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Canada and Alberta Agree to More Pie-In-The-Sky on Woodland Caribou

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Agreement Commented On: [Agreement for the conservation and recovery of the Woodland Caribou in Alberta](#) entered into by Canada and Alberta on October 19, 2020 (the “Canada-Alberta Agreement on Woodland Caribou”)

Decisions Commented On: Canada Energy Regulator Report – Nova Gas Transmission [GH-003-2018](#) (February 2020) and Order-in-Council PC [2020-811](#) (19 October 2020)

On October 23, Alberta and Canada [announced](#) they had finalized an agreement under section 11 of the federal *Species at Risk Act*, [SC 2002, c 29](#) (SARA) concerning the threatened woodland caribou in Alberta. As I predicted [here](#) several years ago, this agreement is the federal government’s response to Alberta’s failure to implement recovery measures and habitat protection for caribou in accordance with the SARA [recovery strategy](#), which clearly documents the Alberta populations as the most at-risk of all the woodland caribou remaining in Canada. This comment examines the actual significance of this agreement for the protection of remaining caribou habitat in Alberta. The short answer is that the caribou would be wise to hold off on celebrating this announcement. This section 11 agreement is unlikely to amount to much, if anything, for them in terms of actual habitat protection on the ground. No one should be fooled by the applause from [industry](#) or the self-congratulatory remarks made by our politicians: this agreement is yet another shameful exercise by those who merely want to give the appearance of effective public policy on reversing the decline of woodland caribou populations in Canada. It will do nothing to change the steadfast reliance by regulators on ‘manage and mitigate’ measures – as demonstrated most recently by the Canada Energy Regulator in its Nova Gas Transmission Report [GH-003-2018](#) - that have proven to be overwhelmingly ineffective.

The Ongoing Demise of Woodland Caribou in Alberta

Often described as an iconic Canadian species, caribou live in most provinces and territories. Woodland caribou are a subspecies of caribou, and the woodland subspecies is further categorized into populations based on geographic location including the boreal woodland and the southern mountain woodland. The boreal population has the widest geographic range in Canada, living in the boreal forest from the Northwest Territories to Labrador. With the exception of a few southern mountain herds located along the western border of Alberta between Jasper and Grand Prairie, woodland caribou in Alberta are part of the boreal caribou population. The southern mountain woodland caribou reside primarily in British Columbia. Both the southern mountain and boreal woodland caribou are listed as a threatened species under SARA, and they are considered a priority species in the federal [Pan-Canadian species at risk policy](#).

The decline of wildlife populations in North America has been studied for more than a century, and, unsurprisingly, this decline largely corresponds with the arrival of the industrial age to the landscape. Early wildlife preservation policy at the beginning of the twentieth century was a response to declining populations of buffalo, antelope, caribou and migratory birds, decimated by the arrival of the railroad and the guns that travelled on it. An excellent survey of early wildlife policy in Canada is provided in Janet Foster's [*Working for Wildlife: The Beginning of Preservation in Canada*](#) (University of Toronto Press, 1978). Wildlife losses back then were more the result of direct killing than habitat destruction, and so the policy solution was the establishment of wildlife sanctuaries and restrictions on hunting.

Nowadays the primary problem is habitat loss and other indirect impacts of human activity on a species (e.g. climate change). The ongoing decline of woodland caribou in Alberta is case-in-point. The Alberta Wilderness Association website provides an easy-to-read [overview](#) of the population decline for woodland caribou, and the Association maintains a [caribou archive](#) of policy decisions made in Alberta on caribou (and in British Columbia more recently for southern mountain caribou). Dr. Mark Hebblewhite (a Professor of Ungulate Habitat Ecology with the University of Montana) explains the connection between energy development, forestry operations, and the destruction of woodland caribou habitat in Alberta and British Columbia in "[Billion dollar boreal woodland caribou and the biodiversity impacts of the global oil and gas industry](#)" (2017) 206 *Biological Conservation* 102.

