

Canadian Institute of Resources Law
Institute canadien du droit des ressources

**Laws Protecting the Sage Grouse
in Alberta as Compared to
Saskatchewan and the United
States**

Sara L. Jaremko

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All enquiries should be addressed to:

The Executive Director
Canadian Institute of Resources Law
Murray Fraser Hall, Room 3353 (MFH 3353)
Faculty of Law
University of Calgary
Calgary, Alberta, Canada T2N 1N4
Telephone: (403) 220-3200
Facsimile: (403) 282-6182
E-mail: cirl@ucalgary.ca

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Toute demande de renseignement doit être adressée au:

Directeur exécutif
Institut canadien du droit des ressources
Murray Fraser Hall, pièce 3353 Faculté de droit
L'Université de Calgary
Calgary, Alberta, Canada T2N 1N4
Téléphone: (403) 220-3200
Télécopieur: (403) 282-6182
Courriel: cirl@ucalgary.ca
Site Web: www.cirl.ca

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Laws Protecting the Sage Grouse in Alberta as Compared with Saskatchewan and the United States

“Life belongs to the living, and he who lives must be prepared for changes.”
– Johann Wolfgang von Goethe

1.0 INTRODUCTION

The Greater Sage-Grouse (*centrocercus urophasianus urophasianus*) [the “sage grouse”]¹ is an endangered, iconic animal native to the north American prairies, whose survival is interrelated with the conservation of its habitat. Sage grouse have been early subjects of species at risk legislation, a relatively new and controversial field, and were subjects of Canada’s first *Emergency Protection Order* [EO] for species at risk. Sage grouse are considered endangered under federal and provincial legislation in Alberta and Saskatchewan, and considered for protection under federal United States legislation. The EO is credited with a small recovery in sage grouse populations in Alberta and Saskatchewan, meanwhile, stakeholder pressures facing this habitat continue, and litigation challenging the EO is underway.

Most sage grouse territory is located in the United States. In 2015, massive collaborative stakeholder efforts culminating in extensive plans by 11 western states, kept the sage grouse from requiring formal protection under American species at risk legislation. Litigation followed on all sides, with both environmental and industry groups challenging the plans. The 2017 change in federal US administration has affected sage grouse protection significantly, with the new administration undertaking to review federal and state sage grouse plans and programs, citing goals of thriving wildlife, local economies, and energy independence, and numerous regulatory and policy changes are underway.

This paper will review Canada’s history of sage grouse protection. It will review and compare the federal and provincial legislation and policy governing sage grouse protection, as well as the 2013 Emergency Order and related litigation. It will review sage grouse protection in the US. It will then critically discuss the respective regimes, along with the emerging trends in the field being: strategic prioritization, multi-species recovery planning, and voluntary and incentivized collaborative efforts.

Scoping: This paper touches on a number of subjects which will not be reviewed in detail, including species at risk other than the sage grouse, except in passing, aboriginal considerations, and broader questions of environmental law. The discussions herein are illustrative and educational and not exhaustive. This paper does not purport to convey scientific expertise. As a rule, I have omitted citations within quotes.

¹ All references to “sage grouse” refer to the Greater Sage Grouse. This paper will not discuss the related species in the United States called the Gunnison Sage Grouse, which is listed under the *ESA*. Similarly, this paper does not discuss a species of sage grouse extirpated from British Columbia, *centrocercus urophasianus phaios*, also subject to consideration under the *SARA*.

Sage Grouse

The sage grouse has been described as:

“an iconic part of our Canadian heritage; a key component of our prairie ecosystem”²;

“unquestionably the most comical-looking bird I have ever seen”³;

“[an] awkward, not-so-smart bird [that] symbolizes the tension over land use and preservation in the West”⁴; and

“in “decid[ing] to litigate for endangered species that had the most known about their habitat needs but no habitat identified in recovery strategies [...] it was the Sage-Grouse’s poor luck to be a ‘poster child.’”⁵

Sage grouse are “the largest species of grouse in North America,” and are known for impressive courtship displays in which males “[inflate and deflate] two yellow-coloured air sacs on their breasts.”⁶

Sage grouse are heavily dependent on sagebrush habitat, which is under increasing pressures including oil and gas development, agriculture, and grazing. In Alberta, habitat “is limited to the distribution of silver sagebrush which is primarily restricted to the extreme southeast corner of the province in the Dry Mixedgrass ecoregion.”⁷ In Alberta, sage grouse habitat is “centered [in a 4,000 km² area] south and east of the town of Manyberries.”⁸ In Saskatchewan, “[the population] exists in two distinct areas of south-west Saskatchewan separated by an expanse of cultivated land. Although expanses of cultivated land are thought to act as barriers to Sage-Grouse movements, genetic evidence indicates that Sage-Grouse movements occur between eastern and western habitats. Important dispersal corridors may connect the east and west habitats.”⁹ Sage-grouse occupy more than 186 million acres of rangeland across 11 western states as well as the two Canadian provinces,¹⁰ as shown in the map below.

² Dr Axel Moehrenschlager, Director of Conservation & Science, Calgary Zoo, < <https://www.calgaryzoo.com/blog/members/calgary-zoo-opens-first-greater-sage-grouse-breeding-facility-in-canada/> >.

³ Ornithologist Charles Bendire in 1877, quoted in Nordhaus, *infra* note 4 at 78.

⁴ Hannah Nordhaus, “Saving the Sage Grouse”, *National Geographic* 234:5 (November 2018) 68, online: < <https://www.nationalgeographic.com/magazine/2018/11/saving-the-sage-grouse/> >.

⁵ Devon Page and Melissa Gorrie, “Chapter 18: Legal Efforts to Protect Species at Risk in Canada: A Case Study of the Greater Sage-Grouse” in William A Tilleman & Alastair R Lucas, eds, *Litigating Canada’s Environment: Leading Canadian Environmental Cases by the Lawyers Involved* (Canada: Thomson Reuters, 2017) 329 at 333.

⁶ Alberta Environment and Sustainable Resource Development, *Alberta Greater Sage-grouse Recovery Plan 2013-2018*, Alberta Species at Risk Recovery Plan No. 30 (Alberta: September 2013) online: < <https://open.alberta.ca/publications/9781460107522> > at 2-3 [AB Recovery Plan].

⁷ *Ibid* at 5.

⁸ *Ibid* at vii.

⁹ M Weiss and B Prieto, *A Conservation Plan for Greater Sage-Grouse in Saskatchewan*, Fish & Wildlife Branch Technical Report 2012-01 (2012 (updated 2014) Government of Saskatchewan), Online: GSK < <http://publications.gov.sk.ca/documents/66/86306-English.pdf> > at 9.

¹⁰ USDA Natural Resources Conservation Service, *Sage-Grouse Initiative: What’s good for grouse is good for ranching: A Blueprint for Creating Long-term, Market-based Incentives for Ranchers to Conserve Sage-Grouse by*

Sage grouse distribution.¹¹

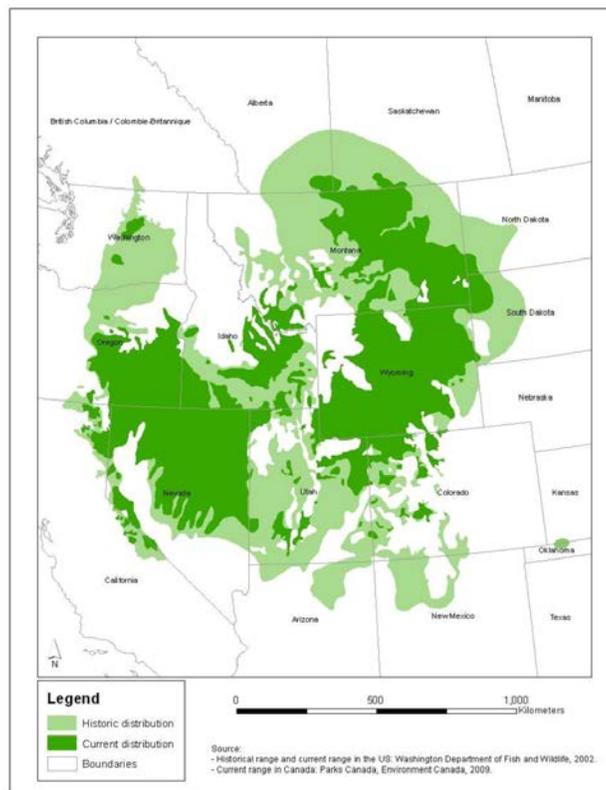


Figure 1 Historical and current distribution of Sage-Grouse in North America

In terms of numbers, “[t]here are approximately 150,000 Greater Sage-Grouse in North America [and] less than one percent are in Canada.”¹² Alberta Fish and Wildlife estimated the Alberta population of sage grouse to be 350-400 individuals in 2015.¹³

This habitat includes areas for breeding (“leks”), nesting, brooding/summer habitat, and overwintering.¹⁴ Sage grouse have experienced significant decline. Threats include biological limiting factors: Limited habitat in region, Small population size; Cropland conversion; Grazing regime (high-intensity); Water management; Energy development (petroleum) / industrial infrastructure; Wind energy development; Natural disturbance and climate (drought, extreme weather conditions, alterations to grazing and fire); Predation (e.g. birds of prey, coyotes, racoons, foxes, etc.); Disease (particularly West Nile virus, first introduced to North America in 1999 and first documented in 2003 in Alberta, Montana, and Wyoming); Human recreation (hunting ceased in 2005 in Alberta and 1938 in Saskatchewan); and Human disturbance/activity (e.g. fences, roads,

Linking NRCS’ Sage-Grouse Initiative with Grassbanks (July 2011), online: < https://albertawilderness.ca/wp-content/uploads/20110700_doc_SGI_Grassbanking_Business_Plan.pdf >.

¹¹ Weiss & Prieto, *supra* note 9 at 4.

¹² *Alberta Wilderness Association v Canada (Environment)*, 2009 FC 710 [AWA 2009 FTC] at para 4.

¹³ Alberta Fish and Wildlife, “Wild Species Status Search”, online: AEP Wild Species Status Search <<http://aep.alberta.ca/fish-wildlife/species-at-risk/wild-species-status-search.aspx>>.

¹⁴ AB *Recovery Plan*, *supra* note 6 at 5-6.

noise, traffic, invasive/exotic plants).¹⁵ In the United States, the list of threats also includes fire and invasive annual grasses, invasive conifers, exurban development, cultivation of grazing lands, mesic area loss and degradation, and fence collisions.¹⁶

Dr. Mark Boyce of the University of Alberta describes the potential extinction of the sage grouse as “the first case where the oil and gas industry has caused the extirpation of a species in Canada. [...] According to the Canadian government, ‘Oil and gas wells and associated pipelines affect 28% of sagebrush habitats across the current species’ range. Industrial development has also fragmented sagebrush habitat through the addition of buildings, highways, trails, fences and electrical poles... More than 80% of the current range of the (g)reater sage-grouse in Alberta has been altered by such impediments.’”¹⁷

Numbers of sage grouse have begun to recover. While total numbers of Canadian sage grouse dropped from 777 in 1996 to only 100 in 2014, following the 2013 EO and translocation of Montana hens to Alberta in 2016, the total population in Canada was estimated at 340 in 2016.¹⁸ Meanwhile, conservation efforts continue and captive breeding has commenced.

2.0 CANADA – SARA

2.1 Law & Policy

Generally

Canadian species at risk are subject to international, federal, provincial, and in some cases, municipal laws and policies. Increasingly, wildlife laws have shifted from considerations of hunting to considerations of habitat protection and protection of species at risk. Wildlife, as well as environment and natural resources fall under federal and provincial legislative competence concurrently.¹⁹ Not expressly contemplated in Canada’s *Constitution Act, 1867*²⁰, wildlife has been considered to fall under mainly provincial jurisdiction: namely, under s.92(13), (16), and s.109: provisions relating to property and civil rights, generally all matters of a merely local or private nature, and all lands, mines, minerals, and royalties [belonging to the province].²¹

¹⁵ *Ibid* at vii, 8-15; see also *SoD Action Plan*, *infra* note 153.

¹⁶ US Department of Agriculture Natural Resources Conservation Service, *Sage Grouse Initiative 2.0: Investment Strategy, FYI 2015-2018* (August 2015), online: < http://www.sagegrouseinitiative.com/wp-content/uploads/2015/08/SGI2.0_Final_Report.pdf > at 7-18.

¹⁷ Alberta Wilderness Association, “Sage-Grouse”, online: Alberta Wilderness Association < <https://albertawilderness.ca/issues/wildlife/sage-grouse/> >.

¹⁸ *Ibid*.

¹⁹ See Sara L Jaremko, “An Overview of Wildlife Legislation in Alberta” (paper delivered at the Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection symposium convened by the Canadian Institute of Resources Law and the University of Calgary Faculty of Law, 3 March 2018), online: < <https://cir.ca/symposium/2018-march-symposium/download-2018-march-materials> >; and Kennedy & Donihee, *infra* note 21.

²⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c3, reprinted in RSC1985, Appendix II, No 5. Section 109 was extended to the Prairie Provinces by operation of the *Natural Resources Transfer Agreement* and the *Constitution Act, 1930*.

²¹ Priscilla Kennedy and John Donihee, *Wildlife and the Canadian Constitution*, Canadian Wildlife Law Project Paper #4 (Canada: Canadian Institute of Resources Law, August 2006), online: < <http://cir.ca/publications/wildlife-law-papers> >.

Federal jurisdiction prevails for migratory birds, international trade and commerce, fisheries, interjurisdictional wildlife, and wildlife on federal lands.²² As Kennedy and Donihee have noted, this context of division of powers demands “cooperative federalism,” as “only a cooperative effort will ensure the long term presence of wildlife on our landscapes.”²³ As summarized by Kumpf and Hughes, “[g]enerally, the federal legislation applies to federal land and federal species (migratory birds, fisheries), while provincial legislation applies to provincial land. If the province has inadequate coverage, the federal legislation will step in.”²⁴ Sage grouse are not “migratory birds.”

In recent years, wildlife management has shifted to taking a form of land-based management and habitat protection.²⁵ Monique Passelac-Ross of the Canadian Institute for Resources Law noted two ways that legislation protects habitat: through general protection of habitat, and through enabling the Crown to set aside public and private lands for habitat protection, with a third mechanism of legislatively created habitat conservation funds.²⁶

2.1.1 History:

Law librarian Nadine Hoffman has prepared a thorough legislative history of Canada’s species at risk law, noting the “long and complex history of the enactment of [the SARA]” and pertinent developments from 1973 to 2018.²⁷ An abbreviated summary of the chronology of major events follows:²⁸

1916	<i>Convention for the Protection of Migratory Birds in the United States and Canada</i>
1966	<i>US Endangered Species Preservation Act</i>
1973	<i>Speech from the Throne</i> promises wildlife protection legislation in Canada
1973	<i>Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)</i> signed
1973	<i>Canada Wildlife Act</i>
1973	<i>US Endangered Species Act of 1973</i>
1975	Canada ratifies CITES with reservations
1977	Creation of COSEWIC
1988	RENEW committee established
1992	<i>Convention on Biological Diversity</i>

²² *Ibid.*

²³ *Ibid* at 14.

²⁴ Laura D Kumpf and Elaine Hughes, “Wildlife Sector Overview”, in Elaine L Hughes, Arlene J Kwasniak & Alistair Lucas, *Public Lands and Resources Law in Canada* (Toronto: Irwin Law Inc, 2016) 293 at 303.

²⁵ Monique Passelac-Ross, *Overview of Provincial Wildlife Laws*, Canadian Wildlife Law Project Paper #3 (Canada: Canadian Institute of Resources Law, July 2006), online: < <http://ciril.ca/publications/wildlife-law-papers> >.

²⁶ *Ibid.*

²⁷ Nadine Hoffman, *Species at Risk Act: A Comprehensive Inventory of Legislative Documents 1973-2017*, (Paper delivered at the Canadian Institute of Resources Law Symposium on Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection, 2 & 3 March 2018), online: < <https://ciril.ca/symposium/2018-symposium/download-2018-march-materials> > at 1.

²⁸ Amended from Hoffman, *supra* note 27 at 5ff.

1992	<i>Wild Animal and Plant Protection Act</i> (proclaimed in 1996)
1996	<i>National Accord for the Protection of Species at Risk</i> (in principles)
2000	<i>C-33: Species at Risk Act</i> first introduced (earlier version of SARA)
2002	SARA
2012	<i>C-38: Jobs, Growth and Prosperity Act</i>

Internationally, Canada is signatory to the *UN Convention on Biological Diversity* [CBD].²⁹ This commitment prompted Canada to create the *CBD Strategic Plan for Biodiversity 2011-2020*. Related documents are the *2020 Biodiversity Goals and Targets for Canada*,³⁰ the *Biodiversity Outcomes Framework*, and the *Canadian Biodiversity Strategy* [CBS].³¹ Canada is subject to other formal and international instruments as well, such as the *Convention on the International Trade in International Species of Wild Fauna and Flora* [CITES],³² which is the basis for Canada's *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*³³ [WAPPRITA].

Further, the former North American Free Trade Agreement [NAFTA] included provisions on species protection.³⁴ The *North American Agreement on Environmental Cooperation* [NAAEC] complemented provisions of NAFTA, and articles 14 and 15 provided a means for individuals to make submissions regarding any of the three countries' enforcement of environmental legislation to the Commission for Environmental Cooperation, who may then request the country to respond.³⁵

NAFTA was replaced on November 30, 2018 by the Canada-United States-Mexico Agreement [CUSMA, also known as USMCA], complemented by its parallel *Environment Cooperation Agreement*,³⁶ which "ensures that the unique institutions that have existed for over 24 years under the NAAEC are retained and modernized, including the Commission for Environment Cooperation and its Montreal-based Secretariat," and the new agreement also contains provisions for species at risk.

²⁹ *United Nations Convention on Biological Diversity*, 11 June 1992, 1760 UNTS 79, 31 ILM 818 (1992) (entered into force 29 December 1993)

³⁰ <http://biodivcanada.ca/default.asp?lang=En&n=9B5793F6-1>

³¹ Canada, "2020 Biodiversity Goals and Targets for Canada", <https://www.canada.ca/en/parks-canada/news/2016/12/2020-biodiversity-goals-targets-canada.html>. See also www.Conservation2020canada.ca

³² *Convention on the International Trade in Endangered Species of Wild Fauna and Flora* (3 March 1973, 993 UNTS 243, 27 UST 1087, 12 ILM 1085 (CITES))

³³ *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c52 (WAPPRITA)

³⁴ See Kumpf & Hughes, *supra* note 24 at 307, which describes complaints made to the NAFTA Commission on Environmental Cooperation regarding endangered species, and concern about the adequacy of that process

³⁵ Commission for Environmental Cooperation, *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Submissions on Enforcement Matters (Montreal: 2000 Commission for Environmental Cooperation of North America), online: < cec.org >

³⁶ Commission for Environmental Cooperation, Press release, "Negotiations on a new Agreement on Environmental Cooperation (ECA) completed (30 November 2018), online: < <http://cec.org/news-and-outreach/press-releases/negotiations-new-agreement-environmental-cooperation-eca-completed> >. Agreements are linked at: < <https://www.canada.ca/en/global-affairs/news/2018/11/canada-signs-new-trade-agreement-with-united-states-and-mexico.html> > and < <https://www.epa.gov/international-cooperation/commission-environmental-cooperation-cec>>; subject to notification.

Comparison of the provisions between NAFTA and CUSMA and supporting documents are outside the scope of this paper, but the CUSMA Environmental factsheet indicates that CUSMA “creates new commitments [...] including substantive obligations to [...] conserve species at risk.”³⁷

A 2001 joint Canada-US document, “Conserving Borderline Species: A Partnership between the United States and Canada” referenced a 1997 “Framework for Cooperation between the US Department of the Interior and Environment Canada in the Protection and Recovery of Wild Species at Risk” which provides history, although it is now outdated.³⁸ Notably, the sage grouse was not featured.

2.1.2 Federal Law

Species at risk legislation in Canada falls largely under the *Species at Risk Act* [SARA].³⁹ The evolution producing current federal species at risk protection stems from the 1992 *CBD*, ratified by Canada in 1992,⁴⁰ which prompted the *CBS*. The *CBS* includes three main components: the *SARA*, 1999’s *National Accord for the Protection of Species at Risk* [Accord]⁴¹, and the *Habitat Stewardship for Species at Risk*.⁴² In addition to this main framework, the *Canada Wildlife Act* includes a provision pre-dating the *SARA*, that the Minister [generally, of Environment] “may, in cooperation with one or more provincial governments having an interest therein, take such measures as the Minister deems necessary for the protection of any species of wildlife in danger of extinction.”⁴³

The *Accord* commits federal, provincial, and territorial ministers to a national approach, including the Canadian Endangered Species Conservation Council [CESCC] and the Committee on the Status of Endangered Wildlife in Canada [COSEWIC], recognition of interjurisdictional species, “complementary action” and support, and includes “lack of full scientific certainty must not be used as a reason to delay measures to avoid or minimize threats to species at risk.”⁴⁴ The *National Framework* supports the *Accord*, and references the species at risk conservation cycle:

³⁷ Government of Canada, CUSMA “Environmental chapter and Environmental Cooperation Agreement summary,” online: < <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/enviro.aspx?lang=eng> >.

³⁸ Environment Canada, Canadian Wildlife Service and U.S. Department of the Interior, Fish and Wildlife Service, *Conserving Borderline Species: A Partnership between the United States and Canada* (Ottawa: Minister of Public Works and Government Services Canada in cooperation with Washington, DC: United States Department of the Interior, Fish & Wildlife Service, 2001).

³⁹ *Species at Risk Act*, SC 2002, c29 [SARA].

⁴⁰ Article 8 pertains to protection and recovery of threatened species and government commitments to their protection through legislation and/or regulation.

⁴¹ Species at Risk Public Registry, “The Accord for the Protection of Species at Risk,” online: Government of Canada, <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding.html#toc2>.

⁴² See Kumpf and Hughes, *supra* note 24 at 304.

⁴³ *Canada Wildlife Act*, RSC 1985, c W-9, s.8.

⁴⁴ Environment and Climate Change Canada, “Species at risk: the act, the accord and the funding programs,” online: Government of Canada < <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding.html> >.

“Species at risk conservation is built on a cycle of assessment, protection, recovery planning, implementation, monitoring, and evaluation”⁴⁵ It identifies six “foundational elements,” including “conservation, governance and legal framework, consultation, socio-economic, and stewardship.”⁴⁶

The *National Framework for Species at Risk Conservation*⁴⁷ is a major policy document that appears to be modified by the 2018 “Pan-Canadian approach to transforming species at risk conservation in Canada,”⁴⁸ which, while reaffirming commitments to the *Accord* and *National Framework*, outlines an approach that includes prioritization, multi-species, and ecosystem-based approaches.

