

Vancouver No. _____

FEDERAL COURT OF CANADA

BETWEEN:

ALBERTA WILDERNESS ASSOCIATION, FEDERATION OF ALBERTA
NATURALISTS, GRASSLANDS NATURALISTS, NATURE SASKATCHEWAN
and
WESTERN CANADA WILDERNESS COMMITTEE

APPLICANTS

AND:

MINISTER OF ENVIRONMENT

RESPONDENT

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following page.

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 applicants. The applicants request that this application be heard at *Vancouver, British Columbia*.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, 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: February 13, 2008

Issued by: _____

Address of
Local office: Federal Court of Canada
Pacific Centre
PO Box 10065
701 West Georgia Street
Vancouver, B.C. V7Y 1B6

TO:

MINISTER OF THE ENVIRONMENT
Minister of Justice and Attorney General of Canada
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c/o Department of Justice Canada
Vancouver Regional Office
900 – 840 Howe Street,
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APPLICATION

This is an application for judicial review of the decision of the Minister of Environment's (the "Minister") on January 14, 2008 to approve a Recovery Strategy for the endangered Greater Sage-Grouse (prairie population - *urophasianus* subspecies) that does not comply with the *Species at Risk Act*, S.C. 2002, c.29 ("SARA").

More particularly, the Applicants submit that the Minister released the Recovery Strategy for the Greater Sage Grouse notwithstanding it failed to comply with section 41(1)(c) of the SARA in that it did not identify the Greater Sage Grouse's critical habitat to the extent possible.

The Applicants make application for:

1. An order quashing or setting aside the Minister's decision to approve the Greater Sage Grouse Recovery Strategy;
2. An order setting aside the Greater Sage Grouse Recovery Strategy and referring it back to the Minister with the direction that it be amended forthwith to identify critical habitat pursuant to section 41 of the SARA and released.
3. An order or orders in the form of a declaration:
 - a. Declaring that the Minister erred in law, acted unreasonably and/or acted without jurisdiction in approving the Greater Sage Grouse Recovery Strategy when it did not comply with section 41 of the SARA;
 - b. Declaring that the Minister considered irrelevant matters or failed to consider relevant evidence in approving the Greater Sage Grouse Recovery Strategy when it did not comply with section 41 of the SARA;
 - c. Declaring that the Minister acted without jurisdiction by fettering his discretion in approving the Greater Sage Grouse Recovery Strategy when it did not comply with section 41 of the SARA;
 - d. Declaring that the Minister based his decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him.
4. An order that the Applicants shall not be required to pay costs to the Respondent of the Application, pursuant to Rule 400 of the *Federal Courts Rules*, in the event that the Application is dismissed.

The grounds for the application are:

The Species at Risk Act and the Greater Sage Grouse

1. The Species at Risk Act (SARA) received Royal Assent on December 12, 2002 and came into force in three phases. On March 24, 2003, sections 134 to 136 and 138 to 141 setting out amendments to other national wildlife legislation came into force. On June 5, 2003, sections 2 to 31, 37 to 56, 62, 65 to 76, 78 to 84, 120 to 133 and 137 came into force. On June 1, 2004, the remainder of the SARA's sections came into force: sections 32 to 36, 57 to 61, 63, 64, 77, and 85 to 119.
2. The purpose of the SARA is:

...to prevent wildlife species from becoming extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened (s.6).
3. The Greater Sage Grouse is North America's largest native grouse species. Greater Sage-Grouse are dependent on sagebrush for food and shelter, thus the silver sagebrush-grassland communities of the native Canadian prairie provide necessary habitat. The species' live in Saskatchewan and Alberta (formerly also in British Columbia) and their range extends into the United States. Both the species' numbers and available habitat have declined significantly in all parts of their North American range. Within Canada the current population of Greater Sage Grouse is 500-700 birds, having declined 80-90% in the last 20 years. Concurrently, the habitat occupied by Greater Sage Grouse in Canada has declined by 94%. Once a widespread and common game species in prairie Canada, Greater Sage Grouse now occupy only 6000 of a former 100,000 square kilometres of habitat, much of it significantly fragmented and degraded.
4. Major factors involved in the decline of the Greater Sage Grouse are loss, fragmentation and degradation of habitat due to cultivation for agriculture, unsustainable livestock grazing, fire suppression, development for industry including road and power-line construction, and petroleum industry exploration and extraction. Greater Sage Grouse are intolerant of human disturbance and may abandon breeding sites (known as "leks") or suffer decreased survival as a result of increased traffic or construction noise several kilometres away.
5. The Greater Sage Grouse is "listed" pursuant to the SARA as an "endangered" species, meaning that it on the List of endangered Wildlife Species set out in Schedule 1 to the SARA. The Greater Sage Grouse's status as "endangered"

means that it is “a wildlife species that is facing imminent extirpation.” “Extirpated” means no longer existing in the wild in Canada, but existing elsewhere in the wild. (s.2).

6. Listing triggers SARA’s provisions to prevent extirpation and provide for recovery of species. These include prohibitions against harm (s.32), protections for residence (s.33) and the requirement of the Minister to undertake recovery planning (ss.37-46) and recovery plan implementation (“action planning”) (ss.47-64).
7. Essential to the recovery planning process is the Minister’s preparation of “recovery strategies” which “must address the threats to survival of the species” (s.41). Recovery strategies must, *inter alia*:
 - describe the species and its needs,
 - identify the threats to its survival and threats to its habitat; and,
 - identify “critical habitat, to the extent possible, based on the best available information” including examples of activities likely to result in the destruction of critical habitat (s.41)(a), (b) & (c).
8. Protecting critical habitat is often necessary to the survival and recovery of a species. This is reflected in the preamble to the SARA - “habitat of species at risk is key to their conservation.” This is also recognized by the definition of critical habitat - “habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species” (s.2).
9. By this definition, protection of critical habitat occurs only if it is identified in a recovery strategy or action plan, which triggers the requirement of the Minister to evaluate protection to critical habitat and recommend a prohibition against its destruction (s.58) on federal land, or recommend to cabinet that they order the prohibition to apply on provincial land (s.61). But, unlike recovery strategies which must be prepared according to mandatory timelines (s.42), the SARA contains no time limits for preparing action plans. Thus, failure to identify critical habitat at the recovery strategy stage risks indefinite delay in its eventual identification and protection.