The abundance of research has established a wealth of knowledge on the demise of the caribou. I previously summarized this in [Alberta Releases Draft Woodland Caribou Range Plan: Pie in the Sky](#). We know habitat loss is the most significant factor in the decline of the caribou. We know woodland caribou habitat is old-growth forest. We know industrial development is clearing and cutting through old-growth forest at a much faster rate than old-growth renewal. We know the decline of woodland caribou populations is the result of disappearing old-growth forest, linear disturbances (e.g. roads or pipelines) associated with industrial development, and the resulting changes to predator-prey dynamics in caribou ranges. Linear disturbances and clearcuts attract wolves (hunting prey) into regions with caribou, and thus expose the caribou to increased predation by wolves. Accordingly, it is disappointing to still observe passages like the following set out in the Introduction to the 2018 [imminent threat assessment](#) for southern mountain caribou completed by Environment and Climate Change Canada:

There is uncertainty about the precise scope and nature of ongoing and upcoming industrial, commercial, and recreational activities; the specific impact that the various industrial, commercial, and recreational activities could have on critical habitat and on caribou, predator, and alternate prey populations; and the nature and efficacy of possible mitigation strategies.

How precise do we need to be on the causal relation between industrial activity and the destruction of caribou habitat? The overwhelming majority of existing and available research on the decline of caribou could not be more explicit and unequivocal on what is causing the loss of populations and what is needed to halt those losses. This is not unknown territory.

The absence of meaningful steps to address the decline of woodland caribou has to be considered one of the greatest failures of modern environmental policy in Canada. When there was still time to protect a meaningful amount of caribou habitat from anthropogenic threats, politicians and wildlife policy bureaucrats ignored or dismissed the precautionary advice of their own biologists (see [here](#) for a short discussion of this in Alberta). Now it is too late for prevention, and we have moved on to the need for emergency measures. Yet, the provinces (Alberta and British Columbia for sure) continue to dither on legal protection for woodland caribou. The primary policy tool continues to be killing wolves; a policy which plays nicely into the human fear of wolves (required reading on this has to include Farley Mowat's [Never Cry Wolf](#)) but obscures industrial development as the real cause of caribou decline.

Alberta has commissioned many task force reports on caribou over the years, including the 2016 [Denhoff Report](#) which recommended a significant expansion of protected areas in northern Alberta for caribou. This report generated policy momentum towards caribou habitat protection, and this momentum culminated with a draft provincial [caribou range plan](#) in late 2017. However, these efforts were later abandoned. In early 2018 Alberta [announced](#) it was suspending further habitat protection and would work with industry to develop solutions. Evidence that this working relationship would sour if Alberta tried to achieve real protection measures surfaced in *ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)*, [2019 ABQB 710 \(CanLII\)](#), wherein a forestry company sought judicial review of operating guidelines issued by Alberta that restricted the company's ability to harvest timber in certain areas, including the highly disturbed Little Smoky range. Thus, aside from the designation of a few wildland provincial parks in recent years which offer some protection for caribou habitat (see [here](#) for a description that explains why Alberta protected areas do not completely protect caribou from industrial or recreational development) and the suspension of new sub-surface mineral dispositions in selected caribou ranges (now being lifted with the signing of the section 11 agreement – as further set out below), caribou habitat remains largely unprotected in Alberta.

The SARA public registry includes a [progress report](#) on steps taken by all the provinces and territories to protect critical habitat for woodland caribou as of June 2019. Generally speaking, the provinces are steadfast in their almost exclusive reliance on what I refer to as 'manage and mitigate' measures to deal with industrial and recreational impacts to caribou habitat. These measures are typically in the form of operating conditions on project approvals and public land dispositions, conditions which set buffer areas, restrict activity during calving seasons, and require habitat damage to be offset with restoration work either on-site or elsewhere. As I noted [here](#), these type of measures also made up a large component of Alberta's draft 2017 provincial caribou range plan.

