

August 31, 2010

Our File: P10-1031

The Honourable Jim Prentice
Minister of Environment
10 Wellington Street
Gatineau, Quebec K1A 0H3
Via Fax (613) 947-9475

Dear Minister Prentice:

Re: *Species at Risk Act*, s. 80(2) request for an emergency order to protect Woodland Caribou – Boreal population in northeastern Alberta

By way of correspondence dated July 15, 2010, Woodward & Co., on behalf of several First Nations Petitioners requested that you take immediate steps to protect the full ranges of the remaining boreal caribou in northeastern Alberta (“boreal caribou”) by preventing further industrial activity anywhere within those ranges. A further letter dated August 17, 2010 was provided to you by Ecojustice on behalf of several environmental groups. They requested the emergency protection of the following herds:

- Red Earth herd
- West Side Athabasca River herd
- Richardson herd
- East Side Athabasca River herd
- Cold Lake Air Weapons Range herd
- Nipisi herd
- Slave Lake herd.

As a public interest group we respectfully add to this our request that you take immediate steps pursuant to subsection 80(2) of the *Species at Risk Act*¹ to protect the full ranges of these same herds of caribou.

Federal Delays in Species Protection

Boreal populations of woodland caribou were listed as threatened under the *Species at Risk Act* when it came into force in 2002. Under the *Species at Risk Act*, the federal Minister of the Environment had a clear responsibility to prepare a recovery strategy for boreal caribou no later than June 2007. To date, no national recovery strategy for boreal caribou has been completed. There is a commitment to provide a proposed national recovery strategy by summer 2011. However, the rapid pace of industrial development and disturbance in northeastern Alberta, combined with the failure to produce and implement a recovery strategy in a timely manner,

¹ *Species at Risk Act*, S.C. 2002, c. 29, s. 80(2).

results in an imminent threat to the survival and recovery of the boreal caribou herds in northeastern Alberta.

The ELC supports meaningful consultation with the public and the meeting of consultation obligations to First Nations, including accommodation of First Nation interests. However in this instance the ELC asserts that aboriginal consultation is not a precondition for the protection of critical habitat.

- The protection of critical habitat for boreal caribou in northeastern Alberta does not *prima facie* infringe any asserted First Nation interests.
- The protection of critical habitat is not an irreversible decision, because the critical habitat that is protected can be enhanced as a result of new information that becomes available as a result of aboriginal consultation. Section 45 of *SARA* permits amendments to recovery strategies by the Minister at any time. Likewise, an emergency order can be repealed once a recovery strategy is in place that is adequate to protect the species (s.82).

In contrast, ongoing development approval decisions and policies that are destructive of boreal caribou habitat are irreversible and engage clear consultation and accommodation obligations.² Aboriginal cultural and harvesting rights are likely to be irreversibly prejudiced by delay in habitat identification. *SARA* itself recognizes this and addresses the best approach for consultation by providing for extensive consultation at various other stages, such as species listing that may adversely effect hunting rights by imposing hunting restrictions.

Further habitat disruption represents an imminent threat to the survival of the species

Four of the seven herds in northeastern Alberta are documented to be in decline. Several of the herds in northeastern Alberta are declining, some rapidly, and for the remaining herds, the populations may or may not persist.

The federal government recently undertook an evaluation of caribou critical habitat issues in the Boreal Plains Ecozone encompassing Northeastern Alberta.³ These evaluations concluded that landscape disturbance and the ensuing changes in predator-prey interactions adversely effects boreal caribou habitat use.⁴ Caribou in northeastern Alberta reduced their use of suitable habitat in close proximity to seismic lines, roads and well sites; caribou avoided roads and well sites.⁵ Caribou also prefer mature forest and demonstrate avoidance of cut blocks.⁶ Because of this avoidance, roads, cut blocks and industrial development are destructive of caribou habitat.

² *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518, *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 (CanLII); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 (CanLII) These cases all consider issues related to habitat disturbance and found that there is a duty to consult in the case of infringements of the right to hunt caribou.