2.1.3 SARA

The purposes of the *SARA* are “to prevent Canadian indigenous species, subspecies, and distinct populations from becoming extirpated or extinct, to provide for the recovery of endangered or threatened species, and encourage the management of other species to prevent them from becoming at risk.”⁴⁹

The *SARA* sets out the protection of wildlife species at risk in Canada. The Preamble includes statements that “Canada’s natural heritage is an integral part of our national identity and history,” that “wildlife [...] has value in and of itself,” and that the legislation values “community knowledge and interests, including socio-economic interests”, among multiple other notes on Canada’s commitments and need for interjurisdictional cooperation.

2.1.3.1 Regulations

Hoffman prepared an extensive review of the complex history and components of the *SARA*.⁵⁰ There had been 70 pieces of subordinate legislation (Statutory Orders, Regulations, or Statutory

⁴⁵ <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding/conservation-national-framework.html>.

⁴⁶ Alberta, *Alberta’s Strategy for the Management of Species at Risk (2009-2014)* (2008), online: Alberta Environment and Parks < <https://open.alberta.ca/publications/9780778577188> >.

⁴⁷ Species at Risk Public Registry, “National Framework for Species at Risk Conservation,” online: Government of Canada, <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding/conservation-national-framework.html>.

⁴⁸ Environment and Climate Change Canada, “Pan-Canadian approach to transforming species at risk conservation in Canada,” (Canada: Government of Canada, 2018), online: Government of Canada <https://www.canada.ca/en/services/environment/wildlife-plants-species/species-risk/pan-canadian-approach.html> > [*Pan-Canadian Approach*] The implications of this document are not clear: it appeared quietly on the Government website in December 2018 and no press releases were located. The 2018 budget contained reference that “[Success in protecting Canada’s nature, parks and wild spaces will look like] A modern ecosystem-based approach for multi-species recovery that improves species at risk conservation”) (<https://www.budget.gc.ca/2018/docs/plan/chap-04-en.html>).

⁴⁹ Environment and Climate Change Canada, “Species at risk: the act, the accord and the funding programs,” online: Government of Canada < <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding.html> >.

⁵⁰ Hoffman, *supra* note 27.

Instruments) registered in the *Canada Gazette, Part II*, at February 2018.⁵¹ At December 2018, there were 65 active regulations and 1 repealed.⁵² These include:

- 17 Orders Acknowledging Receipts of Assessments done pursuant s.23(1)
- 25 Orders re critical habitat
- 11 Orders re Decisions not to add certain species to the list
- 2 Orders re referral back to COSEWIC
- 2 Emergency Orders (Greater Sage Grouse and Western Chorus Frog (Great Lakes/St Lawrence – Canadian Shield Population))
- 1 Order re declining to make an Emergency Order (Killer Whale Northeast Pacific Southern Resident Population, 2018)
- 2 Orders re (Exemptions) Certain Licences re Westslope Cutthroat Trout and White Sturgeon
- 1 Regulation re permits authorizing an activity affecting listed wildlife species
- 2 Orders extending time for assessment of the status of wildlife species

A recovery strategy for the sage grouse was first made⁵³ under the *SARA* in 2008,⁵⁴ amended in part in 2009,⁵⁵ and amended again in 2014. The current recovery strategy is the *Amended Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) in Canada*.⁵⁶

2.2 Operation

The CESCC, an independent entity established under the *SARA*, is composed of federal, provincial and territorial Ministers, coordinates governmental activities, and directs COSEWIC.⁵⁷ The “role of the CESCC is to provide general direction on the activities of [COSEWIC], the preparation of recovery strategies, preparation and implementation of action plans, and to coordinate the activities of various governments represented on the Council relating to the protection of species at risk.”⁵⁸ COSEWIC, created under the *SARA* as an independent body,⁵⁹ carries out assessments and recommends designations, and directs the Recovery of Nationally Endangered Wildlife program

⁵¹ *Ibid* at 3.

⁵² *CanLII* indicated 63 active regulations and 3 repealed under *SARA*, while the federal Department of Justice indicates 65 active and 1 repealed.

⁵³ See https://wildlife-species.canada.ca/species-risk-registry/document/default_e.cfm?documentID=1458.

⁵⁴ K Lungle & S Pruss, *Recovery Strategy for the Greater Sage Grouse (Centrocercus urophasianus urophasianus) in Canada*, (January 2008) in Species at Risk Act Recovery Strategy Series (Ottawa: 2008 Parks Canada Agency), online: < https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs_sagegrouse_0108_e.pdf.

⁵⁵ K Lungle & S Pruss, *Replacement of Section 2.6 of the Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) in Canada*, (2009) in Species At Risk Act Recovery Strategy Series (Ottawa: 2009 Parks Canada Agency), online: < https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs_sage_grouse_sec_2-6_1009_e1.pdf >.

⁵⁶ Environment Canada, *Amended Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) in Canada* (2014) in Species at Risk Act Recovery Strategy Series (Ottawa: 2014 Environment Canada), online: < https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/amended_rs_sage_grouse_e_final.pdf >.

⁵⁷ *SARA supra* note 40 at s.7. COSEWIC also considers the recommendations of NACOSAR (see Hoffman, *supra* note 27 at 2).

⁵⁸ Kumpf & Hughes, *supra* note 24 at 304, quoting Government of Canada *Accord*.

⁵⁹ *SARA, supra* note 40 ss.14, 20.

[RENEW], which, established in 1988, predates the *SARA*, and serves in part to monitor and report on the *Accord*.⁶⁰

The six responsible authorities under the *SARA* and their respective roles are: the Department of Environment and Climate Change, the Department of Fisheries, Parks Canada Agency, the CESCC, the National Aboriginal Council on Species at Risk (NACOSAR), and the COSEWIC.⁶¹

SARA: A diagram overview of the *SARA* process at a level of generality is included in Appendix A. Under the *SARA*,⁶² COSEWIC, directed by the CESCC, assesses species in question (using best available information), and advises the CESCC which makes recommendations to the Minister.⁶³ Within 90 days of receiving the assessment the Minister must declare his/her intention to respond to the assessment and to provide timelines as possible.⁶⁴ Within 9 months of receiving an assessment from COSEWIC, the Minister must opt to: add the species to the List, decline to add the species to the List in which case (s)he must provide reasons, refer the matter back to COSEWIC, remove the species from the List, reclassify the species,⁶⁵ or, if the Minister does not select one of those options within nine months, the species will be added to the List automatically.⁶⁶

The List, “List of Wildlife Species at Risk,” is set out in Schedule 1 of the *SARA* and includes extirpated, endangered, threatened species, and species of special concern. If a species is listed as endangered or threatened, a recovery strategy must be proposed within one year, or if extirpated, a recovery strategy must be proposed within two years.⁶⁷ In cases of species of special concern, a management plan must be proposed within three years.⁶⁸ Recovery strategies include certain details, including objectives, identification of threats, and critical habitat.⁶⁹ Once a recovery strategy is in place, the Minister must include a proposed action plan based on the recovery strategy.⁷⁰ In case a listed species faces imminent threats to its survival or recovery, and equivalent measures have not otherwise been taken, a Minister must recommend to the Governor in Council to make an emergency protection order – which is in the Governor in Council’s discretion to make.⁷¹ Likewise, a Minister must make recommendations to the Governor in Council to repeal an emergency order should the species no longer face imminent threat.⁷²

⁶⁰ Kumpf & Hughes, *supra* note 24 at 304.

⁶¹ Environment and Climate Change Canada, “Species at risk: the act, the accord and the funding programs,” online: Government of Canada < <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding.html> >; See also Hoffman, *supra* note X at 2 for discussion.

⁶² At a level of generality, for example this does not address emergency situations or exceptional situations contemplated by the *SARA*.

⁶³ *SARA*, *supra* note 30 ss.7, 14, 15.

⁶⁴ *Ibid* at s.25(3).

⁶⁵ *Ibid* at s.27. other options are “not at risk” or “data deficient”.

⁶⁶ *Ibid* at s.27(3).

⁶⁷ *Ibid* at s.42(1).

⁶⁸ *Ibid* at s.65.

⁶⁹ *Ibid* at s.41.

⁷⁰ *Ibid* at s.50.

⁷¹ *Ibid* at s.80 & 81.

⁷² *Ibid* at s.82.

Relevant documents are to be published in the public registry throughout. The Species at Risk Public Registry is located online at:

<https://www.registrelep-sararegistry.gc.ca/default.asp?lang=En&n=24F7211B-> > and <
<https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry.html>.

The *SARA* also provides for prohibitions⁷³, various exceptions to prohibitions including agreements and permits⁷⁴, and general exceptions in the case of public safety, health, or national security;⁷⁵ as well as land claims agreements.⁷⁶

With respect to the mandatory and discretionary elements of this process: First, the Minister has discretion whether or not to list an assessed species. Contingent upon listing, recovery planning is mandatory, including designation of critical habitat. Further, emergency orders are within the discretion of the Governor in Council although their recommendation may be mandatory if warranted for a listed species.

With respect to socio-economic (i.e. non-scientific considerations), the *SARA*'s Preamble includes the statement that wildlife, in addition to "ha[ving] value in and of itself [...] is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological, and scientific reasons," and also that, "community knowledge and interests, including socio-economic interests, should be considered in developing and implementing recovery measures." Socio-economic considerations must be included in action plans (s.49) and monitoring of action plans (s.55). In addition, the *SARA* adopts the precautionary principle, as the Preamble and the provision for contents of recovery strategies also includes the language:

"[t]he Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a 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."⁷⁷

A notable element of the *SARA*, consistent with the interjurisdictional cooperation contemplated elsewhere in the *CBS*, is the "safety net." The "safety net" is found, albeit indirectly, in ss. 34(2) and 61(4), which provide that:

34(2) The Governor in Council may, on the recommendation of the Minister, provide that sections 32 and 33 [prohibitions on killing, harming etc. listed wildlife species or damaging or destroying their residence], or either of them, apply in lands in a province that are not federal lands with respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*.⁷⁸

⁷³ *Ibid* at ss.32(1), 32(2), 33, 36(1), 58(1), 60(1), 61(1), 53, 59, 71, 80.

⁷⁴ *Ibid* at s.73.

⁷⁵ *Ibid* at s.83.

⁷⁶ *Ibid* at 83(3) – indigenous considerations fall generally outside the scope of this paper, but they should not be diminished as conservation is often expressly associated with indigenous law and policy.

⁷⁷ *Ibid* at Preamble and s.38.

⁷⁸ *Ibid* at s.34(2).

61 Destruction of Critical Habitat⁷⁹ [relevant segments reproduced]

(1) No person shall destroy any part of the critical habitat of a listed endangered species or a listed threatened species that is in a province or territory and that is not part of federal lands.

(2) Subsection (1) applies only to the portions of the critical habitat that the Governor in Council may, on the recommendation of the Minister, by order, specify.

(4) The Minister must make a recommendation if he or she is of the opinion, after consultation with the appropriate provincial or territorial minister, that

(a) there are no provisions in, or other measures under, this or any other Act of Parliament that protect the particular portion of the critical habitat, including agreements under section 11 [discretionary interjurisdictional conservation agreements]; and

(b) the laws of the province or territory do not effectively protect the critical habitat.

The safety net is also supported by the *Canada Wildlife Act* provision that the Minister [generally, of Environment] “may, in cooperation with one or more provincial governments having an interest therein, take such measures as the Minister deems necessary for the protection of any species of wildlife in danger of extinction.”⁸⁰

The Smart Prosperity Institute at the University of Ottawa Institute of the Environment identifies the “key legislative tools” under [the *SARA*] as:⁸¹

- Section 11 conservation agreements (discretionary and interjurisdictional)
- Section 13 funding agreements
- Safety net provisions (s.34(2), s.61(4))
- Section 80 Emergency order

2.3 Wiggles?

The Canadian strategy includes funding programs, notably the Habitat Stewardship Program [HSP]. The HSP, established in 2000, “provides funding for projects submitted by Canadians that contribute directly to the recovery objective and population goals of species at risk [...] and prevent others from becoming a conservation concern.”⁸² Additional funding programs include the

⁷⁹ *Ibid* at s.61.

⁸⁰ *Canada Wildlife Act*, RSC 1985, c W-9, s.8.

⁸¹ Smart Prosperity Institute, *Species in the Balance: Partnering on Tools and Incentives for Recovering Canadian Species at Risk* (February 2018), online: < <https://institute.smartprosperity.ca/sites/default/files/sr-02-01-18-final.pdf> >.

⁸² Environment and Climate Change Canada, “Habitat Stewardship Program for Species at Risk,” online: <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/programs/habitat-stewardship-species-at-risk.html>.

Aboriginal Fund for Species at Risk, established in 2004; and the Interdepartmental Recovery Fund, first operational in 2002-3.⁸³

SARA also provides for Stewardship Action Plans which “creat[e] incentives and other measures to support voluntary stewardship actions taken by any government in Canada, organization or person”⁸⁴; however, there are no such plans found in the public registry.

With respect to the most recent policy development, the 2018 Pan-Canadian approach is summarized in the following table:⁸⁵

Pan-Canadian Approach to Transforming Species at Risk Conservation in Canada		
New Principles to Guide Collaborative Implementation Work		
Multi-species and Ecosystem-based Approaches Shared Leadership Strengthened Partnerships Aligned Investments	Shared Priorities Indigenous Engagement Evidence-based Decision Making Improved Monitoring and Reporting	
↓		
Priority Places	Priority Species	Priority Threats
Criteria 1. Biodiversity Values 2. Conservation Status 3. Boundary Optimization 4. Achievability of Conservation Outcomes 5. Leadership and partnership Opportunities	Criteria 1. Ecological Value 2. Conservation Status 3. Social and Cultural Value 4. Achievability of Conservation Outcomes 5. Leadership and partnership opportunities	Criteria 1. Impact of the Threat 2. Achievability of Conservation Outcomes 3. Leadership and partnership opportunities
Identification of Priorities → Cooperative Action Planning → Investments and implementation → Monitoring and reporting	Identification of Priorities → Cooperative Action Planning → Investments and implementation → Monitoring and reporting	Identification of Priorities → Cooperative Action Planning → Investments and implementation → Monitoring and reporting
↓		
Results and Benefits Better Conservation Outcomes for More Species at Risk Improved Return on Investment Increased Co-benefits for Biodiversity and Ecosystems		

2.4 Comment

Notable criticisms of the SARA include its limited application and weaknesses in timelines. The SARA applies only to federal lands, so as David Boyd stated, “[t]he Act generally does not apply to endangered species on provincial lands, private lands, or territorial lands in the Yukon, Northwest Territories, and Nunavut. In total, therefore, the Act applies to only 5 percent of

⁸³ Environment and Climate Change Canada, “Species at risk: the act, the accord and the funding programs,” online: Government of Canada < <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding.html> >.

⁸⁴ SARA, *ibid* note 40 s.10.1.

⁸⁵ *Pan-Canadian Approach*, *supra* note 49, Figure 1 at 4 (recreated).

Canada's land area."⁸⁶ With respect to timelines, for example, Kumpf and Hughes note, "[t]he Minister has been criticized for long overdue recovery strategies and for failing to include critical habitats in the strategies or limiting them to public lands to avoid conflict."⁸⁷ Kumpf and Hughes do note successful litigation taken to mean "the government must identify the critical habitat [in a recovery strategy] to the greatest extent possible, and cannot use scientific uncertainty to delay critical habitat identification."⁸⁸

Hoffman notes that despite developments in law and policy, "[i]n September 2017, the World Wildlife Foundation released a report indicating that the species protected by *SARA* have declined at almost the same rate as those species not protected by *SARA*. This may signal further amendments to *SARA* in the future."⁸⁹

3.0 ALBERTA

3.1 Law and Policy

As mentioned, species at risk are subject to mixed federal and provincial jurisdiction. In Alberta, species at risk are governed under the *Wildlife Act* and its regulations, and by policy. Additionally, the emergence of landscape level land-use planning on regional and municipal regional levels supports habitat conservation and protection of species.

The *Wildlife Act* "is not habitat-based, but includes designation of protected areas including habitat conservation areas, wildlife sanctuaries, migratory bird lure sites, and wildlife control areas".⁹⁰ The *Environmental Protection and Enhancement Act* addresses environmental matters but does not specifically address wildlife or species at risk. The main policy is *Alberta's Strategy for the Management of Species at Risk 2009-2014*.⁹¹ A draft *Biodiversity Policy* had been underway in 2015, but has not been completed to date. Sage grouse are subject of the *Alberta Greater Sage-grouse Recovery Plan 2013-2018*.⁹²

⁸⁶ Kumpf & Hughes, *supra* note 24 at 305, quoting Boyd, *infra* note 360 at 184), and noting that the US ESA applies to federal, states, and private land (cited to David Boyd).

⁸⁷ Kumpf & Hughes, *supra* note 24 at 306, citing Doell & Tollefson at 433.

⁸⁸ Kumpf & Hughes, *supra* note 24 at 306, citing the Nooksack Dace case [*Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, 2009 FC 878, citing an Ecojustice news release.

⁸⁹ Hoffman, *supra* note 27 at 22, citing World Wildlife Foundation, *Living Planet Report Canada: A National Look at Wildlife Loss* (September 2017, accessed 15 December 2017) online: <http://assets.wwf.ca/downloads/WEB_WWF_REPORT_v3.pdf?_ga=2.180207204.1390170845.1510695483-1785753042.1510695483>.

⁹⁰ Jaremko, *supra* note 19 at 1, referencing *Wildlife Act*, ss.103(1)(b), (p), and see *Wildlife Regulation*, Schedule 11 and 12, and the discussion in Passelac-Ross, *supra* note X.

⁹¹ Alberta, *supra* note 47. This appears to remain in force as it has not been replaced or updated at the time of writing this paper.

⁹² *AB Recovery Plan*, *supra* note 6.

3.1.1 Wildlife Act

The main statute for species at risk protection in Alberta is the *Wildlife Act* and *Wildlife Regulation*. Legislative direction in Alberta is brief, and policy fills out the details. *Alberta’s Strategy for the Management of Species at Risk 2009-2014*,⁹³ sets out objectives and strategies to be followed:

A modified summary of Alberta’s Strategy (portions verbatim) follows:⁹⁴

Goal:	To ensure that populations of all wild species are protected from severe decline and that viable populations are maintained, and where possible, restored.					
Objectives	1. To identify species that are, or may be at risk and those for which management will help to prevent them from becoming at risk.		2. To identify and implement actions designed to restore species at risk to viable, self-sustaining levels.		3. To identify and implement actions designed to prevent species from becoming at risk.	
Strategies	#1 General Status	#2 Detailed Status	#3 <i>Wildlife Act</i> Listing	#4 Recovery Planning (Recovery strategy & action plans)	#5 Preventing Species from Becoming at risk	#6 Implementing Recovery and Management Actions (Single & multi-species)

The Alberta Strategy also references MULTISAR,⁹⁵ to be discussed further *infra*, noting:

The MULTISAR project has demonstrated success of a multi-species stewardship initiative for species at risk on the Alberta prairie landscape. That project was initially developed for the small landscape of the Milk River Basin, and was subsequently expanded to all of prairie Alberta, largely facilitated through a temporary allocation of funds from the Innovation Program of Ministry of Advanced Education and Technology. MULTISAR would be an appropriate long-term program for management within Sustainable Resource Development.⁹⁶

3.1.2 Alberta Greater Sage-grouse Recovery Plan

The *Alberta Greater Sage-grouse Recovery Plan 2013-2018*⁹⁷ was created to meet requirements under the *Wildlife Act* and the *SARA*, along with the commitment to the *National Accord and National Framework*.⁹⁸ The recovery plan reviews background, threats, proposes critical habitat, outlines knowledge gaps and research priorities, recovery & conservation efforts, and provides a strategy for recovery. The Guiding principles, recovery goals, and supporting objectives are summarized below:

⁹³ Alberta, *supra* note 47.

⁹⁴ *Ibid* at 6-7.

⁹⁵ *Ibid* at 23.

⁹⁶ *Ibid* at 23.

⁹⁷ *AB Recovery Plan, supra* note 6.

⁹⁸ *Ibid* at iii.

1. Guiding principles⁹⁹
 - a. Recovery possible
 - b. Assumption of shared responsibility among stakeholders
 - c. Cooperative partnership approach
 - d. Recognition of continued economic activity in areas. “The Plan will therefore strive to identify effective and feasible recovery strategies.”
 - e. Best available science and adaptive management
 - f. “Lack of information or scientific certainty should not impede implementation of actions believed to be necessary to achieve the goals of this recovery plan.”
2. Recovery goals¹⁰⁰
 - a. Short term
 - b. Restore and prevent further loss of critical habitat
 - c. Increase suitable habitat
 - d. Reverse population decline: augmentation, predator management, habitat remediation
 - e. Long-term
 - f. Enhance and maintain habitat
 - g. Population recovery
3. Supporting objectives¹⁰¹
 - a. Short term goals
 - i. Industry footprint and stewardship
 - ii. Industrial land use standards
 - iii. Education on industrial and agricultural practices
 - iv. Reclamation framework (oil and gas facilities)
 - v. Collaboration with NGOs
 - vi. Translocation from Montana population
 - vii. Captive breeding
 - viii. Assess predator compositions and populations
 - ix. Maintain moratorium on viewing leks
 - b. Long term goals
 - i. Protect critical habitat
 - ii. Enhance habitat
 - iii. Restore and enhance habitat quality (public/private)
 - iv. Modify energy industry operational activities
 - v. Mitigate impacts of resource development
 - vi. Create recreational viewing opportunities
 - vii. Restore hunting

⁹⁹ *Ibid* at 22.

¹⁰⁰ *Ibid* at 23.

¹⁰¹ *Ibid* at 23-4.

Strategies for Recovery focus on “livestock, grazing, and oil and gas extraction [as the] most common land uses in sage -grouse habitat.”¹⁰² The Recovery Plan includes the Action Plan, a section on timetable and costs, and socio-economic considerations. Socio-economic considerations include analysis of grazing and ranching, with reference to a range health score [RHS], and oil and gas considerations include an approach of minimizing disturbance that “has been endorsed by industrial stakeholders,” referencing also AEUB Information Letter, 2000-1 *Principles for Minimizing Surface Disturbance in Native Prairie and Parkland Areas* (AEUB 2002) and the *Recommended Land Use Guidelines for Grassland and Parkland* (ASRD 2011).¹⁰³

The Recovery Plan continues with notes on multiple species at risk and related recovery strategies, noting mutual benefit as “[t]he strong focus that has been placed on land use and habitat restoration should be beneficial to a variety of species associated with the silver sagebrush steppe,”¹⁰⁴ and closes with a section on plan evaluation and amendment. While the Plan contemplates a term of 2013-2018, no replacement plan is yet evident.