In a recent [study](#) of federal and provincial environmental assessments completed between 1995 and 2017 for projects with potential to have significant adverse impacts to caribou, the authors demonstrate that these 'manage and mitigate' measures are almost always relied upon in assessments to address the potential for significant adverse impacts to caribou despite the absence of peer-reviewed research confirm their effectiveness (Rosemarie-Claire Collard, Jessica Dempsey & Mollie Holmberg, "Extirpation despite regulation? Environmental assessment and caribou" (2020) 2:4 Conservation Science and Practice). In the authors' words:

Do these mitigation measures work? Almost no peer-reviewed scientific research has attempted to evaluate the effectiveness of development mitigation measures for caribou. And none of this scant research evaluates the validity of claims made about mitigation measures during the EA process. What little work does exist in [sic] on the topic of mitigation shows that the effectiveness of mitigation strategies commonly proposed for caribou is largely unknown. (at 4)

This ‘manage and mitigate’ approach to halting the decline of woodland caribou is simply pie-in-the-sky: an impossible, unlikely or fanciful idea or plan. Caribou habitat losses continue almost unabated under this approach – see [here](#) for a recent discussion in relation to southern mountain caribou in British Columbia. Notwithstanding the overwhelming evidence of failure and ineffectiveness, ‘manage and mitigate’ remains the policy of choice for regulators – as the following decision illustrates.

Nova Gas Pipeline Expansion in the Little Smoky Range

In the same week that Canada and Alberta announced the signing of the Canada-Alberta Agreement on Woodland Caribou, the federal Minister of Natural Resources [announced](#) that the Governor in Council had approved the construction of a major natural gas pipeline expansion in Alberta that, although largely following or parallel to existing right-of-way disturbances, will destroy additional caribou habitat in the already highly-disturbed (somewhere between 95% and 99% disturbed) and isolated Little Smoky range, located between Hinton and Grande Prairie (for a visual of how isolated this population is, see the map set out in Appendix A of the Canada-Alberta Agreement on Woodland Caribou).

The Canadian Energy Regulator held a public hearing on the Nova Gas pipeline project in 2019 and issued its hearing report [GH-003-2018](#) in February 2020 recommending that the Governor in Council approve the project under the *National Energy Board Act*, [RSC 1985, c N-7](#) (now repealed and replaced with the *Canadian Energy Regulator Act*, [SC 2019, c 28, s 10](#)). The Regulator acknowledged that the pipeline expansion would result in further habitat disturbances for caribou in the Little Smoky range, but nonetheless concluded that this disturbance would not be likely to cause significant adverse effects taking into account the ‘manage and mitigate’ measures proposed Nova Gas. These measures include the usual collection offered by industry (at 177): wildlife surveys; using or paralleling existing disturbances; avoiding construction activity during sensitive breeding and calving seasons; monitoring; and a commitment to implement adaptive management.

The discussion of impacts specific to caribou habitat in the Little Smoky range is located at pages 195 to 210 in report. Any optimism that an energy project regulatory approval process would contribute to the recovery of threatened woodland caribou is surely erased by what is disclosed here. Alternative pipeline routing which would avoid the Little Smoky range was dismissed by Nova Gas, and perhaps most disappointing of all, the company apparently didn’t even address alternative routing in its filed environmental impact report until prompted to do so in questioning (at 197). This, despite knowing the seriousness of further impacts to caribou habitat in this particular range. The fact that the Regulator accepted this position while at the

same time stating “that disturbances within caribou ranges should firstly be avoided and secondly minimized” (at 198) is outrageous, and borderline disingenuous.

At this stage, a reader could be excused for not even bothering to read the details of the proposed Caribou Habitat Restoration and Offsets Measures Plan (CHR & OMP) submitted by Nova Gas and accepted by the Regulator. It is described at pages 198 to 204 of the report. It is essentially a ‘plan to plan’; Nova Gas effectively commits to rehabilitate on-site habitat disturbances, and any residual impacts (calculated by the company as 16.83 hectares) will be offset with restoration measures to be determined later. Industry and government officials in Canada have embraced offsets as the magic bullet to solve an irreconcilable conflict between resource development and caribou. Unfortunately for the caribou, the effectiveness of offsets is far from certain (see [here](#) for a discussion of key issues).