³ Environment Canada, *Scientific Review for the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada*. (Ottawa, 2008)

⁴ *ibid.* at 96-99

⁵ *ibid.*

⁶ *ibid.*

Habitat conditions over the entire range of a population will impact the viability of the species.⁷ Boreal caribou require large, contiguous tracts of habitat to maintain low population densities across their range.⁸

The boreal caribou ranges in northeastern Alberta are already highly impacted by industrial disturbance such as forestry, seismic activity, conventional oil and gas development and oil sands development. The amount of industrial disturbance continues to increase. It is not disputed that none of the ranges for the northeastern Alberta herds are able to absorb additional disturbance.

Therefore, increased disturbance in remaining boreal caribou habitat constitutes a threat to this population.⁹ There are a large number of forestry authorizations, petroleum and natural gas agreements, mineral tenures and other short-term development prospects in the caribou ranges of northeastern Alberta.¹⁰ To date, neither land use planning processes or cumulative effects management approaches in the region have addressed the protection of caribou habitat.

Natural resource development activities, in particular oil and gas exploration and production, and timber harvesting, are common across most of the woodland caribou's range in Alberta.¹¹ The other petitioners have provided evidence of a range of proposed future developments in caribou habitat. Some of these proposals are summarized in the Athabasca Landscape Team report.¹² The Athabasca Landscape team has determined that "Boreal caribou will not persist for more than two to four decades without immediate and aggressive management intervention."¹³

Failure of the provincial government to protect boreal Caribou in Northeastern Alberta

The Government of Alberta has not restricted industrial and other development activity within the existing ranges of at risk herds, nor has it created the wildland areas recommended by the Athabasca Landscape Team to protect caribou ranges.

Under the *Alberta Wildlife Act* there are no provisions for the protection of caribou habitat. Under the *Wildlife Act* the Alberta government may create recovery plans identifying this habitat.¹⁴

⁷ *ibid.* at 110.

⁸ Alberta Woodland Caribou Recovery Team, *Alberta Woodland Caribou Recovery Plan* (July 2005, Edmonton) at 7

⁹ *Ibid.* at 7

¹⁰ see Government of Alberta, *Profile of the Lower Athabasca Region*, (July 2009, Edmonton) at 11-13, 27-44.

¹¹ Alberta Woodland Caribou Recovery Plan, *infra*, note 15 at 9 also see *Athabasca Landscape Management Options*, *infra* note 12 at 23.

¹² Athabasca Landscape Management Team, *Athabasca Caribou Landscape Management Options Report* <http://www.albertacariboucommittee.ca/PDF/Athabasca-Caribou.pdf> at 20.

¹³ *ibid.* at i (emphasis added).

¹⁴ R.S.A. 2000, c.W-10, s.6

The *Alberta Woodland Caribou Recovery Plan* (2004-2014) recommended:

A moratorium on further mineral and timber resource allocation (sales) should be put in place until a range plan is completed, evaluated, and implemented. It is anticipated that this process will take a maximum of one year from the date of range team formation.¹⁵

The Alberta Government explicitly rejected this recommendation.¹⁶ The Alberta Government is also engaged in developing a land use plan for this region, however the terms of reference for the development of this plan do not allow for a reduced development scenario in caribou habitat.

Lower Athabasca Regional Land Use Plan

The advice of the Lower Athabasca Regional Advisory Council (RAC) on the Lower Athabasca Land Use Plan is to “recover” species under the *Alberta Wildlife Act*,¹⁷ however the land use designations that were recommended by the RAC would designate portions of caribou ranges as mixed-use resource areas. The description of mixed-use resource areas is to prioritize the harvesting of forests and bitumen extraction.¹⁸ No mention is made of protecting listed species habitat in this area.

Proposals for “conservation areas” cover some portion of caribou ranges. The priorities in these areas are biodiversity protection. However, it is also stated that existing resource tenures will be continued and that recreational access will be permitted into these areas.¹⁹ The Minister has suggested that these will *all* still allow access disturbance and in some cases further development.²⁰

Accordingly, the current proposal for consideration by the Alberta Government is to further degrade caribou habitat within all herd ranges. Since these herds are declining, some rapidly, from existing disturbance within their ranges, this approach is not capable of resulting in long-term species persistence in those ranges. These plans and approaches of the Alberta government constitute an imminent threat to the survival of the boreal caribou.