Captive breeding

Captive breeding of sage grouse has commenced in Canada. In 2016, the Calgary Zoo opened the first greater sage-grouse breeding facility in Canada, the “Synder-Wilson Family Greater Sage-Grouse Pavilion,” a 31,000 square foot, purpose-built world-class centre, using eggs collected from Saskatchewan’s Grasslands National Park and birds translocated to Alberta from Montana.¹⁰⁵ In October 2018, the Calgary Zoo announced “successful breeding and hatching of sage-grouse at its Devonian Wildlife Conservation Centre (DWCC) [which] marks a significant milestone for these highly endangered birds, as it has resulted in increasing the conservation population in human care, which will positively benefit the wild population through future reintroduction efforts.”¹⁰⁶ At that time, there were “eight hens, six males, and 50 juveniles thriving at the DWCC.”¹⁰⁷ The Zoo acknowledges program funding by AEP and Environment and Climate Change Canada. The Zoo plans to consult with experts and government to plan “how, when and where the sage grouse will be released into the wild.”¹⁰⁸

3.1.3 Regional Planning

The provincial Land Use Framework¹⁰⁹ [LUF], through its enacting legislation the *Alberta Land Stewardship Act* [ALSA], aims toward comprehensive provincial land-use planning, and has been developing regionally-based land use plans since 2008.

¹⁰² *Ibid* at 25.

¹⁰³ *Ibid* at 32.

¹⁰⁴ *Ibid* at 33.

¹⁰⁵ Calgary Zoo, “Calgary Zoo Opens First Greater Sage-Grouse Breeding Facility in Canada” (28 October 2016) Calgary Zoo Members Blog (blog) online: < <https://www.calgaryzoo.com/blog/members/calgary-zoo-opens-first-greater-sage-grouse-breeding-facility-in-canada/> >.

¹⁰⁶ Calgary Zoo, “First Greater Sage-Grouse Reproduce in Human Care in Canada” (18 October 2018) Calgary Zoo News, online: < <https://www.calgaryzoo.com/news/first-greater-sage-grouse-reproduce-human-care-canada> >.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*.

¹⁰⁹ Alberta Environment and Parks, *Land Use Framework*, online: < <https://www.landuse.alberta.ca/Pages/default.aspx> >.

Unique in that it is superordinate to other provincial legislation, the *ALSA* divides the province into seven land-use regions and mandates creation of a regional plan for each region. To date, two have been finalized: the Lower Athabasca Regional Plan¹¹⁰ [LARP], which encompasses the city of Fort McMurray and nearby oil sands mines; and the South Saskatchewan Regional Plan¹¹¹ [SSRP], which encompasses southern Alberta, including the Calgary area and the grasslands region south of CFB Suffield and Medicine Hat – notably, the SSRP encompasses Alberta’s sage grouse habitat. The third regional plan, the North Saskatchewan Regional Plan [NSRP], will encompass the Capital (Edmonton) region, and its creation is underway.¹¹²

Biodiversity is considered extensively in the LUF and *ALSA*’s regional plans. Each regional plan is to include a sub-regional plan of a Biodiversity Management Framework [BMF],¹¹³ and sub-regional linear management frameworks will also affect wildlife and species at risk. A draft SSRP BMF includes an objective that “species at risk are recovered and no new species at risk are designated, [and] intact grasslands habitat is sustained.”¹¹⁴

Regional planning has significant implications for habitat management in itself, and also in relation to protection of species at risk. For example, woodland caribou are listed as endangered under Alberta legislation and threatened under the *SARA*, and therefore are subject to recovery planning both provincially and federally. Alberta’s 2017 proposed Draft Provincial Woodland Caribou Range Plan was to be implemented as a “form of land-use planning covering 23 per cent of the province, [that] incorporates social and economic considerations. Thus, it will be a sub-regional plan under regional plans [and will] form the main component of the LARP landscape management plan.”¹¹⁵ The geography of the caribou range indicates such a plan should ultimately form a sub-regional plan under multiple regional plans in northern Alberta. Alberta Environment and Parks indicate the plan continues to be in development.¹¹⁶

Additionally, the LUF and *ALSA* also include conservation and stewardship tools to encourage “stewardship of private lands in Alberta through the development of applicable incentives and market-based instruments.”¹¹⁷ The tools include “the transfer of development credits (TDCs), land trusts, charitable easements and other tools, land conservation offsets, lease-swapping, and dealing with existing tenure rights in ecologically sensitive areas.”¹¹⁸

¹¹⁰ Alberta, *Lower Athabasca Regional Plan 2012-2022* (Alberta: 2012), online: < <https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf> >.

¹¹¹ Alberta, *South Saskatchewan Regional Plan 2014-2024: An Alberta Land-use Framework Integrated Plan, amended May 2018* (Alberta: 2018) online: < <https://landuse.alberta.ca/RegionalPlans/SouthSaskatchewanRegion/Pages/default.aspx> >.

¹¹² Alberta Land-use Framework, Regional Plans, online: < <https://landuse.alberta.ca/REGIONALPLANS/Pages/default.aspx> >.

¹¹³ BMFs are under development but not yet finalized.

¹¹⁴ Alberta, *South Saskatchewan Region Biodiversity Management Framework: v.1.0 November 20, 2015* (Alberta: 2015) Draft [unpublished] at 2.

¹¹⁵ Alberta, *DRAFT Provincial Woodland Caribou Range Plan* (Alberta: December 2017) Draft, online: , <https://talkaep.alberta.ca/caribou-range-planning> > at 61-2, as discussed in Jaremko EnvConf paper, *supra* note 19 at 8.

¹¹⁶ *Ibid.*

¹¹⁷ LUF, *supra* note 110 at 33.

¹¹⁸ Jaremko, *supra* note 19 at 8, citing LUF, *supra* note 110 at 33.

Notably, “about 75 per cent of Alberta’s species at risk reside in the native habitats of the Grassland Natural Region.”¹¹⁹ Land-use planning has significant potential to affect and protect species at risk.

3.1.4 Emergency Order

Sage grouse in Alberta are also subject of the EO discussed later in this paper.

3.2 Operation

A diagram overview of Alberta’s species at risk protection process at a level of generality is included in Appendix B. This process is a result of the combined effect of the *Wildlife Act* and *Alberta’s Strategy for the Management of Species at Risk (2009-2014)*.

Under the *Wildlife Act* and associated policy, a species is assessed by the provincial Endangered Species Conservation Committee [ESCC]¹²⁰ and an independent scientific subcommittee [SSC]. A Detailed Status Assessment follows the General Status Assessment.¹²¹ ESCC makes recommendations to the Minister about listing and recovery plans.¹²² The Minister formally designates a species as endangered or threatened (Listing).¹²³ Species listed as endangered (animals, invertebrates, plants, algae, fungi, fish) are included in Schedule 6 of the *Wildlife Regulation*.¹²⁴ Footnotes in that Schedule indicate whether the species are categorized as “threatened.” Assessment of species is also published by the ESCC.¹²⁵ Once a recovery plan for an endangered species is made by the Minister it is reviewed by ESCC and subject to public review.¹²⁶ Recovery Planning is listed in policy as Strategy Four.¹²⁷ Prevention Strategies follow: In case a species is assessed to be of special concern, or data deficient, a management plan is created within three years, or further inventory or research is done, respectively.¹²⁸ Following establishment of a recovery plan or management plan, implementation follows, which may include single and multi-species conservation and stewardship projects.¹²⁹

¹¹⁹ Alberta, *supra* note 47 at 14.

¹²⁰ *Wildlife Act*, s.6.

¹²¹ Strategies Two and One, respectively; Alberta, *supra* note 47.

¹²² *Wildlife Act*, s.6.

¹²³ Strategy Three: Alberta, *supra* note 47.

¹²⁴ *Wildlife Regulation*, Alta Reg 143/1997.

¹²⁵ Alberta Fish and Wildlife, “Species Assessed by the Conservation Committee: Alberta Species at Risk” (March 2016: Government of Alberta), online: < <https://open.alberta.ca/publications/species-assessed-by-the-conservation-committee-alberta-species-at-risk> >.

¹²⁶ *Wildlife Act*, s6(4).

¹²⁷ Strategy Four: Alberta, *supra* note 47.

¹²⁸ Strategy Five: Alberta, *supra* note 47.

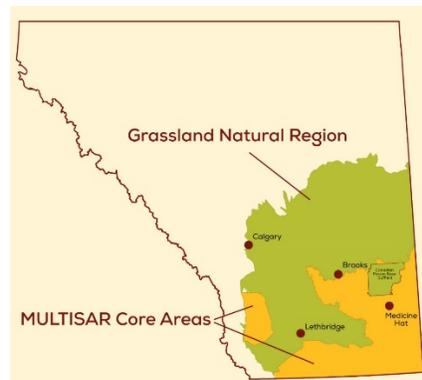
¹²⁹ Strategy Six: Alberta, *supra* note 47.

Recovery strategies are prepared through Environment and Sustainable Resource Development (now Environment and Parks) Species at Risk Program, provided to the Minister by the Fish and Wildlife Policy branch, and reviewed by the ESCC. According to policy, they contain three components: background information, a recovery section with goals, objectives and strategies, and an action plan.¹³⁰

With respect to discretion and socio-economic considerations, there is little in the Alberta process that is not discretionary. Establishment of the ESCC is mandatory, and committee recommendations are mandatory. Listing is discretionary, as are the creation and contents of recovery plans, although recovery plans are directed by policy. Further, Alberta's Strategy indicates, "[c]onsideration of potential socio-economic issues around listing and/or recovery actions should be reserved for the formal designation and/or recovery planning stages."¹³¹

3.3 Wiggles – MULTISAR

MULTISAR is referenced in *Alberta's Strategy for the Management of Species at Risk 2009-2014*,¹³² as indicated above. It is a voluntary and informal program endorsed by Alberta that is funded as part of policy in support of species at risk law in Alberta, and operates "on over 473,400 acres" throughout the grasslands region as indicated in the following map:¹³³



MULTISAR, established in 2002, is a cooperative program based on voluntary stakeholder participation on private and public lands in Southern Alberta grasslands region. Their 2017-18 Report describes them as:

MULTISAR is a program focused on multi-species conservation at the landscape level that promotes stewardship through voluntary participation of landholders on both Crown and private lands. The program is a collaborative effort among landholders, Alberta Conservation Association, Alberta Environment and Parks, and the Prairie Conservation Forum. The primary goals of MULTISAR are to implement collaborative strategies to manage multiple species on a defined working landscape and to assist with their implementation.

¹³⁰ AB *Recovery Plan*, *supra* note 6 at iii.

¹³¹ Consideration of potential socio-economic issues around listing and/or recovery actions should be reserved for the formal designation and/or recovery planning stages" at 8.

¹³² Alberta, *supra* note 47.

¹³³ <http://multisar.ca/where-we-work/>.

These strategies are built as landholder-specific Habitat Conservation Strategies (HCS), leading to the implementation of habitat enhancement activities that benefit both the farm or ranch operation and wildlife. Through these relationships, MULTISAR has implemented 173 habitat enhancement projects on 400,000 acres of land.¹³⁴

Collaborative parties include “landholders, the Alberta Conservation Association, Alberta Environment and Parks, the Prairie Conservation Forum, Cows and Fish, Canadian Cattlemen’s Association, Alberta Beef Producers, the Canadian Round Table for Sustainable Beef, and Environment and Climate Change Canada.”¹³⁵

Financial support for 2017-18 was credited to:

Alberta Conservation Association (ACA), Alberta Environment and Parks (AEP) through a grant to the Prairie Conservation Forum (PCF), the Government of Canada through the Habitat Stewardship Program for Species at Risk (HSP) grant to ACA, and the Species at Risk Partnership on Agricultural Lands (SARPAL- Environment and Climate Change Canada) grant to the Canadian Cattlemen’s Association (CCA), and private donations. Additional in-kind support was provided by Alberta Environment and Parks, Alberta Conservation Association, Prairie Conservation Forum, Canadian Cattlemen’s Association, Milk River Watershed Council, M.D. of Ranchlands, Altalink, EQUUS, and private landholders.¹³⁶

MULTISAR operates through three primary components, Habitat Conservation Strategies [HCS], (including Beneficial Management Practices [BMPs], Species at Risk Conservation Plans [SARCs] (a form of HCS)); Education, Outreach and Awareness Program; and research, Monitoring and Evaluation.

An HCS is “a detailed plan developed by a team of people including landholders, wildlife biologists, and range agrologists. HCSs strive to balance the need for healthy rangelands and quality wildlife habitat through grazing recommendations and habitat improvement projects.”¹³⁷

MULTISAR’s report cites results of their efforts, which include: 42 HCSs on 395,296 acres of land in the Milk River and South Saskatchewan watersheds (a large portion being interconnected) including seven new properties;¹³⁸ 54 species at risk on HCS properties;¹³⁹ 173 HCS projects since 2005. For SARCs, throughout the grasslands region, 82 assessments since 2007 covering 156,254 acres.¹⁴⁰ For BMPs, since 2012 these have totalled 56,712 acres.¹⁴¹

¹³⁴ MULTISAR: *a multi-species conservation strategy for species at risk in the Grassland Natural Region of Alberta, 2017-2018 report*, Alberta Environment and Parks, Fish and Wildlife Policy Branch, Alberta Species at Risk Report No. 162 (Edmonton: March 2018), online: < <https://open.alberta.ca/publications/9781460138694> > at iii at 1.

¹³⁵ *Ibid* at iii.

¹³⁶ *Ibid* at iv.

¹³⁷ MULTISAR: *At Home on the Range: Partnering with Landowners to conserve Grassland Species at Risk in Alberta*, online: < <http://multisar.ca/> >.

¹³⁸ MULTISAR, *supra* note 135 at 7.

¹³⁹ *Ibid* at 9.

¹⁴⁰ *Ibid* at 15.

¹⁴¹ *Ibid* at 15.

Detailed results of MULTISAR’s efforts were provided in this report, but these are difficult to understand in any context without interdisciplinary expert analysis. The program appears to be tremendously successful: the 2017-18 report refers to prioritization of resources going forward, and a media article indicates there is a waiting list for ranchers to participate.¹⁴² The program is described as “voluntary, grassroots, and producer driven”, and stewardship programs are described as “win-win,” describing “situations and was to not only benefit wildlife or species at risk, but also cattle operations.”¹⁴³ The article gives examples of enhancement and assistance regarding upland watering sites, water wells, riparian recovery, grazing lands, restoration of native grasslands, wildlife-friendly fencing, and hawk poles, as well as “portable water units, windbreaks, and calf shelters”.¹⁴⁴ The MULTISAR assessment can be useful to other assessments the ranchers need or would like to undertake for their operations.

Operations Grasslands Community, a program of the Alberta Fish and Game Association, is another organization in the region, established in 1989, which likewise “works one-on-one with its ranching and farming membership (300+ active members) towards our common goals of economic stability, vital communities, and a healthy environment with sustainable wildlife populations, [achieving this through] voluntary habitat-stewardship agreements, land management plans, on-site habitat enhancement projects, and thorough knowledge exchange and innovative education outreach activities.”¹⁴⁵ MULTISAR is listed as one of several supporters.

3.4 Comment

Concerns have been expressed about the effectiveness of legal protection under Alberta’s regime. Shaun Fluker of the University of Calgary Faculty of Law and Jocelyn Stacey wrote that:

“The Wildlife Act provides almost no legal protection to endangered species in Alberta. SARA offers substantive protection, but is of limited application. The history of federal-Alberta relations on environmental matters suggests that an agreement or order to enable the application of SARA to provincial lands is a remote possibility. Accordingly, **the existing legal framework governing species at risk in Alberta gives the perception of legal protection for endangered species that does not actually exist in Alberta.**” [emphasis mine]

As Fluker and Stacey note, “the legal protection afforded under the *Wildlife Act* is essentially limited to the section 36(1) prohibition against wilfully molesting, disturbing, or destroying a house, nest, or den of an endangered animal listed in Schedule 5 of the Wildlife Regulations. The focus of this protection is on the individual animal rather than the species or population. Moreover, the section only protects against wilful harm to a residence.”¹⁴⁶

¹⁴² Alexis Kienlen, “Fifteen years later, conservation program is an overnight sensation,” Alberta Farm Express (13 February 2017), online: < <https://www.albertafarmexpress.ca/2017/02/13/multisar-conservation-program-is-an-overnight-sensation/> >.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Operation Grassland Community, online: < <http://www.grasslandcommunity.org/> >.

¹⁴⁶ Shaun Fluker & Jocelyn Stacey, “The Basics of Species at Risk Legislation in Alberta” (2012) 50: 1 Alta L Rev 95 at 105.

This, combined with the lack of prohibitions against “takes,” protection of critical habitat, and lack of mandatory recovery planning, cause Fluker to doubt that “provisions in the *Wildlife Act* satisfy Alberta’s obligation under the *National Accord* to legislate effective protection for species at risk.”¹⁴⁷ Fluker and Stacey note that the gaps are filled with policy. Relative to Alberta’s protections, the *SARA* is more transparent and “relatively more predictable.”¹⁴⁸

4.0 SASKATCHEWAN

4.1 Law and Policy

Saskatchewan has the sparsest legislation among the jurisdictions reviewed in this paper; however, much of its sage grouse protection is carried out by adoption of federal recovery planning, as well as the activity of voluntary stakeholder collaborations.

The key legislation is the *Wildlife Act*,¹⁴⁹ which includes Part V: Protection of Wild Species at Risk, and the *Wild Species at Risk Regulations*,¹⁵⁰ which includes the lists of designated species. The legislation is relatively brief and lacking in detail, and appears not to have been updated since 1998 save for definitions in 2000 (the Act) and 1999 (the Regulation). The *Wildlife Habitat Protection Act*¹⁵¹ may also be involved as matters arise.

4.1.1 SoD Action Plan

Saskatchewan has adopted joint federal-provincial multi-species action planning, which encompasses protection of the sage grouse. The *Action Plan for Multiple Species at Risk in Southwestern Saskatchewan: South of the Divide*¹⁵² [SoD Action Plan] was adopted by Saskatchewan OC 467/2013 as a federal/provincial agreement to be known as the “South of the Divide Multi-Species Action Plan.” This *SoD Action Plan* is an Action Plan under the *SARA*, which supports the sage grouse recovery strategy. It is to be “considered one in a series of documents that are linked and should be taken into consideration together. Those being the COSEWIC status report, the recovery strategy, and one or more action plans.”¹⁵³

This *SoD Action Plan* “focuses on a group of nine federally-listed species that inhabit the Milk River drainage basin of southwestern Saskatchewan,” an area of 1,415,732 ha (14,157 km²).¹⁵⁴ This area excludes Grasslands National Park, which is located within it but managed separately.

¹⁴⁷ *Ibid* at 105.

¹⁴⁸ *Ibid* at 113.

¹⁴⁹ *Wildlife Act*, SS 1998, c W-13.12.

¹⁵⁰ *Wild Species at Risk Regulations*, RRS c W-13.11 Reg 1.

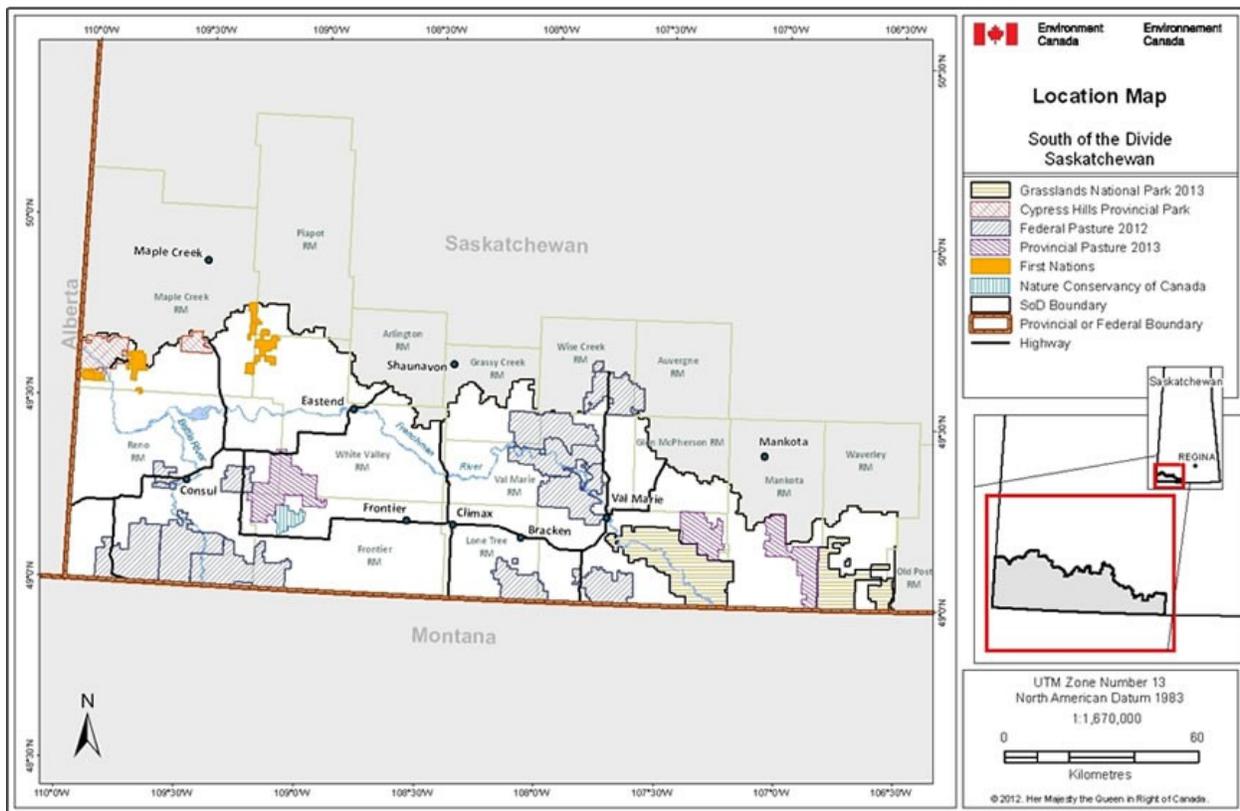
¹⁵¹ *The Wildlife Habitat Protection Act*, SS 1983-4, c W-13.2.