Environment and Climate Change Canada, along with the Indigenous interveners, criticized the proposed CHR & OMP as inadequate, largely on the basis that any additional loss of habitat in the Little Smoky range is unacceptable (at 199 – 201). The manner in which the Regulator dismisses these concerns (at 202 – 204) makes a complete mockery of its legal obligation under section 77 of SARA to consider the impact on the critical habitat of woodland caribou and form the opinion that all reasonable alternatives to the activity that would reduce the impact on the species’ critical habitat have been considered and the best solution has been adopted. The Regulator essentially shifts the blame elsewhere in shirking its responsibility under SARA:

The Commission notes the view of ECCC that all remaining existing habitat in the Little Smoky Caribou Range is considered potential critical habitat and that the existing cumulative effects on the local caribou population are high in magnitude. Despite the existing cumulative effects, and despite SARA provisions allowing for different protection orders, the Commission notes that such orders have not been issued, and is not aware of any advice that ECCC has provided to the Minister indicating that caribou critical habitat is not sufficiently protected in Alberta. (at 203)

Order-in-Council PC [2020-811](#) is the Governor in Council’s approval of the Nova Gas project (pursuant to section 54(1) of the *National Energy Board Act*) with some amended and additional conditions, several of which address the project impacts to woodland caribou:

- the CHR & OMP must include a description and justification for how it incorporates consultation with Indigenous peoples (rather than just a summary as was required by the Regulator);
- the CHR & OMP must describe offsetting measures that will be undertaken outside of the project area which are consistent with the SARA Recovery Strategy;
- Nova Gas must implement offsetting measures (or make a financial payment in lieu thereof) to restore 3480 hectares of legacy disturbance in the Little Smoky range to the status of ‘undisturbed’ as per the SARA Recovery Strategy;
- Nova Gas must seek to establish an Indigenous Working Group (IWG) for the Little Smoky range with a mandate that includes monitoring and oversight of the CHR & OMP implementation.

These are welcome additions to the approval of the Nova Gas pipeline from the perspective of caribou recovery and protection, at least in the sense of ‘better than nothing.’ The linkage of offsetting measures with the objectives in the SARA Recovery Strategy is important as an attempt to integrate project approvals with threatened species recovery planning. Nova Gas is likely to select the financial payment option for off-site habitat restoration; at least, we should probably hope for that result given how unlikely it is that on-the-ground offsetting will ever amount to anything close to undisturbed habitat. Aside from the physical and ecological challenges associated with offsets and critical habitat, as well as the significant time lag between disturbance and restoration, there remains an ongoing problem of restored habitat being re-disturbed by additional projects in the future. Put the money in the bank and hope it is spent wisely and in a transparent manner.

The Regulator expressly rejected the request by Indigenous interveners for a requirement to establish an IWG (at 205 – 206). The condition imposed by the Governor in Council overrules the majority and follows the conclusion of the dissenting panel member (at 206 – 210). The IWG is reminiscent of the agreement between Canada, British Columbia, Saulteau First Nations, and West Moberly First Nations regarding central herds of the southern mountain caribou - the [SMC Central Group Partnership Agreement](#) – and promises the potential for real oversight on CHR & OMP implementation. Unfortunately, oversight on a ‘plan to plan’ is unlikely to help much in relation to actual protection for caribou habitat in the Little Smoky range.

And finally, all of these additional conditions led me to ask: Why does it take action by the political executive in Ottawa to achieve what would be low hanging fruit for the Regulator – the entity which actually heard and considered the evidence in Alberta? The failure of provincial and federal regulators to meaningfully address the conflict between resource development and woodland caribou habitat is precisely why the implementation of critical habitat protection under the federal SARA looms over the provincial landscape in Alberta.

Canada-Alberta Agreement on Woodland Caribou

Woodland caribou reside mainly on provincial and territorial lands, and because of this, habitat protection for caribou ultimately should be legislated by these governments (see [Endangered species under Alberta’s Wildlife Act: Effective legal protection?](#)). While SARA does provide the federal government with discretionary legislative power to apply the habitat protection measures of SARA onto provincial or territorial lands, history tells us this power will be exercised sparingly (see [The Basics of Species at Risk Legislation in Alberta](#) at 110 – 113). Indeed, in the first two decades of SARA’s implementation the federal government has only used this discretionary power in two cases: the emergency protection orders to protect critical habitat for the greater sage grouse in Alberta/Saskatchewan (see [here](#)) and the western chorus frog in Quebec (see [here](#)). In both of these cases, the habitat protected by federal order was miniscule in geographic size relative to what would be covered by a similar order for woodland caribou.