¹⁵ Alberta Woodland Caribou Recovery Team, *Alberta Woodland Caribou Recovery Plan* (July 2005, Edmonton)

¹⁶ *ibid*, cover page “Note from Alberta Government”

¹⁷ Lower Athabasca Regional Advisory Council, *Advice to Government Regarding a Vision for the Lower Athabasca Region*, (August 2020) at 19

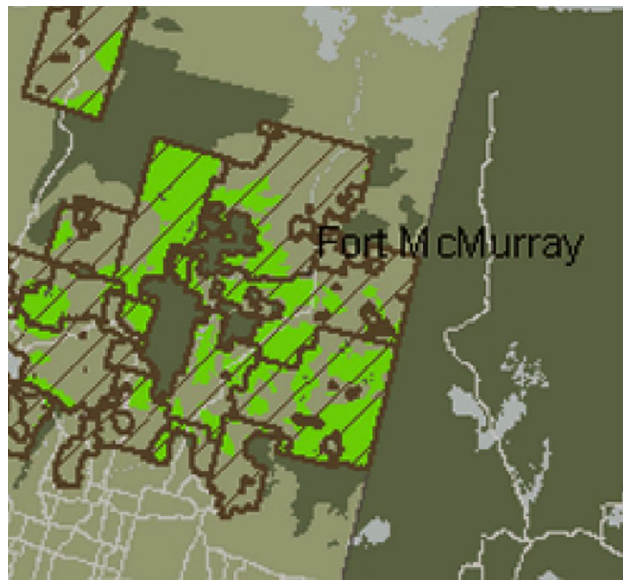
¹⁸ *ibid.* at 28

¹⁹ *ibid* at 27

²⁰ CBC radio interview, Edmonton AM, between 6:00 a.m. and 7:30 a.m. August 27, 2010.

Canadian Boreal Forest Agreement

The Canadian Boreal Forest Agreement (CBFA)²¹ is a voluntary agreement between FPAC members and a number of environmental groups. It provides for temporary harvesting restrictions to March 2012 of some forest tenures in boreal caribou ranges. FPAC members hold tenures partially overlapping the ranges of the West side of Athabasca, Red Earth, East side of Athabasca River, Slave Lake and Cold Lake herds. However the agreement does not cover the entire ranges of these herds. There is no agreement restricting timber harvesting covering parts of the ranges of the West side of Athabasca, East Side of Athabasca, Red Earth, Richardson and Cold Lake herds.²² The agreement allows up to 684,461 ha of harvesting and road construction in the boreal caribou range to March 2012 but does not specify portions of this area in northeastern Alberta.



Map of restricted (light green) and unrestricted (dark green) portions of caribou ranges (CBFA)

Accordingly, even if the CBFA is implemented or extended, the agreement does not protect the entire caribou ranges in this area from further disturbance. Moreover, the expiration of this agreement in March 2012 is an imminent threat to the survival of caribou within these ranges.²³

Notably, this agreement also includes provisions that recognize that final decisions on recovery of caribou rested with government and that there was a need to accelerate the identification of critical habitat.²⁴

²¹ Canadian Boreal Forest Agreement (May 18, 2010) <http://www.canadianborealforestagreement.com/media-kit/Boreal-Agreement-Full.pdf>

²² A full listing of forestry tenures can be found in the Athabasca Landscape Management Team, *supra* note 12 at 16.

²³ CBFA at 27

²⁴ CBFA at 24

Request

Therefore, the ELC requests that you immediately recommend an interim emergency protection of all portions of all current ranges of boreal caribou herds in northeastern Alberta under subsection 80(2) of the *Species at Risk Act*. This emergency protection should include the necessary prohibitions on further development in the current ranges of boreal caribou. These include forestry, roads, seismic lines, wellsite development, and other disturbances that are identified in existing recovery documents and COSEWIC assessments.

Yours truly,

[original signed]

Laura Bowman
Staff Counsel