¹⁵² Environment and Climate Change Canada, *Action Plan for Multiple Species at Risk in Southwestern Saskatchewan: South of the Divide*, Species at Risk Act Action Plan Series (Ottawa: 2017 Environment and Climate Change Canada), online: < https://www.registrelep-sararegistry.gc.ca/virtual_sara/files/plans/ap_south_of_the_divide_e_proposed.pdf > [*SoD Action Plan*].

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid* at Executive Summary.

The regional map is reproduced below:¹⁵⁵



There are in fact 23 listed species in the region, however the *SoD Action Plan* addresses only those for whom recovery is feasible and recovery strategies in place,¹⁵⁶ and to the extent objectives can be realized. The resulting nine species are: Black-footed Ferret, Burrowing Owl, Eastern Yellow-bellied Racer [snake], Greater Sage-Grouse, Prairie Loggerhead Shrike [bird], Mormon Metalmark [butterfly], Mountain Plover [bird], Sprague’s Pipit [bird], and the Swift Fox. As well, the Action Plan “includes management considerations for four species of special concern for which Management Plans have been prepared: Black-tailed Prairie Dog, Long-billed Curlew, McCown’s Longspur, and Northern Leopard Frog (boreal/prairie populations).¹⁵⁷ The *SoD Action Plan* therefore relates to 13 Recovery Strategies and Management Plans under the SARA.

The *SoD Action Plan* adopts critical habitat by reference to the respective Recovery Strategies, with amendments as appropriate, noting that critical habitat [for sage grouse] was “fully identified in the Recovery Strategy” and appended to the Action Plan.¹⁵⁸ The *SoD Action Plan* notes that “the total amount of overlapping (non-additive) critical habitat for all species in the SoD area, is found within 595,573 ha (5,955 km²) of land. [...] Critical habitat has been identified on private land, provincial Crown land, and federal Crown land that is not in federal protected areas.

¹⁵⁵ *Ibid* at Figure 1.

¹⁵⁶ *Ibid* at 2.

¹⁵⁷ *Ibid* at Executive Summary.

¹⁵⁸ *Ibid* at Executive Summary.

The federal government and the government of Saskatchewan are working together to ensure that all critical habitat in the SoD area is effectively protected.”¹⁵⁹

Further, the *SoD Action Plan* completed a socio-economic evaluation including implementation and opportunity costs, conservation and ecological goods and services benefits, as well as distributional impacts on groups of people.

Under the *SoD Action Plan*, measures to be taken are in broad strategies, each with assigned priority, timeline, species and threats:¹⁶⁰

1. Research as part of an adaptive management framework
2. Population and species management
3. Habitat assessment, management and conservation
4. Regulation and policy
5. Communication, collaboration and engagement
6. Conservation planning
7. Monitoring and assessment

There are only 3,000-4,000 people resident in the SoD area. Its socio-economic implementation costs include an unmeasurable opportunity cost if habitat conservation prevents landowners from converting grassland to cropland, and estimates crude oil and natural gas production foregone profits, royalties and taxes “in the medium” from \$26-145 million, plus opportunity costs for development on new footprints,¹⁶¹ although noting relatively little of Saskatchewan’s oil and gas activity takes place in the region.

4.1.2 GNP Action Plan

As Grasslands National Park [GNP] falls within the boundaries of the South of the Divide region, there is a *Multi-Species Action Plan for Grasslands National Park of Canada*,¹⁶² [*GNP Action Plan*] under the authority of Parks Canada. The GNP Action Plan applies within GNP, “and to Fort Walsh and the Cypress Hill Massacre National Historic Sites.”¹⁶³ The *GNP Action Plan* identifies the GNP as “the only national park to represent the mixed grass prairie ecosystem in Canada.”¹⁶⁴

The *SoD Action Plan* acknowledged, “many of the species occurring in the SoD area also occur within GNP, therefore these two action plans will complement each other.”¹⁶⁵ Likewise, the *GNP Action Plan* “complements the larger Action Plan for Multiple Species at Risk in Southwestern Saskatchewan: South of the Divide – 2016 [proposed].

¹⁵⁹ *Ibid* at Executive Summary.

¹⁶⁰ *Ibid* at Part 1.2.

¹⁶¹ *Ibid* at Part 2.4.

¹⁶² Parks Canada Agency, *Multi-species Action Plan for Grasslands National Park of Canada*, Species at Risk Action Plan Series (Ottawa: 2016 Parks Canada Agency) online: < <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/action-plans/multi-species-grasslands-national-park.html> > [*GNP Action Plan*].

¹⁶³ *Ibid* at iii.

¹⁶⁴ *Ibid* at 1.

¹⁶⁵ *SoD Action Plan*, *supra* note 153 at Part 2.

[...] Together, the Federal Government and the Government of Saskatchewan are working to ensure unified wildlife conservation in this area of southwest Saskatchewan.¹⁶⁶ The species in question for which crucial habitat is considered, largely overlap, although the GNP Action Plan adds the Greater Short-horned Lizard and does not include the Black-tailed Prairie Dog, Long-billed Curlew, McCown’s Longspur, and the Northern Leopard Frog.

The GNP Action Plan’s determination of measures involves a prioritization process: which would include ecological effectiveness, visitor experience, external relations, and budget. “Wherever possible, Parks Canada is taking an ecosystem approach, prioritizing actions that benefit numerous species at once to effectively and efficiently protect and recover species at risk. Five themes emerge from these measures: 1) best management practices; 2) habitat restoration; 3) population management; 4) re-introductions and translocations and; 5) partnerships, outreach, and engagement for species at risk recovery.”¹⁶⁷

Detail on the sage grouse is reproduced in the table below, adapted from Appendix A: Species information, objectives and monitoring plans for species at risk in GNP.¹⁶⁸

Species	Greater Sage-Grouse
National objectives	<ol style="list-style-type: none"> 1. The immediate objective is to stop the decline of the adult sage-grouse population in Canada 2. The short-term objective is to reverse the population decline and increase the number of active leks in both Alberta and Saskatchewan. 3. The long-term objective is to achieve a stable or increasing sage-grouse population with: at least 1095 adult sage-grouse among 16 or more active leks in Alberta and: at least 1500 adult sage-grouse among 20 or more active leks in Saskatchewan
Site-based population & distribution objectives	<ol style="list-style-type: none"> 1 (a) Immediate objective (next 5 years) to prevent the extirpation of sage-grouse from GNP, (b) restoration of 25 ha/yr. of sage-grouse habitat 2. Short term (6-10+ years): demonstrate increasing trend in the number of lekking males 3. Long term (20+ years): increase the numbers of mating areas to 6-8 leks and the total population to 300 to 400 individual birds (100 to 133 males)
Population trend in GNP	Significant decline
Population monitoring	Annual spring lek counts on active leks and revisit inactive leks opportunistically
General information and broad park approach	Restore and/or enhance silver sagebrush habitat within areas of sage-grouse current or historical range in GNP. Optimize grazing regime to improve nest success and chick survival. Reduce accidental mortality by removing fences and/or installing fence markers. Manage human disturbance around leks by following EPO prohibitions. Maintain partnerships for reintroductions and/or egg collection for a captive population

¹⁶⁶ *GNP Action Plan*, *supra* note 163 at 1.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid* at Appendix A.

4.1.3 Saskatchewan Sage Grouse Plan

The prior policy, *A Conservation Plan for Greater Sage-Grouse in Saskatchewan*,¹⁶⁹ [*Sage Grouse Conservation Plan*] has unclear status: it contemplated its own replacement by the SoD Multi-Species agreement,¹⁷⁰ but is still posted¹⁷¹ so presumably retains some relevance.

The *Sage Grouse Conservation Plan*'s goals, objectives, and recommended approaches are:¹⁷²

- Goals:
 - “Ensure that a Greater Sage-Grouse population persists in Saskatchewan.
 - “Manage Greater Sage-Grouse habitat to benefit both the species and the sagebrush-steppe ecosystem, and to ensure not only that other species at risk are not negatively impacted, but also potentially benefit from conservation actions.
- Objectives:
 - “Identify the factors contributing to the decline of Greater Sage-Grouse abundance and occupied range in Saskatchewan and mitigate threats to the extent possible.
 - “Monitor populations province-wide.
 - “Protect Sagebrush habitat within Greater Sage-Grouse range in Saskatchewan.
 - “Increase awareness and collaboration.
- Recommended approaches.
 - “1. Population assessment and monitoring.
 - “2. Habitat identification and assessment.
 - “3. Threat Mitigation.
 - “4. Partnership Collaboration.”

3.1.4 Emergency Order

Sage grouse in Saskatchewan are also subject of the EO discussed later in this paper.

4.2 Operation

A diagram overview of Saskatchewan's species at risk protection process at a level of generality is included in Appendix C. This process is a result mainly of the governing legislation.

The adoption of the federal-provincial *SoD Action Plan* may render much of this moot, at least with respect to the sage grouse and its endangered neighbours.

Under the provincial legislation, perhaps on the scientific and community-based advice of an appointed advisory committee, the Minister determines a wild species to be at risk.¹⁷³

¹⁶⁹ Weiss & Prieto, *supra* note 9.

¹⁷⁰ Weiss & Prieto, *supra* note 9 at v identifies it as in interim conservation plan for 2012-2016 “or until an action plan is developed through the South of the Divide Multi-Species Action Plan Initiative”.

¹⁷¹ Environment Saskatchewan “Species at Risk” site: <
<http://www.environment.gov.sk.ca/Default.aspx?DN=c2e39ae8-cbf1-4f07-8d9a-b50ce3f4fd01>>.

¹⁷² Weiss & Prieto, *supra* note 9 at 17ff.

¹⁷³ *Wildlife Act*, *supra* note 150 at s.48.

The Minister's determination includes classification as extirpated, endangered, threatened, or vulnerable.¹⁷⁴ If the Minister determines a wild species to be at risk, the Lieutenant Governor in Council may designate and list the species as extirpated, endangered, threatened, or vulnerable; likewise, if the Minister determines a species should be reclassified or deleted from the list, the Lieutenant Governor in Council may amend the designation and the list.¹⁷⁵ The list of designated species is found in Appendices 1, 2, and 3 of the *Wild Species at Risk* regulation, and lists extirpated, endangered, and threatened species.¹⁷⁶ Once a species is designated, certain prohibitions are in force¹⁷⁷ however, the Director may issue licenses to protect human health and property.¹⁷⁸ Once a species is designated the Minister may prepare and implement a recovery plan which may affect one or more designated species and ecosystem management, and may contain certain contents; including needs, viable status, recovery options, costs and benefits of options, and actions for recovery which (s)he may prioritize, and in prioritizing, (s)he may consider scientific evidence of natural extirpation, technical, or economic feasibility.¹⁷⁹ In preparing a recovery plan, the Minister may consider the status of species elsewhere, prepare a recovery plan in cooperation with other jurisdictions, or adopt another jurisdiction's recovery plan.¹⁸⁰ The Minister may prepare and implement a management plan.¹⁸¹

With respect to discretionary elements and consideration of socio-economic factors: virtually the entire process is discretionary. Economic feasibility is listed as a potential factor in recovery planning.

4.3 Wiggles – SODCAP

Much like MULTISAR or the SGI in the US (to be discussed later in this paper), Saskatchewan has SODCAP, a multi-stakeholder voluntary collaborative partnership created to meet conservation goals.

The South of the Divide Conservation Action Program [SODCAP] “is a partnership between stakeholders and government with a goal of implementing actions relating to the South of the Divide Multi-Species Action Plan. The draft South of the Divide Multi-Species Action Plan (SOD) was developed as a new type of plan, acknowledging that species work together, sharing habitat and meeting their individual needs within the heterogeneity of the ecosystem. It focuses on a combination of 13 different species listed as “At Risk”, Threatened”, or “Endangered” in the *Species at Risk Act*.”¹⁸²

¹⁷⁴ *Ibid* at s.48.

¹⁷⁵ *Ibid* at s.49.

¹⁷⁶ *Wild Species at Risk Regulation*, Appendices 1, 2, 3. The Regulation as it stands includes only extirpated animals and plants, endangered animals and plants, and threatened plants – no named threatened animals.

¹⁷⁷ *Wildlife Act*, *supra* note 150 at s.51 and elsewhere in Act.

¹⁷⁸ *Wildlife Act*, *supra* note 150 at s.52.

¹⁷⁹ *Ibid* at s.50.

¹⁸⁰ *Ibid* at s.50.

¹⁸¹ *Ibid* at s.50.

¹⁸² South of the Divide Conservation Action Program Inc., online: < www.sodcap.com >.

The SODCAP's 2016-17 *Annual Report*¹⁸³ lists funding from 8 sources: SARPAL (Species at Risk Partnership on Agricultural Lands), SSGA (Saskatchewan Stock Growers Association), ECCC (Environment and Climate Change Canada), SCA (Saskatchewan Cattlemen's Association), MoA (Ministry of Agriculture, Growing Forward 2), HSP (Habitat Stewardship Program), Service Canada, and MoE (Ministry of Environment), for a "total operating budget of just over \$550,000."¹⁸⁴ The Board of Directors includes representation from the Saskatchewan Stock Growers Association, The Saskatchewan Cattlemen's Association, Crescent Point Energy, the Ranchers Stewardship Alliance, SaskPower, the Nature Conservancy of Canada, and the Saskatchewan Association of Rural Municipalities, and well as Saskatchewan Ministry of Environment and Environment Canada.

SODCAP's projects include:

- Results-Based Conservation Agreements ("if you build it, they will come")
"to date, 14 projects have been signed across the Milk River Watershed, encompassing more than 56,000 acres. These projects focused specifically on habitat for either the Greater Sage Grouse or Sprague's Pipit, but these ranchers are providing habitat for several species at risk simultaneously. Annual payments to producers amount to approximately \$200,000."¹⁸⁵
- Habitat Management Agreements
"To date 7 habitat management agreements have been signed, impacting more than 75,000 acres. One time payments to producers to implement these multi-year agreements amounted to \$98,000."¹⁸⁶
- Habitat Restoration Agreements
"To date, 2 habitat restoration agreements have been signed, impacting 270 acres. Native seed for another 500 acres has been provided to producers to convert cropland to perennial native cover."¹⁸⁷
- Niche Product Marketing
"A logo has been developed to help producers communicate the ecological value of their operations to consumers."¹⁸⁸ [beef]
- Grassbanking
"The process is underway at the Nature Conservancy of Canada's "Old Man on His Back" lands to create a grass bank with their pasture patrons. More than 2,400 acres will be impacted by the combined efforts of the pasture patrons and NCC staff working together."¹⁸⁹

¹⁸³ South of the Divide Conservation Action Program Inc, *2016-2017 Annual Report: Providing Habitat on a Working Landscape* (2017), online: < <http://www.sodcap.com/Docs/AnnualReport1617.pdf> >.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* at 4.

¹⁸⁶ *Ibid* at 5.

¹⁸⁷ *Ibid* at 6.

¹⁸⁸ *Ibid* at 6.

¹⁸⁹ *Ibid* at 6.

- Milk River Agri-Environmental Group Plan (AEGP)
“In the 2016-17 year, 28 FSP [Farm Stewardship Program – focus on BMPs] and FRWIP [Farm and Ranch Water Infrastructure Program – focus on water development] were submitted to the Ministry of Agriculture for review.”¹⁹⁰
- Conservation Banking
“Conservation Banking is about compensation for habitat lost, and pooling compensatory measures prior to development taking place. Developers would purchase credits from “habitat banks” to offset residual impacts of the development project. EDI Environmental Dynamics Inc. has produced a report on steps required to enable conservation banking to occur in Saskatchewan. Consultation on this topic will continue into 2017-18.”¹⁹¹

Grass banking is a mechanism used by the Sage Grouse Initiative in the US (discussed later in this paper). SODCAP provides the NRCS definition of grass banking:

a “grass bank” is a physical place where forage is made available to ranchers, at a reduced fee, in exchange for tangible conservation benefits being produced to participants’ home ranches. The main goal of *grass-banking* is to have a community-based conservation plan that provides meaningful benefits for both the environment and participating ranchers. According to NRCS, roughly two dozen grass banks have emerged across the US over the last 15 years. Lands in grass banks can be entirely private, public, or a mix of both. Typically, grass banks are operated by a conservation organization and include a privately owned or managed base property with associated public land grazing allotments.¹⁹²

Examples of grass banking are Nature Conservancy’s Matador Ranch in Montana, and Nature Conservancy Canada’s Sandstone Ranch in Alberta (an agreement with members of the Sandstone Ranch Grazing Co-op).

4.3.1 *Stewards of Saskatchewan*

Similar programs to SODCAP’s are also found in Saskatchewan through *Nature Saskatchewan*. Although sage grouse are not a target species at risk, “Nature Saskatchewan’s stewardship programs engage landowners in conserving habitat where species at risk occur.”¹⁹³

In total, the programs currently have 851 participants conserving over 219,000 acres (133,142 hectares) of grassland habitat and 129 miles (208 km) of shoreline habitat for wildlife and plants across southern Saskatchewan. The goals of the programs are to conserve habitat, raise awareness and provide support to agricultural producers, enhance prairie habitat for species at risk, and search for and monitor target species at risk populations. While the focus is on species targeted by each program, these programs

¹⁹⁰ *Ibid* at 7.

¹⁹¹ *Ibid* at 7.

¹⁹² http://www.sodcap.com/grass_banking.html.

¹⁹³ Nature Saskatchewan, *Stewards of Saskatchewan 2017 Report: Habitat Conservation for Species of Risk Through Stewardship* (Regina, Saskatchewan: May 2018), online: <
http://www.naturesask.ca/rsu_docs/COMPILED--2017-18-Final-Report-19JUNE2018-sm.pdf>.

ultimately benefit many other prairie species and their habitats.¹⁹⁴

In addition, the Saskatchewan Conservation Data Centre¹⁹⁵ is managed as a partnership between the Government of Saskatchewan and Nature Saskatchewan. Staff are from the Ministry of Environment, Nature Saskatchewan, Nature Conservancy of Canada, and the Native Plant Society of Canada. The Centre also lists partnerships with the Saskatchewan Invasive Species Council, and the Botanical Assessment Working Group. The Centre is a:

partnership between the province and several non-government organizations with the mandate to manage information related to species at risk in Saskatchewan. The centre maintains a centralized database of information on the status, location and ecology of Saskatchewan species. The database supports conservation planning, recovery, research and monitoring of species at risk.¹⁹⁶

4.4 Comment

Saskatchewan's legislation has been criticized for being outdated and inadequate. Andrea Olive, a Professor of Political Studies and Environmental Policy at the University of Saskatchewan, complains that "oil development is impacting species through habitat destruction, oil and noise pollution, invasive species, and road infrastructure. Current wildlife policy in Saskatchewan is inadequate to protect species at risk in the Bakken formation."¹⁹⁷ There is a disconnect however, as Professor Olive's article does not mention SODCAP or the *Multi-Species Action Plan*, other than a passing mention of the GNP Action Plan, noting there is no oil development in GNP. Olive is quoted in a media article as suggesting Saskatchewan "update the legislation and fund it." A representative from Environment Saskatchewan is quoted describing the efforts underway:

[SK] doesn't want to do a "double effort" in making a specific provincial list. They have adopted the federal listings of endangered and threatened species and use them as a guideline. [...] department reports to the national database for endangered species. [...] The province has two main focuses right now with regards to habitat conservation; one project involving woodland caribou and another involving species at risk in southwestern Saskatchewan.¹⁹⁸

5.0 EMERGENCY PROTECTION ORDER

Sage grouse are subjects of Canada's first EO under the *SARA*, which was issued November 20, 2013. Litigation at the Federal Court of Canada preceded, and likely prompted, the EO, although

¹⁹⁴ Nature Saskatchewan, Online: < <http://www.naturesask.ca/what-we-do/stewards-of-saskatchewan> >.

¹⁹⁵ Saskatchewan Conservation Data Centre, online: < <http://www.biodiversity.sk.ca/> >.

¹⁹⁶ Saskatchewan, Wildlife Species at Risk, online: < <https://www.saskatchewan.ca/business/environmental-protection-and-sustainability/wildlife-and-conservation/wildlife-species-at-risk> >.

¹⁹⁷ Andrea Olive, "Oil development in the grasslands: Saskatchewan's Bakken formation and species at risk protection," (2018) *Cogent Environmental Science*, 4: 1443666, online: < <https://doi.org/10.1080/23311843.2018.1443666> > Professor Olive has also written a book on the subject, although time did not permit exploration during this research.

¹⁹⁸ *Ibid.*

the Court did not directly order the EO. Litigation has ensued as well. This section will review the history around the EO, along with the preceding and subsequent litigation.

In response to decreasing Canadian populations, and as required under SARA,¹⁹⁹ Canada launched the 2008 federal *Recovery Strategy for the Greater Sage-Grouse*.²⁰⁰ The 2008 federal Recovery Strategy was successfully contested as inadequate by a group of Alberta and Saskatchewan conservation groups²⁰¹ represented by Ecojustice, in *Alberta Wilderness Association v Canada (Environment)* (2009 FC),²⁰² then *Alberta Wilderness Association v Canada (Attorney General)* (2013 FCA).²⁰³ In December 2013, Canada issued the *Emergency Protection Order for the Protection of the Greater Sage-Grouse*²⁰⁴ under SARA,²⁰⁵ on the basis that the Greater Sage-Grouse “faces imminent threats to its survival and recovery,” and identified habitat boundaries and restricted permitted activities. Litigation has also arisen challenging the EO.

5.1 History

A timeline of sage grouse history pertinent to the EO is as follows:²⁰⁶

- 1987: sage grouse listed as threatened in Saskatchewan
- 1997: COSEWIC lists sage grouse as threatened in Alberta and Saskatchewan
- 1998: COSEWIC lists sage grouse as endangered
- 2000: Alberta lists sage grouse as endangered
- 2003: SARA enacted
- 2003: sage grouse listed as endangered under SARA
- 2007: sage grouse Recovery Strategy under SARA proposed
- 2008: sage grouse Recovery Strategy published
- 2008: Environmental groups file application for judicial review re critical habitat in Recovery Strategy
- 2009: federal court orders redrafting of critical habitat in Recovery Strategy, upheld on appeal
- 2011: Petition for EO under SARA
- 2013: EO made

¹⁹⁹ SARA, *supra* note 40 at s.39 requires a Minister to prepare a strategy for recovery of a species listed under Schedule 1 (facing imminent extirpation or extinction). SARA’s recovery planning process requires a recovery strategy, and an action plan to implement the recovery strategy (see *AWA v Canada Env*, 2009 FC paras 6-7ff).

²⁰⁰ Government of Canada, *Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) in Canada*, online: SARA Registry <

http://www.sararegistry.gc.ca/document/dspDocument_e.cfm?documentID=1458 >.

