many endangered species that are shared with the U.S. The ensuing significant habitat modification impairs breeding, feeding, and sheltering and thereby constitutes a "taking" within the meaning of the Pelly Amendment. Moreover, by failing to adopt legislation protecting species and their habitat over extensive enough areas to prevent extinction, Canada has substantially diminished the effectiveness of the Western Hemisphere Convention.

The statutory criteria for a certification under the Pelly Amendment have been met. Accordingly, we respectfully request that you urge your governmental counterparts in Canada to abide by Canada's obligations under the Western Hemisphere Convention and pass legislation that protects all threatened and endangered species and their habitat. Moreover, because Canada's past efforts to adopt endangered species legislation have fallen far short of what is needed, we ask that you open a docket, seek comment, and proceed administratively with a certification of Canada under the Pelly Amendment.

Respectfully submitted,

March 22, 1999  
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