



Court File No. T-1926-19

FEDERAL COURT

TIMBERWOLF WILDERNESS SOCIETY

Applicant

AND:

MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD

Respondent

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*, RSC
1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at **Calgary, Alberta**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a

solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

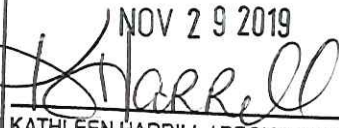
IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

NOV 29 2019

Date: _____

Issued by: _____

ORIGINAL SIGNED BY
KATHLEEN HARRILL
A 301 ORIGINAL

I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court on / and dated
NOV 29 2019

KATHLEEN HARRILL / REGISTRY OFFICER

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APPLICATION

This is an application for judicial review in respect of the failure of the Minister of Fisheries, Oceans and the Canadian Coast Guard (**Minister**) to finalize an action plan under section 50 of the *Species at Risk Act*, SC 2002, c 29 (*SARA*) for the Alberta population of Westslope Cutthroat Trout on provincial lands in accordance with sections 38 and 49 of *SARA*, and with respect to the Ministers ongoing practice of delaying the finalization of recovery strategies and action plans in violation of sections 43 and 50 of *SARA*.

The Applicant makes this application for:

1. An order in the nature of mandamus compelling the Minister to include on the *SARA* public registry a final action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands in accordance with section 50 of *SARA*, within 15 days of judgment in this matter.
2. An order that this Honourable Court retains jurisdiction over the matter of the Minister's obligation to post a final action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands that complies with the requirements of section 49 of *SARA*.
3. An order in the nature of mandamus compelling the Minister to include final versions on the *SARA* public registry of all recovery strategies and action plans within the Ministers responsibility for which the 90 day consultation and amendment period has ended within 30 days of judgment in this matter.

4. A declaration that:
 - a. A competent Minister under the *Species at Risk Act* has no discretion to extend the 90-day period to receive comments and finalize a recovery strategy or action plan described in sections 43 and 50 of the *Species at Risk Act*; and
 - b. The Minister of Fisheries, Oceans and the Canadian Coast Guard violated the *Species at Risk Act* by delaying the finalization of recovery strategies and action plans.
5. Such further and other relief as this Honourable Court may deem just.

The grounds for the application are:

The Parties

6. The Applicant, Timberwolf Wilderness Society, is a provincially registered non-profit society dedicated to protecting Alberta's environment, wilderness areas, and species at risk. The Applicant brings this application as a public interest litigant.
7. The Applicant has a genuine interest in the administration of *SARA* and the Minister's compliance with their duties in a manner that serves the remedial purposes of *SARA*. The Applicant is concerned with the lawful and effective application of *SARA* to restore and protect species at risk.
8. The Applicant has extensive knowledge on the conservation status and habitat requirements of the Alberta population of Westslope Cutthroat Trout.

9. The Respondent is the competent Minister for administering *SARA* with respect to aquatic species, other than individuals of aquatic species in or on federal lands administered by the Parks Canada Agency.
10. The Respondent is the competent Minister for administering *SARA* with respect to the Alberta population of Westslope Cutthroat Trout on provincial lands.

The Alberta population of Westslope Cutthroat Trout

11. In May 2005 the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) classified the Alberta population of Westslope Cutthroat Trout as a threatened species. The COSEWIC assessment was included in the public registry on August 30, 2007.
12. On March 27, 2013, the Governor in Council, on the recommendation of the Minister, listed the Alberta population of Westslope Cutthroat Trout as a threatened species under *SARA*.
13. On March 28, 2014 the Minister included a final Recovery Strategy for the Alberta population of Westslope Cutthroat Trout (**2014 Recovery Strategy**) on the public registry.
14. The 2014 Recovery Strategy recognizes:
 - a. the objective of identifying opportunities to help recover pure and near-pure populations of Westslope Cutthroat Trout, partly by restoring habitat and eliminating or suppressing populations of non-native fish that are having negative impacts on Westslope Cutthroat Trout;

- b. that improperly placed and obstructed culverts that block Westslope Cutthroat Trout access to upstream networks are very common, and that if Westslope Cutthroat Trout cannot move past culverts to complete their life-history the amount of habitat lost is potentially very large;
- c. that roads and forestry operations have multiple deleterious effects on critical habitat, and are a major threat to the Westslope Cutthroat Trout that could be reduced or eliminated if appropriate regulatory reviews and management actions are exercised;
- d. that severely fragmented habitat and small, isolated populations place each remnant population of Westslope Cutthroat Trout at high risk of extinction from genetic factors and random catastrophes; and
- e. that the critical habitat of the Westslope Cutthroat Trout was only partially identified in the Recovery Strategy, and that the areas identified as critical habitat will be insufficient to achieve the population and distribution objectives for the Westslope Cutthroat Trout.

15. On December 2, 2015, the Minister published in the Canada Gazette a Critical Habitat Order made under section 58 of *SARA* for the Alberta population of Westslope Cutthroat Trout on provincial lands.