²⁰¹ Alberta Wilderness Association, Grasslands Naturalists, Nature Saskatchewan, and the Western Canada Wilderness Committee. AWA’s list includes the Federation of Alberta Naturalists who were not parties to the litigation.

²⁰² *AWA 2009 FTC*, *supra* note 12.

²⁰³ *Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190 [*AWA 2013 FCA*].

²⁰⁴ Emergency Protection Order for the Protection of the Greater Sage-Grouse, SOR/2013-202, Registration 2013-11-20; online: < <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-202/page-1.html> >.

²⁰⁵ SARA, *supra* note 40 at ss.80 and 97(2).

²⁰⁶ Modified from Unger, *supra* note 207.

5.2 Preceding Litigation

The two sage grouse cases were brought by Ecojustice, an environmental law charity, on behalf of environmental groups. The two cases were about inclusion of critical habitat in a recovery strategy in the first case, and cabinet confidence in decision-making in the *SARA* process in the second case. Notably, neither judgment directed Canada to make an EO. However, the litigation ostensibly or likely impelled Canada to make the EO. The applicants in the first case were Alberta Wilderness Association, Federation of Alberta Naturalists, Grasslands Naturalists, Nature Saskatchewan, and Western Canada Wilderness Committee; and applicants in the second case were Alberta Wilderness Association, Western Canada Wilderness Committee, Nature Saskatchewan, and Grasslands Naturalists.

In the first case, *Alberta Wilderness Association v Canada (Environment)* (2009 FC),²⁰⁷ the Federal Court granted an application for judicial review of the 2008 “Recovery Strategy for the Greater Sage-Grouse (*Centrocercus urophasianus urophasianus*) in Canada,” on the basis that it did not adequately describe critical habitat. While Justice Zinn found that the Minister did not err in law in his interpretation of *SARA* regarding identification of critical habitat, he granted the application for judicial review “as the decision of [the Minister], to the extent that it fails to identify any critical habitat, is unreasonable.”²⁰⁸ The correct standard of review was reasonableness,²⁰⁹ and in light of known information about sage grouse habitat, as well as the precautionary principle, the Minister’s decision to omit critical habitat from the recovery strategy was unreasonable.²¹⁰ The Court granted the judicial review, and directed the parties to make submissions as to remedy, although it was Justice Zinn’s “preliminary view that Section 2.6 entitled Critical Habitat ought to be struck, with a direction to the respondent that it redraft that section within a fixed time frame in keeping with these Reasons.”²¹¹ The case also addressed evidentiary submissions.

In 2009, Canada replaced the applicable section of the Recovery Strategy. In 2011, the Alberta Wilderness Association hosted the Sage Grouse Summit²¹² together with government officials, citizens, ENGOs, and scientists,²¹³ Ecojustice wrote a letter to the Minister requesting an EO and the identification of additional critical habitat, and this letter was ignored.²¹⁴ Ecojustice filed the second judicial review application in February 2012.

In the second case, *Alberta Wilderness Association v Canada (Attorney General)* (2013 FCA)²¹⁵, the Federal Court of Appeal set aside an interlocutory order and ordered that Canada could not claim Cabinet confidence to shield it from documentary requests on its decision-making

²⁰⁷ *AWA 2009 FTC*, *supra* note 12.

²⁰⁸ *Ibid* at para 2.

²⁰⁹ *Ibid* at para 44.

²¹⁰ *Ibid* at para 70.

²¹¹ *Ibid* at para 70 & 71.

²¹² Alberta Wilderness Association, “Sage-Grouse”, online: Alberta Wilderness Association < <https://albertawilderness.ca/issues/wildlife/sage-grouse/> >.

²¹³ Page & Gorrie, *supra* note 5.

²¹⁴ *Ibid* at 337-8.

²¹⁵ *AWA 2013 FCA*, *supra* note 204.

under s.80(2); that is, Canada’s filed Certification and Objection “does not constitute a valid claim for Cabinet confidence pursuant to section 39 of the *Canada Evidence Act*.”²¹⁶

The appellants’ motion for an order that Canada inform them of Canada’s decision under s.80(2) was dismissed.²¹⁷ The appellants initially requested an order of *mandamus* regarding response to their previous demand for an EO, and a request for production of documents under the *Federal Court Rules*, Rule 317.²¹⁸ Canada had responded to the Rule 317 request with a Rule 318 *Certification and Objection*, arguing that Canada’s decision-making process was not complete and that judgment on the exercise of its duty to protect the sage grouse was premature, and also that because the Governor in Council’s decision to make an EO (or not) “involves cabinet decision-making, it is protected by Cabinet confidentiality” [as under *Canada Evidence Act*, s.39].²¹⁹ The appellants filed a motion seeking orders including disclosure of Canada’s decision regarding the EO, an order “declaring the Certification and Objection invalid or unlawful,” and an order that Cabinet confidentiality could not apply to a subsequent Certification and Objection or other materials disclosing Canada’s decisions under s.80(2).²²⁰ The motion judge denied the motion, and the appellants appealed the motion judge’s interlocutory order.

The point to best take away from the Justice Pelletier’s judgment in the second sage grouse case is that:

If the position asserted by the respondents [re Cabinet confidence as argued] is correct, it would have the effect of sheltering from review every refusal to make a recommendation for an emergency order. This cannot be so. The Minister’s discretion to decline to make a recommendation to Cabinet must be exercised within the legal framework provided by the legislation. [...] The Minister’s decision to decline to make a recommendation is therefore reviewable. The standard of review is reasonableness.²²¹

Shortly following this interlocutory decision delivered August 1, 2013, in September 2013, Canada advised Ecojustice that the Minister would recommend an EO, and would release an amended recovery strategy including additional critical habitat.²²² Canada issued the Emergency Order November 20, 2013, and Ecojustice and the Appellants considered it a victory.

Writing on the sage grouse litigation, Ecojustice lawyers Devon Page and Melissa Gorrie described the sage grouse litigation as one of three cases chosen as species whose habitat needs were well known, were endangered, but whose recovery strategies omitted critical habitat; these cases having three (initial) objectives:

²¹⁶ *Ibid* at para 57.

²¹⁷ *Ibid* at para 57.

²¹⁸ *Ibid* at para 10-11.

²¹⁹ *Ibid* at para 12.

²²⁰ *Ibid* at para 16.

²²¹ *Ibid* at para 48-9.

²²² Page & Gorrie, *supra* note 5 at 342.

“1) assert federal jurisdiction to protect species and their habitat, including on provincial and private land; 2) ensure the strongest interpretation of *SARA*’s provisions generally; and 3) expose and override the federal government’s policy of interpreting *SARA* so as to grant themselves discretion in whether to identify critical habitat in a recovery strategy” [because] “since *SARA*’s wording meant that habitat would and could only be protected if identified in a recovery strategy, federal intransigence on habitat identification was effectively neutering the law.”²²³

More recently, as part of an out of court settlement with the Canadian Parks and Wilderness Society on a different matter, the Minister of Environment and Climate Change Canada agreed in May 2018, “that, moving forward, the Government of Canada will track and report unprotected critical habitat for species at risk on non-federal lands 180 days after critical habitat has been identified.”²²⁴ The legal implications of this agreement are not immediately apparent.

5.3 Emergency Order

EOs may be granted under the *SARA* under section 80. Notably, the EO can apply to non-federal lands. A Minister must recommend an EO if (s)he is of the opinion that a species faces imminent threats to its survival or recovery, and has consulted with the other competent Ministers,²²⁵ unless (s)he is of the opinion that equivalent measures have been taken under another federal Act to protect the species.²²⁶ Upon such a recommendation, the Governor in Council *may* make an EO.²²⁷ With respect to the contents, provisions pertinent to the sage grouse are:

80(4) The emergency order may

(c) with respect to any other species [not aquatic or migratory birds],

(i) on federal land or in the exclusive economic zone of Canada

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates; and

(B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates; and

²²³ *Ibid* at 332.

²²⁴ Environment and Climate Change Canada, “The Government of Canada and the Canadian Parks and Wilderness Society reach an important agreement on species at risk reporting” (8 May 2018) Press Release, online: < <https://www.canada.ca/en/environment-climate-change/news/2018/05/the-government-of-canada-and-the-canadian-parks-and-wilderness-society-reach-an-important-agreement-on-species-at-risk-reporting.html> >.

²²⁵ *SARA*, *supra* note 40 at ss.80(2) & (3).

²²⁶ *Ibid* at s.81.

²²⁷ *Ibid* at s.80(1).

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.

The *Emergency Order for the Protection of the Greater Sage-Grouse*²²⁸ was issued November 20, 2013, to become effective February 2014. It has been amended twice: the first amendment on March 7, 2014, provided non-application to a specified parcel of land, and the second amendment on October 19, 2017, made a change respecting where structures were located vs used prior to the EO.²²⁹

The EO for sage grouse sets out critical habitat in detail with legal land descriptions, lists a variety of prohibited activities including, “acute sensory disturbances,” and sets out exceptions.

In the words of Page and Gorrie,

The order applies to approximately 1,700 square kilometres of Crown land in southern Alberta and Saskatchewan. It prohibits the killing or moving of sagebrush and other native plants in the birds’ habitat. It also includes restrictions around building new fences and roads, and making excess noise from sunrise to sunset during the Sage-Grouse mating season.²³⁰

Since the EO for sage grouse, one other EO has been issued for the western chorus frog.²³¹ Notably, one Ministerial recommendation for an EO has been recently denied, that being for the southern resident killer whale, on the grounds that protective measures were being taken [under the SARA], other protective measures were being taken, and “whereas social, economic, policy and other factors, and the broader public interest, have also been considered.”²³²

5.4 Subsequent Litigation

Litigation has been commenced by parties affected by the sage grouse EO. LGX Oil & Gas Inc. is involved in three active court cases on the subject of the EO: an application for judicial review, a civil claim for damages, and the case of its own bankruptcy and insolvency.

Firstly, LGX Oil & Gas, together with the City of Medicine Hat filed an application for judicial review of the EO in 2014.²³³ This application for judicial review seeks judicial review on the grounds that,

²²⁸ *Emergency Order for the Protection of the Greater Sage-Grouse*, SOR/2013-202 [EO].

²²⁹ See EO, *supra* note 229 on CanLII for “Versions”.

²³⁰ Page & Gorrie, *supra* note 5 at 342.

²³¹ *Emergency Order for the Protection of the Western Chorus Frog (Great lakes / St Lawrence – Canadian Shield Population)*, SOR/2016-211.

²³² *Order Declining to make an Emergency Order for the protection of the Killer Whale Northeast Pacific Southern Resident Population*, SI/2018-102. In that case, the Order cites measures under SARA to protect the SRKW, and “other measures have been taken, continue to be taken and will be taken by the Government of Canada and other organizations to address the three imminent threats to the survival and recovery of the SKRW; and “whereas social, economic, policy and other factors, and the broader public interest, have also been considered [...] Her Excellency the Governor General in Council declines to make an emergency order”.

²³³ *The City of Medicine Hat et al v. Attorney General of Canada et al* (January 3, 2014), Doc. Calgary T-12-14 (FC) (Notice of Application).

s.80(2) and 97(2) of the *SARA* and the Order made thereunder are *ultra vires* the jurisdiction of Parliament; and the Governor in Council, on the recommendation of the Minister failed to observe principles of natural justice, erred in law, and based its decision on erroneous assumptions and facts, rendering the decision to recommend and introduce the Order unreasonable.²³⁴

As Page and Gorrie wrote, “The City of Medicine Hat and LGX Oil & Gas Inc., both of whom own and operate oil and natural gas interests in an area that they claim is affected by the emergency order, have launched a judicial review application in federal Court to quash or suspend the emergency order.”²³⁵ The application for judicial review “is currently in abeyance pending negotiations between the parties. In the interim, Ecojustice has brought a motion seeking intervener status for our clients – particularly to ensure the constitutional authority of the federal government to protect species at risk under *SARA*.”²³⁶

Secondly, meanwhile, LGX and others filed suit against Canada in the Alberta Court of Queen’s Bench for the “*de facto* expropriation of their mineral rights to the oil and natural gas and the associated mineral and surface leases and rights-of-way (the “Oil and Gas interests”) located in the Manyberries area in southeastern Alberta as a result of the *Emergency Order for the Protection of the Greater Sage-Grouse*, SRO/2013-202”.²³⁷ The Plaintiffs are LGX Oil & Gas Inc., by its Court-appointed receiver and manager Ernst & Young Inc.; The City of Medicine Hat; Lintus Resources Limited; Swade Resources Ltd.; WF Brown Exploration Ltd.; Barnwell of Canada Ltd.; and Spyglass Resources Corp.²³⁸ The Amended Statement of Claim was filed in May 2018 and revised an initial damages figure of \$60MM to \$123.6MM.²³⁹ Canada’s defence is wide-ranging and is based on the EO as regulatory and not justiciable; in the alternative, the claimed loss is not compensable in the absence of regulations providing for compensation under *SARA*; in the alternative, the claimed loss is not compensable as the EO did not have an extraordinary impact; in the alternative, compensation under *SARA* is discretionary, and the Plaintiffs should have been aware of the species at risk legislation and likelihood of actions or orders.²⁴⁰

Thirdly, concurrently, LGX Oil & Gas is under receivership in bankruptcy proceedings, and in the course of that proceeding, Canada has appealed a declaration on disclaimer effect.²⁴¹

Should the first two cases currently in progress proceed to judgment or appellate judgment, the jurisprudence will be significant to species at risk protection in Canada.

²³⁴ *Ibid.*

²³⁵ Page & Gorrie, *supra* note 5 at 343.

²³⁶ *Ibid.*

²³⁷ *LGX Oil & Gas Inc (Receiver of) v Canada (Attorney General)* (in progress), Calgary, 1501-14562 (ABQB); Documents online at Ernst & Young Inc. Restructuring Document Centre, *LGX Oil & Gas Inc. [Receiver]*, online: < <https://documentcentre.eycan.com/Pages/Main.aspx?SID=380> > [*LGX v Canada*].

²³⁸ *Alberta Treasury Branches v. LGC Oil & Gas Inc.*, Calgary, 1601-07375 (ABQB); Documents online at Ernst & Young Inc. Restructuring Document Centre, *LGX Oil & Gas Inc [Receiver]*, online: < <https://documentcentre.eycan.com/Pages/Main.aspx?SID=380> > [*ATB v LGX*].

²³⁹ *LGX v Canada*, *supra* note 238 [Amended Statement of Claim filed May 16, 2018].

²⁴⁰ *LGX v Canada*, *supra* note 238 [Statement of Defence to the Amended Statement of Claim].

²⁴¹ *ATB v LGX*, *supra* note 239.

Final determination of the LGX litigation may be informed by a recent Federal Court case reviewing the EO for the Western Chorus Frog,²⁴² which determined that,

the federal power to issue an emergency protection order in section 80 of SARA covering provincial lands does not offend the division of powers under the Constitution Act 1867 and is otherwise lawful.²⁴³

In the case, a housing developer had claimed \$20MM for frustration of its housing development by the EO, and had argued the EO was *ultra vires* Parliament and expropriated property without compensation. The expropriation argument also failed.²⁴⁴ It is not immediately apparent whether this case has been appealed. This case should be reviewed closely for its discussion of these issues, which also arise in the LGX case.

5.5 *Corporate due diligence*

Jason Unger of the Environmental Law Centre looked at the EO litigation, and considered the “moral of the [LGX litigation] story” to be a call for heightened due diligence on the parts of actors when it comes to species at risk. He wrote, “the story of *LGX v Canada*, the *SARA*, and insolvency “is a story that calls on companies (and investors) to conduct their due diligence around impacts on species at risk and habitat more generally.”²⁴⁵

Unger described the respective timelines of sage grouse protection in southern Alberta and LGX’s interests in the Manyberries property: key to note is that while LGX acquired their interest in the property in 2012, and the EO was made in 2013, the sage grouse litigation had been underway and an EO had been petitioned in 2011. Unger described the *SARA* history as having “clear flags of progressing regulatory relevance.”²⁴⁶ He blamed the lack of corporate due diligence on the issue of “how we treat habitat protection generally [noting Alberta’s] wiggly policy,” and on the federal government’s “timid” administration of the *SARA*, giving the example of delayed recovery strategies and ignoring or misinterpreting identification of critical habitat, “timidity [which] reinforces the signal that governments are hesitant, if not inherently opposed, to take meaningful and clear action for species at risk and their habitat, lulling those who invest into a false sense of security that due diligence need not delve into issues of species and habitat,” combined further with companies’ limited knowledge of the *SARA*.²⁴⁷

Unger indicated that “[the question of] how to deal with habitat protections and impacts on existing authorizations/licenses, where the impacts or potential impacts, on species at risk habitat were not known] would be addressed in an upcoming ELC publication.” The upcoming publication promises to be interesting and valuable to the field.

²⁴² Case is *Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2018 FC 643. Groupe Candiac had claimed \$20MM for frustration of its housing development and had argued the EO was *ultra vires* Parliament and expropriated without compensation.

²⁴³ Shaun Fluker, “More Justice for the Western Chorus Frog,” (12 September 2018), online: ABLawg <<https://ablawg.ca/2018/09/12/more-justice-for-the-western-chorus-frog/>>.

²⁴⁴ *Ibid.*

²⁴⁵ Unger, *supra* note 207.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

6.0 UNITED STATES

Most sage grouse habitat is situated in the United States. The Greater Sage-Grouse is “classed as extirpated in Arizona, Kansas, Nebraska, New Mexico, and Oklahoma,”²⁴⁸ and has territory in eleven states (CA, CO, ID, MT, NV, ND, OR, SD, UT, WA, and WY). In 2015, US Departments of the Interior and Agriculture finalized extensive plans for greater sage-grouse, relating to 11 Western states, thereby keeping the animal from requiring protection under the *Endangered Species Act*.²⁴⁹ Much litigation followed, with environmental as well as industrial groups challenging the plans.²⁵⁰ Following the change in federal US administration, sage grouse protection has changed significantly. Since June 2017, the Department of the Interior has undertaken to review federal and state sage-grouse plans and programs, citing goals of thriving wildlife and local economies, and with reference to energy independence.²⁵¹

Listing of sage grouse as an endangered or threatened species is considered to be not warranted under US legislation.

6.1. Law and Policy

The key piece of legislation in the United States governing species at risk is the *Endangered Species Act*²⁵² [ESA]. The ESA was passed as a bipartisan bill in 1973. In addition to addressing species classification, recovery measures, and prohibitions, the ESA mandates cooperation with states, interagency and international cooperation.

The ESA is administered by the Interior Department’s US Fish and Wildlife Service [FWS] and the Commerce Department’s National Marine Fisheries Service [NMFS], with responsibility divided by type of organism. While the ESA is found in the US Code as §§ 1531 et seq., its sections are commonly referred to by the numbering of the original legislation, a practice which will be used in this paper.

For easy reference, the respective section numbers are:

²⁴⁸ Alberta Wilderness Association, “Sage Grouse”, online: < <https://albertawilderness.ca/issues/wildlife/sage-grouse/> >.

²⁴⁹ <https://www.doi.gov/pressreleases/secretary-zinke-signs-order-improve-sage-grouse-conservation-strengthen-communication>.

²⁵⁰ See for example E&E News, “US National Greater Sage-Grouse Planning Strategy” (25 February 2016), online: < <https://www.eenews.net/stories/1060033004> >.

²⁵¹ <https://www.doi.gov/pressreleases/secretary-zinke-signs-order-improve-sage-grouse-conservation-strengthen-communication>.

²⁵² *Endangered Species Act of 1973*, 16 USC § 1531 et seq. [ESA]; for convenience: online < <https://www.fws.gov/endangered/laws-policies/esa.html> > and < <https://www.law.cornell.edu/uscode/text/16/chapter-35> >.

US Code § (Chapter 35 – Endangered Species)	ESA section	Section heading
1531	2	Congressional findings and declaration of purposes and policy
1532	3	Definitions
1533	4	Determination of endangered species and threatened species
1534	5	Land acquisition
1535	6	Cooperation with States
1536	7	Interagency cooperation
1537	8	International cooperation
1537a	8a	Convention implementation
1538	9	Prohibited acts
1539	10	Exceptions
1540	11	Penalties and enforcement
1541	12	Endangered plants
1542	15	Authorization of appropriations
1543	17	Construction with Marine Mammal Protection Act of 1972
1544	18	Annual cost analysis by Fish and Wildlife Service

6.2 Operation

A diagram overview of the United States species at risk protection process at a level of generality is included in Appendix D.

Under the *ESA*, FWS/NMFS assesses candidates.²⁵³ This may be prompted by petition.²⁵⁴ FWS/NMFS assesses the species as (protection) warranted, warranted but precluded, or not warranted. The Secretary of Interior/Commerce makes a determination of status solely on the basis of science²⁵⁵ and determines the species' status provided they are endangered or threatened by reason of one of the following five factors: habitat destruction, overutilization, disease or predation, inadequacy of existing regulation, or other natural or manmade causes.²⁵⁶ If protection is warranted, the Secretary proposes a regulation that the species are endangered or threatened,²⁵⁷ concurrently with designation of critical habitat as prudent and determinable.²⁵⁸ Designation of critical habitat may be deferred for one year²⁵⁹ and/or revised subsequently.²⁶⁰ If the species is listed, it is published to the Federal Register²⁶¹ and added to the *List of Endangered and Threatened Wildlife* or the *List of Endangered and Threatened Plants*.²⁶²

²⁵³ *Ibid* at s.4.

²⁵⁴ *Ibid* at s.4(b)(3).

²⁵⁵ *Ibid* at s.4(b)(1)(A).

²⁵⁶ *Ibid* at s.4(a)(1).

²⁵⁷ *Ibid* at s.4(a)(1).

²⁵⁸ *Ibid* at s.4(a)(3)(A).

²⁵⁹ *Ibid* at s.4(b)(6).

²⁶⁰ *Ibid* at s.4(a)(3).

²⁶¹ *Ibid* at s.4(c).

²⁶² *Endangered and threatened wildlife*, 50 CFR 17.11; and *Endangered and threatened plants*, 50 CFR 17.12; For convenience: online: < <https://www.law.cornell.edu/cfr/text/50/17.11> > and < <https://www.law.cornell.edu/cfr/text/50/17.12> >.

