

Court File No. \_\_\_\_\_

**FEDERAL COURT**

BETWEEN:

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.

Date: \_\_\_\_\_

Issued by: \_\_\_\_\_

Address of local office:

Federal Court of Canada  
3<sup>rd</sup> Floor, 635 – 8<sup>th</sup> Avenue SW  
Calgary, Alberta  
T2P 3M3

TO:

MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD  
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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 prepare an action plan under sections 47 and 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**.

### **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 proposed action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands in accordance with sections 38 and 49 of **SARA**, within 45 days of the Court's judgment in this matter.
2. An order that each party shall bear its own costs in this application, pursuant to Rule 400 of the *Federal Courts Rules* and recognizing the public interest in having these proceedings litigated.
3. Such further and other relief as this Honourable Court may deem just.

### **The grounds for the application are:**

#### ***The Parties***

4. 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.

5. The Applicant has a genuine interest in the administration of *SARA* and the Minister's compliance with his 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 in Alberta.
6. The Applicant has extensive knowledge on the conservation status and habitat requirements of the Alberta population of Westslope Cutthroat Trout.
7. The Respondent is the competent Minister for administering *SARA* in relation to the Alberta population of Westslope Cutthroat Trout on provincial lands.

***The Alberta population of Westslope Cutthroat Trout***

8. 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.
9. In December 2007 the Minister issued a response statement under section 25(3) of *SARA* detailing how the Minister intended to respond to the COSEWIC assessment.
10. 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*.
11. On March 28, 2014 the Minister included a final Recovery Strategy for the Alberta population of Westslope Cutthroat Trout (**Recovery Strategy**) on the public registry.

12. The 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.
13. 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.

14. No proposed or final action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands has been included on the public registry.
15. On October 24, 2017, the Minister included an updated COSEWIC assessment of the Westslope Cutthroat Trout on the public registry which stated:
  - 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.

***The Minister's legal obligation to issue an action plan***

16. Section 47 of *SARA* requires the Minister to prepare one or more action plans for the Alberta population of Westslope Cutthroat Trout based on the Recovery Strategy.
17. Section 38 of *SARA* requires the Minister to consider the precautionary principle when preparing an 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.”

18. Section 41(1)(g) of *SARA* requires a recovery strategy to contain a statement of when one or more action plans in relation to the recovery strategy will be completed.
19. The Recovery Strategy states that an action plan for the Alberta population of Westslope Cutthroat Trout will be completed by March 31, 2015.
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. Section 50(1) of *SARA* requires the Minister to include a proposed action plan on the public registry. If an action plan is not finalized in the time set out in the Recovery Strategy, section 50(4) of *SARA* requires the Minister to include in the public registry a summary of what has been prepared with respect to the action plan.

22. At the request of the Applicant, on May 31, 2017 the Minister included on the public registry a summary statement of what has been prepared in relation to an action plan for the Alberta population of Westslope Cutthroat Trout as required by section 50(4) of *SARA*.

23. The Minister's summary statement indicated that delaying the completion of the action plan for the Alberta population of Westslope Cutthroat Trout was necessary in order to improve the quality and thoroughness of the action plan and to incorporate the most thorough and up-to-date genetic information on the Westslope Cutthroat Trout.

***The Minister has failed to prepare an action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands***

24. The Minister has failed to include a proposed action plan for the Alberta population of Westslope Cutthroat Trout on provincial lands on the public registry, and is more than three years beyond the deadline of March 31, 2015 for preparing one or more final action plans for the species, as set out in the Recovery Strategy.



25. The Applicant has requested the Minister prepare an action plan for the Alberta population of Westslope Cutthroat Trout:
- a. on August 2, 2016, the Applicant sent a written request to the Minister to issue an action plan;
  - b. the Applicant has contacted the Minister several times to update the Minister on the increasingly urgent need for an action plan; and
  - c. the Minister has to date replied twice, stating that development of an action plan was underway and outlining the content of the expected action plan.
26. Sufficient information is available to the Minister to identify:
- a. several sub-populations of Westslope Cutthroat Trout on provincial lands that face a short term threat of irreversible damage;
  - b. unprotected critical habitat for the Alberta population of Westslope Cutthroat Trout on provincial lands; and
  - c. particular measures necessary for preserving the remaining Alberta population of Westslope Cutthroat Trout on provincial lands.
27. The Minister's failure to prepare an action plan for the Alberta population of Westslope Cutthroat Trout:
- a. deprives the Westslope Cutthroat Trout of legal protection for habitat necessary for their survival or recovery that was not identified as critical habitat in the recovery strategy;
  - b. slows the recovery actions necessary to recover the Westslope Cutthroat Trout and prevent further loss of genetic diversity;

- c. allows the threats to the survival and recovery of the Westslope Cutthroat Trout identified in the recovery strategy to continue unaddressed and unmonitored;
- d. defeats the public input and transparency objectives of *SARA* that are intended to allow for public consideration of the actions that will be taken to address the threats identified in the recovery strategy;
- e. violates the precautionary principle; and
- f. frustrates the purpose and scheme 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: February 11, 2019

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