16. On October 24, 2017, the Minister included an updated COSEWIC assessment of the Westslope Cutthroat Trout on the public registry which states:

- a. the Alberta population of Westslope Cutthroat Trout has been extirpated from large portions of the watershed that was their habitat, and that hybridization is widespread, with the number of streams

expected to have pure strains of Westslope Cutthroat Trout dropping from 61 streams in 2007 to 51 streams in 2014;

- b. conditions for the Westslope Cutthroat Trout continue to deteriorate due to ongoing development;
- c. most habitat patches are too small to support a viable population in the long term;
- d. there has been an observed decline in the number of subpopulations, area of occupancy, abundance, and occurrence of the Westslope Cutthroat Trout.

17. A proposed combined Recovery Strategy and Action Plan for the Alberta Populations of Westslope Cutthroat Trout was included on the public registry on May 14, 2019. It has not been finalized.

The Minister's legal obligation to issue a final action plan

18. Section 50(1) of *SARA* requires the Minister to include a proposed action plan in the public registry. Section 50(2) requires the Minister to hold a 60 day comment period for any person to file written comments. Section 50(3) requires the Minister to make any changes to the proposed action plan that he or she considers appropriate and finalize the action plan within 30 days of the end of the comment period.

19. Section 38 of *SARA* requires the Minister to consider the precautionary principle when preparing a recovery strategy or action plan, as follows: "If there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty."

20. Section 49 of *SARA* states that an action plan must include the following:

- a. an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;
- b. a statement of the measures that are proposed to be taken to protect the species' critical habitat, including the entering into of agreements under section 11;
- c. an identification of any portions of the species' critical habitat that have not been protected;
- d. a statement of the measures that are to be taken to implement the recovery strategy, including those that address the threats to the species and those necessary to achieve the population and distribution objectives, as well as an indication as to when these measures are to take place;
- e. the methods to be used to monitor the recovery of the species and its long-term viability;
- f. an evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation; and
- g. any other matters that are prescribed by the regulations.

21. The Minister included a proposed recovery strategy-action plan for the Alberta population of Westslope Cutthroat Trout on the public registry on May 14, 2019.

The Minister delayed the finalization of the recovery strategy-action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands

22. The Minister has failed to include on the public registry a final action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands, and the 30 day period for the Minister to make changes and finalize the plan ended on August 13, 2019.
23. The proposed draft recovery strategy-action plan for the Alberta population of Westslope Cutthroat Trout identifies:
 - a. additional critical habitat, including riparian habitat, for the Alberta population of Westslope Cutthroat Trout on provincial lands; and
 - b. measures necessary for preserving the remaining Alberta population of Westslope Cutthroat Trout on provincial lands.
24. The Minister's decision to delay the finalization of the recovery strategy-action plan for the Alberta population of Westslope Cutthroat Trout:
 - a. deprives the Westslope Cutthroat Trout of legal protection for the new critical habitat necessary for their survival or recovery is identified in the proposed recovery strategy-action plan for the Alberta population of Westslope Cutthroat Trout;
 - b. slows the implementation of the proposed recovery actions necessary to recover the Westslope Cutthroat Trout and prevent further loss of genetic diversity; and
 - c. violates sections 43 and 50 of *SARA*.

The Minister's Practice of delaying the finalization of *SARA* recovery documents

25. The Minister has a demonstrated practice of delaying the finalization of recovery strategies and action plans.

26. Among the *SARA* documents that have had their finalization delayed by the Minister are:
 - a. The Action plan for the Alberta Population of Westslope Cutthroat Trout;

 - b. The Recovery Strategy for the Speckled Dace;

 - c. The Action Plan for the Speckled Dace;

 - d. The 2019 Recovery Strategy for the Nooksack Dace;

 - e. The Recovery Strategy for the Misty Lake Sticklebacks;

 - f. The Action Plan for the Misty Lake Sticklebacks;

 - g. The 2018 Action Plan for the Paxton Lake and Vananda Creek Stickleback Species Pairs;

 - h. The 2019 Recovery Strategy for Paxton Lake, Enos Lake, and Vananda Creek Stickleback Species Pairs;

27. The Minister's decision to delay the finalization of *SARA* recovery strategies and action plans:
 - a. deprives species at risk of the protection and benefits given to them by *SARA*;

- b. slows the implementation of recovery actions necessary to prevent further loss of genetic diversity;
- c. violates the precautionary principle; and
- d. violates sections 43 and 50 of *SARA*.

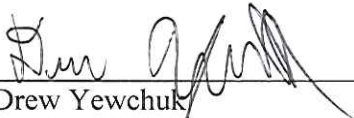
General Grounds for the Application

28. The Applicant relies on sections 18 and 18.1 of the *Federal Courts Act*, the *Federal Courts Rules*, *SARA*, and such further grounds as counsel may identify and this Honourable Court may consider.

This Application will be supported by the following material:

- 1. The Affidavit of David W. Mayhood, to be served.
- 2. Material in the possession of the Minister and the Department of Fisheries and Oceans Canada.
- 3. Material included on the *SARA* public registry.
- 4. Such further and other materials as counsel may advise and the court may allow.

Date: November 29, 2019


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