Within one year of the proposed regulation, the Secretary makes a determination regarding listing,²⁶³ a final regulation regarding revision of critical habitat,²⁶⁴ gives notice about de-listing or downlisting,²⁶⁵ or gives notice of extending the one-year period.²⁶⁶ If the species is de-listed or downlisted, it is monitored for five years.²⁶⁷ If a species is listed, then certain prohibitions apply, including “takings,” import and export and trafficking, etc.²⁶⁸ If a species is listed as Threatened, the Secretary must issue protective regulations.²⁶⁹ If a species is listed (designated as endangered or threatened), then the Secretary must develop and implement a recovery plan if such a plan will promote conservation, and giving priority to species most likely to benefit, particularly species in conflict with economic activity.²⁷⁰ Contents of recovery plans are specified (actions, criteria for success, estimates of time and cost).²⁷¹ The Secretary reviews all listed species every five years.²⁷²

A species may be warranted but precluded from listing²⁷³ due to species of higher priorities.²⁷⁴ By policy, species are assigned a priority #1-12, and priority species #1-3 will be listed first.²⁷⁵ Conservation efforts, such as Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAAs)²⁷⁶ are encouraged but not mandated for candidate species.²⁷⁷ Parties to CCAAs will receive protection in the event the species is subsequently listed in the form of an Enhancement of Survival Permit.²⁷⁸ A Candidate Notice of Review is published in the Federal Register each year.

²⁶³ *ESA*, *supra* note 253 at s.4(b)(6).

²⁶⁴ *Ibid* at s.4(b)(6).

²⁶⁵ *Ibid* at s.4(b)(6).

²⁶⁶ *Ibid* at s.4(b)(6).

²⁶⁷ *Ibid* at s.4(g).

²⁶⁸ *Ibid* at s. 9. “Takes” are defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” *ESA* s.3(19).

²⁶⁹ *Ibid* at s.4(d).

²⁷⁰ *Ibid* at s.4(f).

²⁷¹ *Ibid* at s.4(f)(B).

²⁷² *Ibid* at s.4(c)(2).

²⁷³ *Ibid* at s.4(b)(3)(B)(iii).

²⁷⁴ Prioritization is based on “the degree or magnitude of threat is the highest criterion, followed by the immediacy of the threat and the taxonomic distinctiveness of the species (monotypic genus, then species, then subspecies, variety of vertebrate population). The *ESA* gives no preference to popular species or so-called “higher life forms.” (US Fish & Wildlife Service, “Listing a Species as a Threatened or Endangered Species” Factsheet, online: < <https://www.fws.gov/endangered/esa-library/pdf/listing.pdf> >.

²⁷⁵ US Fish & Wildlife Service, “Candidate Species” Factsheet, online: < https://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf >.

²⁷⁶ US Fish & Wildlife Service, “Candidate Conservation Agreements” Factsheet, online: < <https://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf> >.

²⁷⁷ FWS, *supra* note 276.

²⁷⁸ *Ibid*, reference to *ESA* s.10(a)(1)(A).

Relevant documents are published in the Federal Register. Exceptions to prohibitions on Takes include: HCPs,²⁷⁹ safe harbor agreements,²⁸⁰ hardship exemptions,²⁸¹ permitting,²⁸² Alaska natives,²⁸³ pre-Act exemptions,²⁸⁴ and experimental populations.²⁸⁵ An Endangered Species Committee (commonly referred to as the “God Squad”) composed of leaders of seven areas of government, determines whether to grant exemptions to federal agencies requirements to protect listed species upon application for certain actions.²⁸⁶

With respect to discretion and socio-economic considerations, Listing is mandatory if warranted and appropriately prioritized. Endangered/Threatened status is determined solely on the basis of science.²⁸⁷ Critical habitat is determined on the basis of science but also considers economic impacts and national security.²⁸⁸ In developing recovery plans for listed species, the Secretary is to prioritize listed species “that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.”²⁸⁹ Decisions of the Endangered Species Committee may be informed by socio-economic considerations.²⁹⁰

6.3 Wiggles – SGI

The Sage Grouse Conservation Agreement [SGCA] was made in 2013 by “ranchers, oil and gas companies, the US Forest Service, the Bureau of Land Management, state agencies, and environmentalists.”²⁹¹ Under it, “public lands would be managed with core areas of protected sage brush habitat, interspersed within areas of less ecological value where carefully staged oil and gas exploration and development could continue.”²⁹²

The Sage Grouse Initiative [SGI] uses Farm Bill funds and is managed by the Natural Resources Conservation Service [NRCS] through the Working Lands for Wildlife [WLFW] program.

²⁷⁹ *ESA*, *supra* note 253 at s.10(a)(1)(B).

²⁸⁰ *Ibid* at s.10(a)(1)(A).

²⁸¹ *Ibid* at s.10(b).

²⁸² *Ibid* at s.10(d).

²⁸³ *Ibid* at s.10(e).

²⁸⁴ *Ibid* at s.10(f).

²⁸⁵ *Ibid* at s.10(j).

²⁸⁶ *Ibid* at s.7(e). The seven members of the Endangered Species Committee are the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and state representative(s) appointed by the President.

²⁸⁷ *Ibid* at s.4(b)(1)(A).

²⁸⁸ *Ibid* at s.4(b)(2).

²⁸⁹ *Ibid* at s.4(f)(1)(A).

²⁹⁰ *Ibid* at s.7(h), by implication.

²⁹¹ Bruce Babbitt, “Why We Must Save the Endangered Species Act from the Trump Administration,” Opinion, *Yale Environment 360* (20 September 2018), online: < <https://e360.yale.edu/features/why-we-must-save-the-endangered-species-act-from-the-trump-administration-babbitt> >.

²⁹² *Ibid*.

The SGI, a \$60 million federal plan,²⁹³ was modelled on a 2007 initiative by Wyoming, which houses more than a third of the remaining sage grouse and has an economy that depends on fossil fuel extraction, and brought together a broad coalition – ranchers, industry representatives, conservation groups, land managers, and politicians – to create a policy to halt the bird’s decline. [...] The group ultimately agreed to limit any development and restore disturbed areas within “core” grouse habitat – not including the Jonah Field [site of natural gas extraction], where the grouse population was already diminished – while allowing more intensive development elsewhere.²⁹⁴

Petitions to list the sage grouse started in 1999.²⁹⁵ In 2010, the Obama administration identified listing to be warranted. The SGI was launched in 2010 by NRCS. In 2011, a decision on Listing was deferred pending this initiative. In September 2015, Interior Secretary Sally Jewell announced that:

An unprecedented, landscape-scale conservation effort across the western United States has significantly reduced threats to the greater sage-grouse across 90 percent of the species’ breeding habitat and enabled the U.S. Fish and Wildlife Service (FWS) to conclude that the charismatic rangeland bird does not warrant protection under the *Endangered Species Act* (ESA). This collaborative, science-based greater sage-grouse strategy is the largest land conservation effort in U.S. history.²⁹⁶

The official determination was made October 2, 2015, when the FWS determined that listing as endangered or threatened was no longer warranted for the sage grouse, determining that “primary threats to greater sage-grouse have been ameliorated by conservation efforts implemented by Federal, State, and private landowners. [and] regulatory mechanisms provided by Federal and three State plans reduce threats on approximately 90 percent of the breeding habitat across the species’ range.”²⁹⁷ This determination contemplated review in five years. The finding included a review of sage grouse history under the *ESA*; detail on the species and its habitat; federal plans amending 98 land management plans since 2010 for BLM and US Forest Service lands, and their terms including uses for minerals, energy, and grazing; state planning efforts in the various states; the Sage Grouse Initiative; Candidate Conservation Agreements; and other relevant factors; as well as analysis using the Five Factors considered in listing under the *ESA*; and included a section observing Canadian law and regulation.

²⁹³ Nordhaus, *supra* note 4 at 80.

²⁹⁴ *Ibid* at 80.

²⁹⁵ *Ibid* at 80.

²⁹⁶ US Department of the Interior, “Historic Conservation Campaign Protects Greater Sage-Grouse” (22 September 2015) Press Release, online: < <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse> >.

²⁹⁷ Fish and Wildlife Service, Interior Department, 80 FR 191 pgs. 59858-59942 - Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species (October 2, 2015), (to be codified at 50 CFR Part 17) online: < at <http://www.regulations.gov> at Docket Number FWS-R6-ES-2015-0146 >.

A slogan of SGI is “[w]hat’s good for rangelands is good for grouse.”²⁹⁸ Main tools include conservation easements, conifer removal, and prescribed grazing. NRCS writes:

NRCS launched an aggressive campaign called the Sage-Grouse Initiative (SGI) designed to enable ranchers to lead the way on improving the fate of sage-grouse. SGI is a strategic and science-based approach to landscape-scale conservation that seeks to deliver enough of the right conservation practices in the right places to elicit positive responses in sage-grouse populations. SGI marshals existing federal Farm Bill incentive programs to assist private landowners in proactively removing threats to sage-grouse while improving the sustainability of working ranches. NRCS is focusing popular programs, including the Environmental Quality Incentives Program (EQIP), Wildlife Habitat Incentive Program (WHIP), Wetlands Reserve Program (WRP), Grassland Reserve Program (GRP), and Farm and Ranch Land Protection Program (FRPP) to assist producers across the entire range of sage-grouse in the West. To date, more than \$100 million has been committed through these programs for on-the-ground conservation.”²⁹⁹

NRCS describes SGI as one of many Landscape Conservation Initiatives established under the 2008 Farm Bill & ostensibly continued under the 2014 [current] Farm Bill.

NRCS uses Landscape Conservation Initiatives to accelerate the benefits of voluntary conservation programs, such as cleaner water and air, healthier soil and enhanced wildlife habitat. NRCS conservation programs help agricultural producers improve the environment while maintaining a vibrant agricultural sector. [...] NRCS’ sage grouse efforts are part of Working Lands for Wildlife (WLFW), through which NRCS provides technical and financial assistance to help ranchers restore and protect habitat for sage grouse.³⁰⁰

In a 2015 report, NRCS lists investment by NRCS of \$211 million “over the life of the 2014 Farm Bill,” and overall investment by NRCS, conservation partners and landowners totalling \$424.5 million since 2010. At 2015, some figures were provided:

SGI 2.0 estimates that a total of \$760 million will be invested by 2018 in cooperative efforts that restore sagebrush habitat, enhance working landscapes, and protect this iconic Western bird. Here is a look at the numbers:

Dollars:

- >> \$296.5 million from NRCS since 2010
- >> \$128 million from partners since 2010
- >> \$211 million from NRCS FY 2015-18
- >> \$124.5 million from partners FY 2015-18

²⁹⁸ Sage Grouse Initiative, *SGI Brochure*, online: < <http://www.sagegrouseinitiative.com/wp-content/uploads/2014/05/SGI-4fold-Brochure-2014-lowres.pdf> >.

²⁹⁹ USDA, *supra* note 10.

³⁰⁰ US Department of Agriculture Natural Resources Conservation Service, “Sage Grouse Initiative,” online: US NRCS < <https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/initiatives/?cid=steldevb1027671> >.

\$760 million in total

Results:

- >> Enrolled 1,129 ranchers
 - >> Conserved 4.4 million acres
 - >> Established 451,000 acres of conservation easements
 - >> Implemented sustainable grazing systems on 2.4 million acres >> Enhanced 405,241 acres of habitat by removing invading conifer trees
- By 2018, we expect to conserve a total of 8 million acres of habitat³⁰¹

Typical practices in SGI plans include:

prescribed grazing systems that balance forage supply with livestock demand (based upon 25% harvest efficiency) and increase nesting cover for grouse, marking or removing fences near breeding sites to reduce accidental grouse collisions and mortalities, removal of encroaching conifer trees from sagebrush rangelands to restore habitat suitability, and range seeding and weed control to improve habitat quality. A ‘threats checklist’ is completed for each ranch to document that necessary conservation measures have been adopted to address all identified threats.³⁰²

Grassbanking is another tool, as discussed *infra*. Compensatory mitigation [land swap] is a tool used a last resort.³⁰³

SGI is credited for partnering with 1,474 ranchers and conserving 5.6 million acres in 11 states.³⁰⁴ The SGI website lists approximately 82 partners, categorized by Conservation Districts, Federal Agencies, Nongovernmental Organizations, Partnerships, Private Land Trusts, Wildlife Agencies, Universities and Colleges.³⁰⁵ Notably, however, there is only one oil and gas company (ConocoPhillips) and one mining company (Newmont Corporation) listed on the website under Private Corporations.

6.3.1 Response to SGI

The SGI has been largely and widely celebrated. McGrath et al, following a panel of the Environmental Law Institute, described the nature of SGI.

³⁰¹ Sage Grouse Initiative, “New Sage Grouse Strategy Unveiled: 4760 Million Invested by 2018,” (27 August 2015), online: < <https://www.sagegrouseinitiative.com/new-sage-grouse-strategy-unveiled-760-million-invested-2018/> >.

³⁰² USDA, *supra* note 10.

³⁰³ Dan Elliott, “Trump Administration directive could hurt effort to save sage grouse, some governors say,” *Billings Gazette* (13 August 2018), online: < https://billingsgazette.com/news/state-and-regional/trump-administration-directive-could-hurt-effort-to-save-sage-grouse/article_9c345c68-0acb-5ba8-a012-841d36f6f355.html >.

³⁰⁴ Sage Grouse Initiative: Wildlife Conservation Through Sustainable Ranching, Online: < <https://www.sagegrouseinitiative.com/> >.

³⁰⁵ <https://www.sagegrouseinitiative.com/about/partners/>.

They wrote, “[t]he narrative around the sage-grouse determination raises questions of “eco-pragmatism,” where factors such as climate change and human population growth guide environmental decision-making, and protection efforts are balanced with development needs,”³⁰⁶ despite criticism that this process results in reduced *ESA* protection in favour of economic interests. McGrath et al summarized,

U.S. Department of the Interior Secretary Sally Jewell has referred to the landscape-scale efforts to protect the greater sage-grouse as the model for the future of conservation. She said that the big picture of rolling up your sleeves and getting input from all stakeholders is how land-management agencies should orient themselves in the 21st century. Engagement of stakeholders and voluntary prelisting conservation strategies is a large trend in the *ESA* world and the subject of much debate. Some critics claim that these largely voluntary conservation measures are not up to the level of the protections of listing species under the *ESA*. They argue that state-based protection plans are more likely to grant exceptions for economic interests and that the sage-grouse example is an instance of politics trumping science.³⁰⁷

Members of this sage grouse panel included a FWS representative praising SGI as partnerships under the *ESA*; a petroleum industry lawyer who praised the “major success story,” while expressing concerns about “unintended consequences” and noting, “pragmatism cannot overcome the need to stay within the bounds and satisfy the requirements of what Congress has said in the relevant statutes;”³⁰⁸ and a representative of the Center for Biological Diversity, which was actively suing on the plans for inadequate species protection under the *ESA*, who noted the idea of states having their “hands tied” without action by his organization, disagreements on thresholds, and expressing desire for more ambitious conservation goals.³⁰⁹

Brian Rutledge of the Audubon Society described SGI as “the future of conservation,” despite issues.³¹⁰ However, Rutledge noted the plans prompted lawsuits filed on behalf of both environment and energy, “arguing, respectively, that the plan would not adequately protect grouse or that the restrictions were “draconian.””³¹¹ Numerous lawsuits followed the 2015 sage grouse conservation plans. These will not be reviewed in detail, but included lawsuits by environmental groups Western Watersheds Project, WildEarth Guardians, the Center for Biological Diversity and the Prairie Hills Audubon Society; as well as lawsuits by the states of Utah and Idaho, and “a collection of Nevada counties and mining companies.”³¹²

³⁰⁶ Kerry L McGrath et al, “The *ESA* Today: Eco-Pragmatism and State Conservation Efforts,” (seminar transcript), (October 2016) 46 *Environmental Law Reporter* 10827, online: < <https://www.eli.org/events/esa-today-eco-pragmatism-state-conservation-efforts> > at 10827.

³⁰⁷ *Ibid* at 10829.

³⁰⁸ *Ibid* at 10830.

³⁰⁹ *Ibid* at 10832-3.

³¹⁰ Nordhaus, *supra* note 4 at 80.

³¹¹ *Ibid* at 80.

³¹² Scott Straeter, E&E News reporter, “Enviros sue to force changes to federal plans” (25 February 2016) E&E News, online: < <https://www.eenews.net/stories/1060033004/print> >.

Founding president of the Laramie Audubon Society in Wyoming, Robin Groose, wrote that “efforts to “reform” the *ESA* would be premature of this time.”³¹³ Describing past experiences, he wrote:

[N]ow, thoughtful environmentalists must concede that we must accept some loss of prime sage grouse habitat to hydraulic fracturing, horizontal drilling and chemical tracers for enhanced oil and gas recovery. Now, petroleum serves as a bridge from the twilight of coal consumption to the dawn of renewable power production. [...] Now is not the end. America awaits objective data that would confirm the worth of the Wyoming plan for sage grouse conservation.³¹⁴

6.4 Comment

The *ESA* faces criticism that it does not sufficiently consider economic factors. Alternatively, former Secretary of the Interior Bruce Babbitt³¹⁵ insisted that the *ESA* both considers economic factors and effectively protects species at risk. Babbitt wrote, “less than 1 percent of [listed] species have gone extinct”, and the *ESA* has both revitalized animals like the bald eagle and gray wolf, and protected landscape habitats; and economic factors are considered in HCPs, including measures of conservation banks, safe harbor provisions, and land exchanges, “in fact, the act has fostered economic growth by facilitating sustainable resource use and increasing land development values through the protection of highly desirable open space.”³¹⁶ He described the Sage Grouse Conservation Agreement as “a perfect example of how the Endangered Species Act [...] is supposed to work.”³¹⁷ Babbitt concluded that the *ESA*, “properly administered, [...] has all the flexibility and tools necessary for working out cooperative agreements” and that no legislative or regulatory changes should be made.³¹⁸

Canadian conservationists have expressed concern about *ESA* reform as well, noting the importance of interjurisdictional efforts for transboundary species. Yellowstone to Yukon co-founder Harvey Locke advocates “a continental approach to conservation,” positively noting Canada’s support of international conservation initiatives such as the UN Convention for Biodiversity, which the US has not ratified, but also positively noting the US’ history of high standards of conservation.³¹⁹

³¹³ Robin Groose, “Endangered Species Act: If it ain’t broke, don’t fix it,” Op-Ed, *Casper Star Tribune* (25 August 2018), online: < https://trib.com/news/state-and-regional/groose-endangered-species-act-if-it-ain-t-broke-don/article_4f6aab4b-202e-5fe7-b757-e437dc385493.html >.

³¹⁴ *Ibid.*

³¹⁵ In office 1993 – 2001.

³¹⁶ Babbitt, *supra* note 292.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Annie Rueter, “Trump’s proposed changes to Endangered Species Act worry Canadian conservationists,” *Canadian Geographic* (14 August 2018), online: < <https://www.canadiangeographic.ca/article/trumps-proposed-changes-endangered-species-act-worry-canadian-conservationists> >.

The *ESA* has also faced criticism for failing to appreciate the dynamic nature of species. In 2010, Holly Doremus recommended a shift to a “more dynamic model of conservation policy.”³²⁰ She described the 1973 creation of the *ESA* as reflecting the “context at the times,” leading to

three fallacies based in a static conception of nature and of law: the essentialist fallacy, the wilderness fallacy, and the rule of law fallacy. [...] we know that nature is capable of rapid change, and we expect such change to be the rule rather than the exception in the twenty-first century. For the *ESA* to effectively serve our conservation goals, it must adopt a more realistic view that accounts for nature’s dynamic qualities and avoids freezing legal obligations. These changes will not be easy to achieve, because dynamic regulatory regimes are politically, psychologically, and practically difficult to implement.³²¹

Another environmentally motivated criticism is that the *ESA* does not adequately address climate change. As Blumm (Professor at Lewis and Clark Law School) and Marienfeld wrote, the listing agencies seem determined to prevent the *ESA* from becoming an agent of climate-change mitigation. Perhaps this aversion to taking any meaningful climate-change action will prevent a hostile congress from amending the *ESA*. However, these developments are unwelcome news for those concerned about the mounting climate-change crisis, and they are certainly unhappy news for species listed under the *ESA* due to warming global temperatures.³²²

6.5 Current Developments

This section looks at the recent initiatives pertinent to endangered species and the sage grouse, by the current US administration that took office in 2017. The Trump administration, largely through Interior Secretary Ryan Zinke,³²³ has been active in 2017 and 2018 in efforts to revise existing law and policy in the area. The following discussion is meant to be general and illustrative rather than exhaustive: a thorough review of proposed and inchoate changes to legislation and regulation pertinent to endangered species in the US is outside of the scope of this paper and many matters are yet to be determined and clarified.

In the broader context, Blumm and Jamin protest President Trump’s “public lands revolution” on three fronts: national monuments, BLM planning regulations, and revisions of Federal land Policy and Management Act.³²⁴

³²⁰ Holly Doremus, “The Endangered Species Act: Static Law Meets Dynamic World” (2010) 32 Wash UJL & Policy 175.

³²¹ *Ibid.*

³²² Michael C Blumm & Kya B Marienfeld, “Endangered Species Act Listings and Climate Change: Avoiding the Elephant in the Room” (2014) 20 Animal Law 277.

³²³ Secretary Zinke was first Interior Secretary under Trump but resigned December 15, 2018 to be effective at the end of 2018, to be replaced by Acting Secretary David L Bernhardt. Whether and what substantive difference this will make in administration is yet to be seen.

³²⁴ Michael C Blumm & Olivier Jamin, “The Trump Public Lands Revolution: Redefining “The Public” in Public Land Law” (2018) 48 Environmental Law 311.

With respect to sage grouse protection, Blumm and Jamin note that the 2015 plans “were widely hailed as the largest collective wildlife conservation effort ever undertaken, the fruits of an unprecedented federal-state collaborative conservation effect. Although the amendments enjoyed some bipartisan support, they were opposed by the oil and gas industry [...]”³²⁵

In March 2017, the President issued the *Presidential Executive Order on Promoting Energy Independence and Economic Growth*,³²⁶ which directed executive departments and agencies to “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law,” while also declaring that “the policy of the United States [is that] all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of Congress and the States concerning these matters in our constitutional republic,” and declaring that “the policy of the United States [is that] necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvement for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.”³²⁷ The Order also revoked a number of related former Presidential actions.

In June 2017, “Secretary Zinke issued a secretarial order [³²⁸] calling for a Sage-Grouse Review Team” to review on the 2015 land plan amendments and make recommendations for change, mainly to accommodate oil and gas interests.”³²⁹ This called for other changes including “reduced restrictions in focal and priority habitat areas, removing the [FWS] authority to approve energy project waivers in those areas, using population targets to judge the overall health of the sage grouse population, and a captive breeding program to boost numbers.”³³⁰ Interior Secretary Zinke presented a plan of his own, seeking to “protect the threatened sage grouse [and give] Western states greater flexibility to allow mining, logging and other economic development where it is now prohibited.”³³¹

³²⁵ *Ibid.*

³²⁶ *Presidential Executive Order on Promotion Energy Independence and Economic Growth* (28 March 2017), online: < <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/> >.