The Greater Sage Grouse Recovery Strategy and federal disregard of the SARA

10. The Greater Sage Grouse was a species listed on Schedule 1 of the SARA when the Act came into force, therefore the Recovery Strategy was due June 5th, 2006 (ss. 42(2)).

11. The SARA requires a proposed recovery strategy to be placed on a SARA Public Registry where, for 60 days, the public may file written comments with the Minister (s.43(1)). 30 days after this, the Minister must include the final recovery strategy on the Public Registry (s.43(2)).
12. A proposed Greater Sage Grouse Recovery Strategy was posted to the Public Registry on or about September 25th, 2007. Comments on the proposed Recovery Strategy were submitted by Nature Canada on behalf of a broad coalition of environmental organizations working to ensure that the SARA is implemented. Their comments noted, *inter alia*, the failure of the Recovery Strategy to identify critical habitat notwithstanding that its location is known.
13. On January 14, 2007, approximately one and one-half years after it was due, the final Greater Sage Grouse Recovery Strategy was posted to the Public Registry. The Recovery Strategy does not identify critical habitat even while it identifies habitat loss, degradation and fragmentation as a major factor in the species' decline, and recommends habitat protection. The Applicants take the position that the Greater Sage Grouse is an *exceptionally* well studied species and that it is not only possible to identify critical habitat, such identification has in fact occurred.
14. The failure to identify critical habitat in the Greater Sage Grouse Recovery Strategy is representative of a broader systemic failure on the part of the federal government to identify critical habitat in recovery strategies. A report commissioned by the federal government and released in 2006 which evaluated the federal government's implementation of the SARA (Stratos Inc., *Formative Evaluation of Federal Species at Risk Programs*, prepared for Environment Canada, Fisheries and Oceans Canada and Parks Canada Agency (Ottawa, July 2006)), found that federal implementation of the SARA was, generally, in disarray but reserved its strongest criticism and concern for the government's failure to prepare recovery strategies that identified critical habitat:

Core departments have made very limited, and less than anticipated progress in identifying critical habitat through the recovery planning process...Policy considerations are also a factor [in not identifying critical habitat]. Where provinces/territories are leading recovery planning efforts, they report a reluctance to identify critical habitat on non-federal lands until the supporting policy framework is clarified.

...

These delays and challenges in identifying critical habitat could have significant repercussions on the progress made in implementing the Act and achieving its related intended outcomes.

As a result, the majority of recovery strategies posted by the Minister to the public registry do not identify critical habitat.

The Applicants

15. The Applicants are “public interest groups” in that they work for environmental protection and have no personal, proprietary or pecuniary interest in the outcome of this Application.
16. The Applicants work in Alberta and/or Saskatchewan to, *inter alia*, protect the environment including its endangered species. Some of the Applicants have campaigns specifically addressing Greater Sage Grouse decline while others of the Applicants have focused their attention on ensuring the implementation of the SARA generally. The Applicants believe that they need to bring this Application to address federal failure to implement the SARA, which failure is further endangering Canada’s at risk species. They believe that an order requiring SARA to be complied with is in the public interest because the viability of Canada’s wildlife populations is a matter affecting all Canadians. The Applicants have joined forces as co-applicants to help allay the cost of litigation.
17. The Applicants also believe that, unfortunately, they have no choice but to litigate this matter. Each of the Applicants has a record of working to protect the environment and at-risk species and also a record of working, using non-litigious means, to ensure that their protection. They bring this Application only in the face of overwhelming evidence that: (a) the Canadian government is attempting to avoid its obligation to implement the SARA so as to protect Canada’s at-risk species; and, (b) non-litigious means have not proven effective in ensuring this whereas litigation, or its threat, has proven effective.
18. For example, seeking to divert the federal government from its course of not identifying critical habitat in recovery strategies, on December 4th, 2006 some of the Applicants sued the federal government (T-2143-06) for releasing the recovery strategy of the Piping Plover, an endangered bird, where the recovery strategy failed to identify critical habitat when its identification was possible. After issuing the Application and without filing any supporting affidavits, on March 15, 2006 the Minister of the Environment issued a new recovery strategy for the Piping Plover that identified critical habitat. The Application was therefore not pursued.
19. Prior to and since the Piping Plover application, numerous meetings occurred between some of the Applicants and the representatives of the federal government to ensure that future recovery strategies would identify critical habitat where it was possible to do so. The release of the Greater Sage Grouse Recovery Strategy suggests this approach is not, as the Applicants had hoped, effective.
20. Such further additional grounds as counsel may identify and this Honourable Court may consider.

This Application will be supported by the following material:

1. Affidavits on behalf of each of the Applicants, to be served.
2. An affidavit on behalf of Professor Mark Boyce, to be served.
3. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 request:

The Applicants request that the Minister send a certified copy of the following material that is not in the Applicants' possession but is in the Minister's and Department of Environment's possession to the Applicants, and to the Registry:

1. The record of materials before the Minister, the Department of the Environment and Parks Canada relevant to the preparation and approval of the Greater Sage Grouse recovery strategy.

Date: February 13, 2008

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