The overarching federal strategy under SARA to pursue recovery and secure habitat protection on provincial and territorial lands for woodland caribou appears to be engagement with the provinces and territories by way of section 11 conservation agreements. Section 11 of SARA provides authority for a responsible federal Minister (for woodland caribou on provincial lands,

this is the Minister of Environment and Climate Change Canada) to enter an agreement with another government, organization or person for the purpose of implementing habitat protection measures for species at risk. The SARA registry discloses the section 11 agreements [here](#). All but one of these 9 agreements pertain to caribou.

In addition to the Canada-Alberta Agreement on Woodland Caribou, there are SARA section 11 agreements with several other provinces and territories with respect to woodland caribou. For the most part, these are what I call ‘framework planning agreements’ because they largely consist of provisions directed towards the establishment of a framework for coordination on recovery planning and protection of caribou, as well as consultation with Indigenous peoples. There are some exceptions to this where real protection is delivered or deliverable in the agreement – notably the agreements with the Yukon and Northwest Territories and the agreement between Canada, British Columbia, Sauleau First Nations, and West Moberly First Nations regarding central herds of the southern mountain caribou – the [SMC Central Group Partnership Agreement](#).

The type of federal-provincial collaboration reflected in these section 11 governance arrangements is of a familiar sort to that seen in others areas of public policy within Canadian federalism such as health care; a governance model whereby the federal government contributes funding in exchange for commitments by the province to spend the money on the ground in accordance with mutually agreeable principles and objectives. In the case of woodland caribou, Canada is contributing funds and, in exchange for these funds, the provinces commit to implement specified protection and recovery measures. From the perspective of habitat protection for caribou, the key to these agreements is the provincial commitments (usually set out in a schedule to the agreement).

However, before we get to these commitments in the Canada-Alberta Agreement on Woodland Caribou it is worth noting that in this agreement Canada and Alberta gave themselves up to 100 years to achieve the following outcomes: to achieve naturally self-sustaining status for all woodland caribou local populations in Alberta (at s 8.2.3); to achieve the critical habitat outcomes outlined in the SARA Recovery Strategy (at s 8.3.3.1). Why bother with any of this, if that is the timeline – particularly in relation to achieving critical habitat objects in the recovery strategy? The caribou will have long disappeared from Alberta by 2120 without real protection for critical habitat, none of which is offered or even mentioned in this agreement.

What are Alberta’s actual commitments in this agreement? These are set out in tables in Appendix B. In sum, these amount to more of the same: set up committees, establish programs, map, plan, evaluate, manage, monitor, coordinate, mitigate, and kill the wolves. The plan to save the highly disturbed and isolated Little Smoky herd is to use captive rearing (see [here](#) for a story on captive rearing implemented by the Sauleau First Nations and West Moberly First Nations for the Klinse-Za herd of southern mountain caribou in central British Columbia). The word “protection” appears a mere 7 times in the agreement: 5 of those instances are in the preamble, and the other 2 instances are in relation to a commitment by Canada and Alberta to consider information in relation to caribou protection provided by Indigenous peoples and other “stakeholders.” In fact, the agreement reveals Alberta is actually taking a step backwards in habitat protection by resuming the sale of sub-surface mineral leases in caribou habitat (s 8.3.1.3). To the extent that the agreement focuses Alberta on ‘manage and mitigate’

commitments which better align with the federal SARA Recovery Strategy (something the agreement arguably does – I’m being generous here), one wonders who will enforce these commitments if Alberta comes up short on these deliverables?

This agreement accomplishes almost nothing new in terms of substantive gains for the recovery and protection of woodland caribou in Alberta. Canada and Alberta do not need a section 11 agreement to agree to collaborate, convene, cooperate, engage with Indigenous peoples, and share information with each other. I think the Governor in Council accomplished more for caribou habitat protection in Alberta with its Order-in-Council PC [2020-811](#) on the Nova Gas project. And that’s not saying much.

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