³²⁷ *Ibid.*

³²⁸ Department of the Interior, “Secretary Zinke Signs Order to Improve Sage-Grouse Conservation, Strengthen Communication and Collaboration Between States and Feds,” (8 June 2017), Press Release, online: < <https://www.doi.gov/pressreleases/secretary-zinke-signs-order-improve-sage-grouse-conservation-strengthen-communication> >.

³²⁹ Blumm & Jamin, *supra* note 325 at 345.

³³⁰ *Ibid* at 344.

³³¹ The Canadian Press, “US unveils plan aimed at protecting Sage Grouse while not impeding oil and gas,” *JWN Energy* (8 August 2017), online: < <https://www.jwnenergy.com/article/2017/8/us-unveils-plan-aimed-protecting-sage-grouse-while-not-impeding-oil-and-gas/> >.

While some governors were in favour of the shift towards the state role, others protested a shift from habitat to population management; meanwhile a quoted environmentalist protested the attempt to “abandon habitat protection for unfettered oil and gas development,” and a quoted energy industry representative welcomed the initiative but wished it to go further.³³²

In September 2017, the “Interior Department formally moved to amend the greater sage grouse for Bureau of Land Management lands.”³³³ In 2018,

for the sake of energy independence and not “destroying local communities,” as Interior Secretary Ryan Zinke put it, the Bureau of Land Management has proposed lifting some restrictions on development in key sage grouse habitat. Under another proposed policy, which could affect many species, the administration would allow regulators to consider not only the science but also the economic impact of listing species as endangered.³³⁴

In former Interior Secretary Babbitt’s words, “Zinke has now torn up [the Sage Grouse Conservation Agreement] and put hundreds of thousands of acres of protected habitat up for oil and gas development.”³³⁵ In May 2018, supporters claimed new changes to sage grouse protection said to be in response to requests by governors in affected states – which “could open some areas previously closed to leasing and allow waivers or exceptions to rules that prohibit drilling pad and wells in other areas”- are “aimed at increasing flexibility on public lands where the birds reside – not undoing protections outright.”³³⁶

Proposed Rules were presented in July 2018, titled *Revision of the Regulations for Listing Species and Designating Critical Habitat, Revision of Regulations for Interagency Cooperation, and Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants*.³³⁷ The Attorneys General of Massachusetts, California, Maryland, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia have expressed great concern that the combined effect would “wreak havoc on one of our nation’s most successful conservation

³³² *Ibid.*

³³³ Dashka Slater, “Ryan Zinke Throws the Greater Sage-Grouse Under the Bus” (14 December 2017) *Sierra Magazine*, online: < <https://www.sierraclub.org/sierra/2018-1-january-february/grapple/trump-administration-throws-greater-sage-grouse-under-bus> >.

³³⁴ Nordhaus, *supra* note 4 at 80.

³³⁵ Babbitt, *supra* note 292.

³³⁶ The Canadian Press, “Trump proposes easing oil, gas leasing restrictions put in place to protect sage grouse,” *JWN Energy* (3 May 2018), online: < <https://www.jwnenergy.com/article/2018/5/trump-proposes-easing-oil-gas-leasing-restrictions-put-place-protect-sage-grouse/> > quoting a government spokesperson.

³³⁷ Docket ID No. FWS-HQ-ES-2018-0006: Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35,193 (July 25, 2018); Docket ID No. FWS-HQ-ES-2018-0009: Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018); Docket ID No FWS-HQ-ES-2018-0007: Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35,174 (July 25, 2018); See Office of Attorney General Maura Healey (Massachusetts), “Multistate AG Comments on ESA Listing, Interagency Cooperation, and 4(d) Rules_final” (25 September 2018), online: < <https://www.mass.gov/doc/multistate-ag-comments-on-esa-listing-interagency-cooperation-and-4d-rulesfinal> >.

laws and harm the States' vital interest in species protection," expressing concerns about the increase of economic considerations along with the reduction of scientific consideration.³³⁸

In July 2018, the Bureau of Land Management also announced the end of "mandatory off-site compensatory mitigation on most federal land [as] one of numerous Obama-era environmental regulations and practices rolled back by the Trump administration."³³⁹

Conservationist groups have commenced litigation contesting the changes to the sage grouse plans. A lawsuit in the Idaho District Court, *W. Watersheds Project v. Zinke*,³⁴⁰ contests a number of actions by the Interior Secretary and Bureau of Land Management [BLM] allegedly in violation of the *National Environmental Policy Act*, *Federal Land Policy and Management Act* and *Administrative Procedure Act*: approval of numerous oil and gas leases and projects, and directives IM 2018-026, and IM 2018-034; and seeks remedial and declaratory relief. On September 21, 2018, the District Court of Idaho granted an injunction³⁴¹ in the matter, preventing BLM from leasing lands under a directive IM 2018-034 issued January 31, 2018, intended to "simplify and streamline the leasing process to alleviate impediments and burdens,"³⁴² which removed a 30-day public comment period and reduced a protest period from 30 to 10 days, pending final resolution of the lawsuit.³⁴³ Resolution of this lawsuit will be significant to the future of sage grouse protection in the United States.

As Rehtin and Lis-Coghlan write, "[u]nder [the 2017 Presidential Order], BLM has relaxed regulations for energy developers and significantly expanded the acreage available for oil and gas leases, bringing the agency into conflict with groups seeking to protect the bird", and that BLM's October 2018 removal of certain sage grouse habitat from land sales was the temporary result of litigation by the Center for Biological Diversity regarding inadequate public consultation.³⁴⁴

³³⁸ Office of Attorney General Maura Healey (Massachusetts), "Multistate AG Comments on ESA Listing, Interagency Cooperation, and 4(d) Rules_final" (25 September 2018), online: < <https://www.mass.gov/doc/multistate-ag-comments-on-esa-listing-interagency-cooperation-and-4d-rulesfinal> >.

³³⁹ Dan Elliott, "Trump Administration directive could hurt effort to save sage grouse, some governors say," *Billings Gazette* (13 August 2018), online: < https://billingsgazette.com/news/state-and-regional/trump-administration-directive-could-hurt-effort-to-save-sage-grouse/article_9c345c68-0acb-5ba8-a012-841d36f6f355.html >.

³⁴⁰ *W. Watersheds Project v. Zinke*, No. 1:18-cv-00187 (Complaint, April 30, 2018), online: < http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180430_docket-118-cv-00187_complaint-1.pdf >. Plaintiffs are the *Western Watersheds Project* and the *Centre for Biological Diversity*, and Defendants are Ryan K. Zinke, *Secretary of Interior*, David Bernhardt, *Deputy Secretary of Interior*, and *Untied States Bureau of Land Management, an agency of the United States*.

³⁴¹ *W. Watersheds Project v. Zinke*, No. 1:18-cv-00187, 2018 WL 4550396 (D. Idaho Sept 21, 2018), online: < http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180921_docket-118-cv-00187_memorandum-decision.pdf >.

³⁴² As cited in the injunction at 5.

³⁴³ For discussion of the injunction, see Dylan Lawrence, "Court Enjoins Streamlined Leasing Procedures in Sage-Grouse Habitat," XXXV:4 Mineral Law Newsletter (2018) 7.

³⁴⁴ Ingrid Rehtin & Kamila Lis-Coghlan, "BLM Drops Sage-Grouse Habitat from Oil & Gas Auction," (8 November 2018), *National Law Review*, online: < <https://www.natlawreview.com/article/blm-drops-sage-grouse-habitat-oil-gas-auction> >; see also The Associated Press, "Lawsuit targeting oil, gas lease sales cites imperiled bird," (30 April 2018) *Montreal Gazette*, online: < <https://montrealgazette.com/pmn/news-pmn/lawsuit-targeting-oil-gas-lease-sales-cites-imperiled-bird/wcm/201a287e-ef95-4f28-97b4-b61066790f7c> >.

On December 6, 2018, the Bureau of Land Management announced “publication of the Final EISs and proposed amendments in the *Federal Register*,” to be followed by a “30-day protest period” and 60 day period for governor review, to be concluded with a Record of Decision.³⁴⁵ BLM describes the revisions as requested by governors of affected states, and the result of “the Western Governors Association’s Sage-Grouse Task Force,” and describes them as “reflect[ing] months of consultation and collaboration with Western governors on how best to avoid listing of the species as threatened and endangered without stifling local economies.”³⁴⁶ Quoted governors praised attention to state feedback and collaboration in conservation. However, Dashka Slater of the Sierra Club wrote that this announcement meant a reduction in protected sage land from 10.7 million acres to 1.8 million.³⁴⁷

A new *Agriculture Improvement Act 2018 [Farm Bill]* was signed December 20, 2018.³⁴⁸ It is not yet clear what implications the terms of this new Farm Bill will have on SGI.

A partial “government shutdown” began December 22, 2018 and was in place on January 1, 2019. At January 1, 2019, the FWS Environmental Conservation Online System³⁴⁹ is down, with a statement that “due to the expiration of government funding, the ECOS Site will be unavailable till further notice.” The BLM website is still up, with the caveat that the website will not be updated during the government shutdown.

A Montreal Gazette article noted, “the Trump administration’s proposal would reverse or modify the Obama-era protections in seven states – Wyoming, Nevada, Utah, Colorado, California, Idaho and Oregon. No significant changes were proposed in Montana, Washington or the Dakotas,” and quotes Kathleen Sgamma of the Western Energy Alliance, “We can do both – protect sage grouse and move forward with responsible energy development. [...] We’ve reduced the size of well pads, reduced the numbers of wells. And we had done all these things and the prior administration assumed development was taking place like it was 20 years ago.”³⁵⁰

6.5.1 Implications for Listing

If these changes to the SGI result in weakened protection for the sage grouse, will the sage grouse then warrant listing under the *ESA*, therefore prompting strengthened protection? Potentially not. Blumm and Jamin considered that while these actions might result in the requirement for listing the species, leaked documents indicate plans of

- 1) removing protections for priority sage grouse habitat; 2) eliminating sage grouse focal area designations; 3) allowing states to adjust BLM habitat management areas without triggering the plan amendment process; 4) deferring to states on habitat management; and

³⁴⁵ US DOI Bureau of Land Management, “Updated Plans for Greater Sage-Grouse Conservation Reflect Wishes of States, Governors,” Press Release (6 December 2018), online: < <https://www.blm.gov/node/18291> >.

³⁴⁶ BLM Dec 6 *ibid*.

³⁴⁷ Slater, *supra* note 334.

³⁴⁸ The 2014 Farm Bill was to be replaced by September 30, 2018 to prevent expiry.

³⁴⁹ <https://ecos.fws.gov/>.

³⁵⁰ The Associated Press, “Lawsuit targeting oil, gas lease sales cites imperiled bird,” (30 April 2018) Montreal Gazette, online: < <https://montrealgazette.com/pmnn/news-pmnn/lawsuit-targeting-oil-gas-lease-sales-cites-imperiled-bird/wcm/201a287e-ef95-4f28-97b4-b61066790f7c> >.

5) expanding the use of categorical exclusions in carrying out NEPA implementation. [and] an environmentally hostile congress could use the appropriations process to defund implementation of the 2015 plan amendments and to exempt the sage grouse from ESA protections.³⁵¹

In December 2018, FWS advised that they did not intend to review the status of sage grouse in 2020 as had been contemplated by their 2015 decision to preclude listing, such review being “often a first step towards determining if greater protections are needed. Spokesperson Jennifer Strickland told the AP that the Fish and Wildlife Service is not legally required to complete a review. Instead, it will work with the Western Association of Fish and Wildlife Agencies to document the effectiveness of the conservation plans.”³⁵²

Amid active proposals to amend regulations and policy, the future of the SGI and sage grouse protection is unclear. It is not yet known whether *de facto* amendment and continuation of the Sage Grouse Conservation Agreement and Sage Grouse Strategies will ultimately be possible. It will be important to monitor developments in 2019 and onwards, including the resolution of *W. Watersheds Project v. Zinke*.³⁵³ However, SGI appears optimistic. At December 18, 2018, the SGI website posted an article titled “[t]he future is bright for conserving western working landscapes,”³⁵⁴ which celebrated participation of 1,800 producers, 7 million acres in SGI, with NRCS’ Western Working Lands for Wildlife Coordinator Tim Griffiths indicating that SGI would “without a doubt [continue working to conserve sagebrush country in the future],” and that “through WLFW, SGI will continue to strategically implement Farm Bill resources to deliver effective conservation solutions on these important landscapes. We’re also working with partners on much broader opportunities to conserve additional western rangelands – prairie, grassland, and sagebrush – ensuring that benefits extend across fence lines, entire watersheds, and even span across several states.”³⁵⁵ On the subject of changes for 2019, regulatory amendment was not mentioned.

7.0 CRITICAL ANALYSIS

Writing for the National Geographic, Hannah Nordhaus describes the sage grouse question as “the age-old battle between those who want to preserve western lands and those who want to extract a living from them – only in this case, the burden falls on a comical, knee-high bird. As the sage grouse goes, so does the West.”³⁵⁶ The sage grouse is a symbol – of the West, of species at risk protection,³⁵⁷ of the future of conservation, and of the future of reconciliation of economic and environmental considerations in public policy.

³⁵¹ Blumm & Jamin, *supra* note 325 at 345-8.

³⁵² The Associated Press, “Lawsuit targeting oil, gas lease sales cites imperiled bird,” (30 April 2018) Montreal Gazette, online: < <https://montrealgazette.com/pmn/news-pmn/lawsuit-targeting-oil-gas-lease-sales-cites-imperiled-bird/wcm/201a287e-ef95-4f28-97b4-b61066790f7c> >.

³⁵³ *W. Watersheds v. Zinke*, *supra*, note 341.

³⁵⁴ Sage Grouse Initiative, “The future is bright for conserving western working landscapes,” (18 December 2018), online: < <https://www.sagegrouseinitiative.com/1800-ranchers-and-counting/> >.

³⁵⁵ *Ibid.*

³⁵⁶ Nordhaus, *supra* note 4 at 79.

³⁵⁷ See Page and Gorrie, *supra* note 5.

An observation found during research speaks somewhat to the inherent weaknesses of Canadian efforts, as well as the symbolic nature of its sage grouse protection. A 2011 blueprint by NRCS on the SGI reported that:

SGI fencing modifications alone are preventing 800 – 1,000 sage-grouse fence strikes per year which is equivalent to all of the male sage-grouse counted on breeding grounds in Alberta, Saskatchewan, Washington, and the Dakotas combined.³⁵⁸

7.1 Recommendations from commentary and literature

A number of suggestions have been made for how to generally improve species at risk legislation in Canada and the US.

David Boyd expressed concern that the *SARA*, among other shortcomings, does not suffice for biodiversity protection. He wrote,

[a] scientific consensus is emerging that current approaches are not the most effective means of protecting biodiversity. The UN Global Biodiversity Assessment concluded, “Species, though important, may not be the best overall target for conservation. The ecosystem and its component communities which contain the species appear to be more appropriate targets for conservation, because they take into account explicitly the many ecological interactions between organisms and their biotic and abiotic natural environment.” Endangered species legislation is not a panacea but merely a tool in the much broader effort required to protect biological diversity. This effort must also include a more ecologically informed approach to land-use decisions, more and larger protected areas, more comprehensive environmental assessment, a national biological survey, greater public involvement, and more incentives for landowners and land users to protect endangered species and habitat.³⁵⁹

An illustration of this may be found in the example of the polar bear. An article in *Arctic Today*³⁶⁰ noted that despite extensive public campaigning by environmental groups making it a symbol of the fight against climate change, the polar bear is not expected to go extinct, despite reductions in some populations, while at the same time hunting restrictions have been tightened and human-bear conflict has risen, causing problems for Arctic residents. Leanne Clare of the WWF Arctic Program is quoted as saying, “[w]hen the symbol gets bigger than the region itself and people don’t realize that the polar bear is just one piece of a whole diverse web of life in the Arctic, then it can become almost a barrier,” and “the polar bear is an important symbol for the Arctic [but] we have a situation, where some communities feel that we are prioritizing polar bears over them.”³⁶¹ This may support a shift to multi-species and ecosystem based planning.

³⁵⁸ USDA, *supra* note 10 at 13.

³⁵⁹ David R Boyd, “Endangered Species,” in *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2004) 181 at 194-5.

³⁶⁰ Martin Breum, “How the narrative on polar bears has become a problem for Arctic environmental groups,” *Arctic Today* (21 October 2018), online: < <https://www.arctictoday.com/narrative-polar-bears-become-problem-arctic-environmental-groups/> >.

³⁶¹ *Ibid.*

Commentary has indicated the Courts' willingness to give the SARA a "robust" interpretation. Professor Nigel Bankes describes the Federal Court's insistence that "the Government of Canada in all its guises must take SARA seriously, and, in particular must take seriously its duty to designate critical habitat for endangered species as part of developing a recovery strategy."³⁶²

The Smart Prosperity Institute, based out of the University of Ottawa and Institute of the Environment, made the following eight recommendations to improve decision-making processes and recovery outcomes under the SARA:

1. Full implementation of existing SARA provisions ("including section 11 conservation agreements, safety net order, and emergency orders.")³⁶³
2. "Harness a suite of economic instruments to promote stewardship on private land and crown land."³⁶⁴
3. "Three further areas [for] economic instruments and related tools [...]: leveraging opportunities to restore degraded landscapes, using economic instruments to protect [critical habitat] on private land [...], tailoring economic instruments to manage broader threats in the landscape, such as point and nonpoint source pollution and invasive species."³⁶⁵
4. "Use place-based (multispecies and ecosystem) approaches as appropriate, to improve the biological effectiveness or cost-effectiveness of recovery strategies and action plans."³⁶⁶
5. "Enhance existing SAR conservation initiatives on private land by making government-funded stewardship programs more directed, flexible and incentive-based."³⁶⁷
6. "Strengthen data collection, sharing, management and dissemination to improve multiple dimensions of SAR decision-making and program implementation."³⁶⁸
7. "Complement project-level impact assessments with broader regional impact assessments [...] to help address the assessment of cumulative effects for projects triggered under section 73 of SARA or section 5 of CEAA."³⁶⁹
8. "Increase[e] overall funding for SAR conservation."

³⁶² Nigel Bankes, "SARA has a spine as well as teeth," (3 January 2011), online: ABlawg, < <https://ablawg.ca/2011/01/03/sara-has-a-spine-as-well-as-teeth/> >. See also Nigel Bankes, "Federal Court of Appeal confirms that a SARA protection statement must offer the critical habitat of a listed species real legal and non-discretionary protection" (23 February 2012), online: ABlawg, < <https://ablawg.ca/2012/02/23/federal-court-of-appeal-confirms-that-a-sara-protection-statement-must-offer-the-critical-habitat-of-a-listed-species-real-legal-and-non-discretionary-protection/> >.

³⁶³ Smart Prosperity Institute, *supra* note 82 at 6.

³⁶⁴ *Ibid* at 6.

³⁶⁵ *Ibid* at 6-7.

³⁶⁶ *Ibid* at 7.

³⁶⁷ *Ibid* at 7.

³⁶⁸ *Ibid* at 7.

³⁶⁹ *Ibid* at 7.

Professor Shaun Fluker outlined a proposed “*Wildlife Species Protection and Recovery Act*” for Alberta, created with the assistance of his law students in a 2017 blog post³⁷⁰ noting Alberta’s excessive use of policy and lack of transparency. His proposal generally considered: “transparency, accountability, predictability,” and removing politics, thereby “allow[ing] economic development to trump species protection [...] in a unique manner.”³⁷¹ In this proposed regime, the listing process is determined entirely by science and uses science-based prioritization: there is no discretion in listing. However, the proposed regime allows for species to be *removed* from the list through a prescribed process including Ministerial discretion and economic considerations. Another addition is the appointment of a “wildlife guardian,” with hearing rights in this removal process.³⁷² Content is prescribed for recovery planning and an administrative enforcement regime is established.³⁷³

The proposal seems to make executive discretion more onerous, but preserves it, and otherwise appears at first glance to remedy many shortcomings in the provincial legislation.

7.1.1 Comparisons

The obvious comparisons between the regimes discussed in this paper relate to points of mandatory and discretionary executive decision-making, as well as the points for consideration of socio-economic factors in addition to, or as opposed to science alone. To summarize: under the *SARA*, listing is discretionary, and critical habitat designation is mandatory; in Alberta, listing is discretionary, and critical habitat is discretionary; in Saskatchewan, listing is discretionary and critical habitat is discretionary; and in the US, listing is mandatory following due prioritization, and critical habitat designation is discretionary. These distinctions have strong implications for species protection in each jurisdiction.

It is virtually impossible to evaluate comparisons of rhetoric, assuming one values both conservation and economics. Interdisciplinary assessment and contextual reporting will be required for any proper assessment and progress.

The emerging trends in species protection as reviewed in this paper are: prioritization, multi-species planning, and the roles of voluntary and incentivized stakeholder collaborations in each jurisdiction. As noted above, the new federal policy document “Pan-Canadian approach to transforming species at risk conservation in Canada,”³⁷⁴ outlines an approach that includes prioritization, multi-species, and ecosystem-based approaches.

³⁷⁰ Shaun Fluker, “A Proposal for Effective Legal Protection for Endangered Species in Alberta: Introducing the *Wildlife Species Protection and Recovery Act* (Alberta)” (4 October 2017), online: ABLawg < <https://ablawg.ca/2017/10/04/a-proposal-for-effective-legal-protection-for-endangered-species-in-alberta-introducing-the-wildlife-species-protection-and-recovery-act-alberta/> >.

³⁷¹ *Ibid.*

³⁷² This element warrants separate consideration outside of the scope of this paper.

³⁷³ Fluker, *supra* note 371.

³⁷⁴ *Pan-Canadian Approach*, *supra* note 49. The implications of this document are not clear: it appeared quietly on the Government website in December 2018 and no press releases were to be located. The 2018 budget contained reference that “[Success in protecting Canada’s nature, parks and wild spaces will look like] A modern ecosystem-based approach for multi-species recovery that improves species at risk conservation”) (<https://www.budget.gc.ca/2018/docs/plan/chap-04-en.html>).

The voluntary collaborative initiatives discussed in this paper, starting with the SGI, provide “a new paradigm for at-risk wildlife [that] works through voluntary cooperation, incentives, and community support. [...] Six ingredients for proactive conservation learned from the [SGI] and applicable for wildlife conservation anywhere [are]:

1. Shared vision
2. Strategies: “Direct resources where the biological returns are highest.”
3. Accountability
4. Leverages
5. Certainty
6. Trust and Credibility “Take a community, grass-roots approach that’s based on the principles of neighborliness. Some call it ‘kitchen table conservation.’”³⁷⁵

7.1.2 *Economic factors and quantification*

A major source of criticism of species at risk law relates to economics. David Boyd, in 2004, wrote:

Part of Canada’s reluctance to pass a strong federal law stems from the economic havoc ostensibly imposed on America by the ESA. According to its critics, “This type of legislation can have a devastating impact, particularly in resource communities. In the northwest U.S., they’ve had massive job losses without gaining much in conservation.” However, objective assessments refute the anecdotal evidence offered by opponents of endangered species legislation. The law is not as rigid as its critics suggest.³⁷⁶

With respect to the sage grouse, the EO appended a Regulatory Impact Assessment Statement [RIAS], which “includes an interesting mix of methodologies to ascertain the costs and benefits of saving the sage grouse in Canada.”³⁷⁷ Professor Fluker:

also note[s] that the RIAS only values the sage grouse instrumentally in terms of the benefits the species provides to Canadians (existence value) and the ecosystems it inhabits. It is important, [he] think[s], to remember that the enactment of *SARA* was in part to recognize that all species have intrinsic value (see preamble to the legislation. [...] intrinsic value poses a problem for those implementing *SARA* because assessing it does not allow for cost/benefit calculations and generally is not amenable to quantification. Nonetheless, we do not assess our own worth by calculating the costs and benefits of our existence, so why do we insist on doing so for other species – particularly those for which we have accepted an obligation to protect? [...] But *SARA* obligates us *in principle* to protect the

³⁷⁵ Sage Grouse Initiative, *Success on the Range*, (July 2015), online: < <http://www.sagegrouseinitiative.com/wp-content/uploads/2015/07/SGI-Success-on-the-Range-FINAL-LOW-RES-FULL-SPREADS-WITH-HYPERLINKS-FOR-WEB-073015.pdf> > at 3.

³⁷⁶ Boyd, *supra* note 360 at 193.

³⁷⁷ Shaun Fluker, “The Curious Case of the Greater Sage Grouse in Alberta,” (17 January 2014), online: ABlawg < <https://ablawg.ca/2014/01/17/the-curious-case-of-the-greater-sage-grouse-in-alberta/> >.

sage grouse from extirpation in Canada. It is not a matter of preferences, costs and benefits, or choosing between sage grouse and resource development.³⁷⁸

In light of those points, it should be noted that SARA's preamble also includes the statement, "community knowledge and interests, including socio-economic interests, should be considered in developing and implementing recovery measures."³⁷⁹

Further discussion of the unquantifiable dimensions of species at risk is found in David Suzuki's article, "Beyond the Species at Risk Act: Recognizing the Sacred."³⁸⁰ Suzuki writes:

Headlines in the popular press give us a clue about a biodiversity crisis with terrifying implications for humanity. These stories range from the endangerment of the polar bear to depleting songbirds and the sixth extinction crisis on earth. Unfortunately, such stories are usually one day reports in the back pages, a reflection of how little species extinction matters to society. In contrast, any economic story about falling or rising stock prices, the value of the US dollar or a corporate takeover, may play on the front pages for days. And despite the fact that Canada was the first country to ratify the UN Convention on Biodiversity and the fact that Canada passed a new endangered species policy, the Species at Risk Act in 2003, most Canadians rarely take pause to consider the sanctity of biodiversity or the future of conservation in the country.

Suzuki reviews in turn, "What is biodiversity and what is it's role?; Why does biodiversity matter today?; Perceptual filters shape the way we see the world; From "a part of" to "apart from" nature; The urban priority – economics; Human beings – a new kid of geological force; Limits scientific reductionism; "managing complex systems"; The salmon forest; What can we do?; Good government; and From SARA to the sacred."³⁸¹

Economic impacts of species protection can be significant. The economic impacts of sage grouse protection in Wyoming were presented by academics in the fields of environment and natural resources and applied economics in a 2017 Wyoming Law Review article.³⁸² Stoellinger and Taylor provided an extensive report, "commissioned and funded by the Office of Governor Matthew Mead, that "analyzes the economic impact of sage-grouse conservation measures in Wyoming, and attempts to predict the economic impact of sage-grouse listing as threatened or endangered."³⁸³ It is difficult, without expertise in economics, to fully appreciate the significance of these findings.

³⁷⁸ *Ibid.* Fluker refers to an "excellent book that persuasively argues it is a category mistake to apply economic reasoning to endangered species problems (Mark Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* 2d ed (Cambridge University Press, 2007))." See also Jason Unger, "Grousing about the value of species or "how much for that caribou in the window?" (13 December 2013), online: Environmental Law Centre < <http://elc.ab.ca/grousing-about-the-value-of-species-or-how-much-for-that-caribou-in-the-window/> > for more of this discussion.

³⁷⁹ SARA, *supra* note 40 at Preamble.

³⁸⁰ David Suzuki, "Beyond the Species at Risk Act: Recognizing the Sacred" (2011) 22 J Env L & Prac 239.

³⁸¹ *Ibid.*

³⁸² Temple Stoellinger & David "Tex" Taylor, "A Report on the Economic Impact to Wyoming's Economy From a Potential Listing of the Sage Grouse," (2017) 17:1 Wyoming LR 79.

³⁸³ *Ibid* at 80.

With respect to commodity production from sage-grouse habitat, the report states, “[d]ue to its economic importance, the potential reduction in commodity production on sage-grouse habitat from sage-grouse management has serious economic implications for Wyoming.” Different described scenarios involve hundreds of millions of dollars in direct economic impact, thousands of jobs, hundreds of millions in labor earnings, and tens of millions in state/local government revenue; “The potential reduction in commodity production from a sage-grouse listing has more serious economic implications for Wyoming.” With figures into billions of dollars and tens of thousands of jobs, “[b]oth of the above scenarios represent a significant loss to the Wyoming economy.” The report further considers how employment would have fared during and after the recession in 2008-2013 had sage-grouse listing been in place – and the result is decreased employment by thousands of jobs.³⁸⁴ With respect to grazing on sage grouse habitat, using 2013-2020 figures, the report indicates current actions imply state-level economic loss in the hundred of million dollars and tens of thousands of job-years of total employment, and impacts of listing are unknown.³⁸⁵

Unger of the Environmental Law Centre acknowledges that the LGX litigation “story [also about bankruptcy & insolvency] is from the perspective of preserving species at risk, and should not be construed as diminishing the real and harsh impacts insolvencies have on people.”³⁸⁶ This raises the question, if companies should include species at risk considerations in their due diligence, then part of that equation involves the entire landscape: how much land is occupied by proposed and designated habitat for species at risk, and how much of an impact will this have on operations? The \$120MM sought in damages in the LGX litigation does indicate a bluntness: while it may behoove industrial actors to bolster their due diligence in considering species at risk protection that is a high stake. As well, in addition to increase in corporate due diligence, this experience might also make the federal Cabinet more hesitant to use its discretion to issue an EO.

In a recent example, the Lake Louise ski resort appealed fines totaling \$2.1 million dollars under the *Species at Risk Act* and *Canada National Parks Act* “for the removal of 38 [endangered] whitebark pine trees” in 2013, a fine that “amounts to about \$55,000 a tree.”³⁸⁷

A recent, highly publicized case involving species at risk was the Federal Court’s quashing of the approval for the Trans Mountain pipeline expansion.³⁸⁸

³⁸⁴ *Ibid* at 100,101.

³⁸⁵ *Ibid* at 112-3.

³⁸⁶ Unger, *supra* note 207.

³⁸⁷ Kevin Martin, “Lake Louise ski area appeals massive fine for removing massive trees,” (21 December 2018), Calgary Herald, online: < <https://calgaryherald.com/news/crime/lake-louise-ski-area-appeals-massive-fine-for-removing-endangered-trees/wcm/5dd18df5-89e2-42ca-968e-0c8a32ac1851> >.

³⁸⁸ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153. For discussion of the case, see Martin Olszynski, “Federal Court of Appeal Quashes Trans Mountain Pipeline Approval: The Good, the Bad, and the Ugly,” (6 September 2018), online: ABlawg < <https://ablawg.ca/2018/09/06/federal-court-of-appeal-quashes-trans-mountain-pipeline-approval-the-good-the-bad-and-the-ugly/> >.

The approval was quashed on two grounds, first on a shortcoming in aboriginal consultation, and second, in relation to environmental assessment relating to consideration of the proposal's effect on species at risk protected under the SARA, namely the Southern Resident Killer Whales.³⁸⁹ The Trans Mountain project website describes the economics of the pipeline expansion as including a cost of approx. \$7.4BB, and a result of 15,000 immediate jobs, 37,000 direct, indirect and induced jobs per year during operations, and a “combined impact on government revenue for construction and the first 20 years of expanded operations [of] \$46.7 billion”³⁹⁰ Meanwhile, the whale pod in question included 74 members in 2018.³⁹¹ Assuming that the Minister had no discretion on granting exemptions, that there was no private profit by the project, that the species at risk factor was the only one in question, that there was a direct and exclusive conflict, none of which are correct, and assuming that the project would destroy the entire pod, at a public revenue total of \$46.7 BB, it amounts to over \$631MM per whale.

There are undoubtedly many Canadians that would take the position that no non-human living thing is worth that amount of money, and who would hold the opinion that this looks more like evidence of legislative overreach than environmental victory, and the decision is potentially an inchoate pyrrhic victory itself. Animals have intrinsic and unquantifiable value, but surely, quantification is a relevant and practical consideration when conflicts arise.

In discussing economics, it is prudent to recall that virtually every action each individual takes in a day has direct and indirect economic implications. The concept of “greed” belongs more accurately in the field of corporate/commercial law – which was not seen mentioned in the course of research for this paper, but perhaps should be, albeit within the realm of capitalism. Economic interests serve shareholders and corporate executives, who are often wealthy and likely to survive bankruptcies, but they also serve the daily lives of working people, who are less likely to make executive decisions, but whose lives are often more evidently related to the land on which they live, and whose wellbeing is more likely defined and ennobled by navigating adversity and adapting to circumstance – arguably in a spirit not imposed by species at risk legislation on plants and animals, and who, due to millennia of political evolution forged by both peace and conflict, can vote.

³⁸⁹ For discussion of this litigation, see Dyna Tuytel and Margot Venton, “Challenges in Receiving SARA Protections: A Killer (Whale) Case Study” (paper delivered at the Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection symposium convened by the Canadian Institute of Resources Law, 3 March 2018), online: < <https://cir1.ca/symposium/2018-march-symposium/download-2018-march-materials> >.

³⁹⁰ <https://www.transmountain.com/project-overview>.

³⁹¹ Fisheries and Oceans Canada, *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada*, (2018) Species at Risk Act Recovery Strategy Series (Ottawa: Fisheries and Oceans Canada 2018), online: < https://www.registrelep-sararegistry.gc.ca/virtual_sara/files/plans/Rs-ResidentKillerWhale-v00-2018dec-Eng.pdf > at 8.

7.1.3 Evolution

The factor of natural adaptation and extinction is an interesting one. As argued by Holly Doremus and discussed above, the *ESA* warrants amendment to shift from a static to dynamic regulation.³⁹² Applied to Canada, this may support multi-species and landscape-based management, adaptive management and discretion in the listing and recovery processes.

Approximately 333 km northwest of Alberta's sage grouse habitat near Manyberries, Drumheller's Royal Tyrrell Museum of Paleontology is filled with species who went extinct prior to human domination of the landscape. On adaptation, Nordhaus for the National Geographic describes the scene eloquently:

There are species – such as ravens, which now use oil rigs as perches to prey on sage grouse – that manage to flourish when their environment shifts. Sage grouse are not among them. They are supremely evolved to live in the harsh, silent American steppe, but they are birds of little brain. “They’re not smart at all,” Sharon O’Toole says. They run into fences, stand in the middle of busy roads. Humans, like ravens, are more adaptable. We can learn to do things differently. That’s what Audubon’s Rutledge believes: That we can alter the behaviors that trap us in time-worn conflict and chest-puffing displays of political dominance in the West. He hopes that collaboration on sage grouse, if allowed to work, will provide a template for other conservation efforts. “Everyone says you can’t change this,” he says. “And if I’m rational, probably not. But I don’t think it’s any excuse not to try.”³⁹³

7.1.4 Rule of law

Blumm and Jamin protested regulatory changes by “an Administration which considers parts of the public – those with substantial local clout in rural areas – to be more important than the more numerous recreational and preservationist community that public lands serve.”³⁹⁴ On the other side of things, a 2015 letter to the editor of the Wyoming Business Report stated concisely:

Good stewardship is our duty; however, when do animals become more important than humans? When do birds trump humans trying to make a living – their OWN survival? I’m sick of this.³⁹⁵

The contrast between the informal three-sentence letter to the editor and the impassioned 66-page article in the *Journal of Environmental Law* indicates a potentially problematic disconnect between levels and arenas of discourse. It should also be noted that the voluntary collaborative partnerships reviewed in this paper tend to focus on ranching interests but give less mention to oil and gas and mining actors – although provisions relating to those actors were included in the US plans and

³⁹² Doremus, *supra* note 321.

³⁹³ Nordhaus, *supra* note 4 at 80.

³⁹⁴ Blumm & Jamin, *supra* note 325 at 316.

³⁹⁵ Linda Lobeck, “New lawsuit file for sage grouse,” Letter to the Editor, Wyoming Business Report (August 1-15, 2010) 23. This was found while searching online databases in the UCalgary law library. Ms Lobeck is, or is plausibly an ordinary citizen; a quick Google search did not identify someone by that name in Wyoming in public life.

considerations in the 2015 FWS finding that the sage grouse did not warrant listing. For another practical example of concerns on the ground somewhat disconnected from higher level dialogue on this subject, practical “common myths” and concerns by landowners about species at risk are described by Saskatchewan’s Grassland Community as:

1. The government will take away my privately owned land if there is a species at risk there.
2. My lease land will be taken away.
3. Conservation groups, government or otherwise, will tell me to do...
4. If I have Burrowing Owls nesting in my pasture, I won’t be able to graze that pasture anymore.
5. If I report my species at risk to OGC, then my information will be shared with everyone.
6. Loggerhead shrikes (aka ‘butcher birds’) will eat all my songbirds³⁹⁶.

Following the sage grouse litigation in 2013, Professor Martin Olszynski wrote about division of powers and the rule of law.³⁹⁷ He considered whether public policy should be determined by the executive or judiciary, in light of enacted legislation, and considered the resulting patterns of “legislative reversal” and “Charter dialogue” between courts and legislatures³⁹⁸ and noted:

“such ‘pyrrhic victories’ are not uncommon in environmental law; many of the changes to federal environmental and natural resource legislation over the past few years can be explained by this dynamic, [...] While SARA has to date largely been spared [at 2013], [...] there is every reason to believe that more litigation is likely should the EPO for the Sage-grouse be deemed inadequate. The fundamental question is then, which is better: to preserve a law by allowing it to be covertly rendered ineffective, or to insist on its strict implementation and risk having it modified or scrapped altogether?”³⁹⁹

In the comments beneath the blog post, Olszynski refers to the dilemma as “the stuff of public choice theory.”⁴⁰⁰

Considerations of the rule of law raise interesting questions: for example while the *SARA* is federal legislation, its discretionary elements are carried out by an elected executive. The *SARA* in particular was created through compromise and controversy, executive discretion is built into its fabric, and as any law, it is subject to judicial interpretation and legislative amendment.

Page and Gorrie of Ecojustice describe the *SARA*’s history as “embraced by neither parliamentarians nor the government actors mandated to enforce it,” and including

³⁹⁶ Operation Grassland Community, “Species at Risk: Common Myths” The Landowner’s Toolkit Series, online: < www.ogcsp.com >.

³⁹⁷ Martin Olszynski, “Update on the Sage-grouse, the Separation of Powers and the Rule of (Ineffective Environmental) Law(s),” (24 September 2013), online: ABlawg < <https://ablawg.ca/2013/09/24/update-on-the-sage-grouse-the-separation-of-powers-and-the-rule-of-ineffective-environmental-laws/> >.

³⁹⁸ Fulsome discussion of these issues falls outside the scope of this paper but it is a highly relevant analysis.

³⁹⁹ Olszynski, *supra* note 392.

⁴⁰⁰ referring to Kathryn Harrison UBC, e.g. “Passing the Buck: Federalism and Canadian Environmental Policy” https://books.google.ca/books/about/Passing_the_Buck.html?id=ZQZppw8bz4C&hl=en.

“[federal/provincial] jurisdictional wrangling,” “major policy debates,” and fears of “US style litigation.”⁴⁰¹ They describe the SARA as “an imperfect piece of legislation born from political compromise and jurisdictional doubts. However, it does provide many tools that the federal government can – and in some cases must – use to protect species at risk.”⁴⁰² Hoffman built a substantial paper out of the complexity in the creation and ongoing evolution of the SARA and its components.⁴⁰³ David Boyd lists parties’ extreme reactions to the initial SARA: to the David Suzuki Foundation, it didn’t go far enough, but to the Canadian Cattlemen’s Association, the Canadian Federation of Agriculture, the Fraser Institute, and the Western Stock Grower’s Association, it was thought to be “disastrous.”⁴⁰⁴

The developing field of environmental law inherits a tension in law between serving humans and serving nature for its own sake, an issue that must be explored and resolved satisfactorily in its broader social context. Proposals of note include the idea of constitutionalizing the right to a healthy environment,⁴⁰⁵ New Zealand in 2017 granting a river legal personhood,⁴⁰⁶ and for an example close to home, the Environmental Law Centre’s proposed *Environmental Bill of Rights* for Alberta.⁴⁰⁷ Questions arise when considering how these initiatives would resolve conflicts between human and environmental interests. These issues are broad and require extensive and open deliberation.⁴⁰⁸

In any event, the law is the law, and the SARA does expressly value species for their own sake, as well as expressly consider socio-economic interests. If correct application of the law, in this or another regard, results in unpalatable consequences, then the law must be followed regardless, or changed.

⁴⁰¹ Page & Gorrie, *supra* note 5 at 329.

⁴⁰² *Ibid* at 344.

⁴⁰³ Hoffman, *supra* note 27.

⁴⁰⁴ Boyd, *supra* note 360 at 183.

⁴⁰⁵ For an example of discussion, see Lynda M Collins & David R Boyd, “Non-Regression and the Charter Right to a Healthy Environment” (2016) 29 J Env L & Prac 285. Fulsome discussion of this subject is outside the scope of this paper.

⁴⁰⁶ See for example, Colin Dwyer, “A New Zealand River Now Has the Rights of a Human,” (16 March 2017), NPR, online: < <https://www.npr.org/sections/thetwo-way/2017/03/16/520414763/a-new-zealand-river-now-has-the-legal-rights-of-a-human> >.

⁴⁰⁷ Brenda Heelan Powell, “An Environmental Bill of Rights for Alberta,” (9 March 2018), online: < <http://elc.ab.ca/environmental-bill-rights-alberta/> >.

⁴⁰⁸ Such examination is outside of the scope of this paper. In another direction, some more disturbing and somewhat bizarre food for thought that challenges western assumptions is a New York Review of Books article titled “The Menace of Eco-Fascism,” [Matthew Phelan, “The Menace of Eco-Fascism,” (22 October 2018) NYR Daily, online: The New York Review of Books < <https://www.nybooks.com/daily/2018/10/22/the-menace-of-eco-fascism/> >] which identifies dissonance of American environmentalism “forged in the crucible of Vietnam- and Civil Rights-era progressive movements, and melding the traditions of Henry David Thoreau and Teddy Roosevelt with the ideals of the 1960s counterculture,” in contrast with “presumed allies abroad,” listing a host of domestic and foreign movements in which environmental sentiment is aligned with groups not generally consistent with traditional north American ideological values.

7.1.5 Collaboration

To counter divisiveness closer to home, writing about Albertan eco-politics in *Alberta Views Magazine* in 2014, Kevin Van Tighem described a path forwards in conservation, including species at risk, which transcends partisanship and divisiveness. He interviewed local leaders Preston Manning (a “libertarian conservative”) and Harvey Locke (a progressive) on conservation issues, and related his own experiences. Van Tighem wrote that “getting serious [about environmental conservation as is necessary] cannot be contingent on the province electing a particular political party. Alberta needs a collaborative, post-partisan approach to environmental conservationism.”⁴⁰⁹ Van Tighem contrasted Manning and Locke’s philosophies:

Just as Harvey Locke is right that the environment sustains all life on Earth, and is too complex and all-embracing to be conserved by simply turning it into a bundle of marketable goods and services, Manning scores an important point when he points out that biodiversity, water and air must be conserved everywhere, not just in protected landscapes—that we require new thinking about private-lands conservation. And that’s the important point: They’re both right. No single point of view and no single set of conservation tools will deliver meaningful conservation results in this crowded, complicated century.⁴¹⁰

In Van Tighem’s own experience of a collaborative effort spearheaded by NCC on lands adjoining Waterton, facing commercial pressure because of the Park, he described the inspiration of a “non-partisan synergy” that resulted from working together on a common cause.

The Waterton Front [Van Tighem’s example] should serve as inspiration, and corroboration, for an approach to environmental conservation that draws from all sides of the political spectrum. Conservation, far from a cause compatible with one political philosophy, can and should be the great social cause of the 21st century, breaking down partisan divides and mobilizing a full range of approaches to keep nature whole and vital into the future. The consequences of failure are too great, and the rewards of success too important, for Albertans to settle for anything less.⁴¹¹

7.1.6 Closing

Legal analysis may judge a legislative regime on form alone, on the measure of its legal coherence and enforceability, and resist measures of executive discretion in preference of certainty, but it ought inseparably to also consider the substance. Laws as instruments of constitutional democracy are tools of democratic governance, which is wiggly and messy, and virtually never set in stone. Species protection is perhaps at a crossroads: there are opportunities to manage the sage grouse at international, national, regional and local levels, and tensions between those levels. In my humble perception, the zeitgeist supports the principle that efforts here to transcend or otherwise move away from stakeholder-based and democratic messiness are likely strategies towards pyrrhic and/or hollow victories. The primary role for law and government in this area seems to be, aligned

⁴⁰⁹ *Ibid* at 30.

⁴¹⁰ *Ibid* at 34.

⁴¹¹ *Ibid* at 34.

with duly enacted legislation, government standards and monitoring, to support emerging voluntary and incentivized collaborative stakeholder efforts, including protecting them from unscrupulous actors and providing certainty to corporate actors facing shareholder pressures. Ascertaining effectiveness of strategies going forward will require interdisciplinary and contextual analysis. To be clear, I want to see the sage grouse and its habitat thrive, but take the position that legal efforts to promote and protect its survival must be done properly. I am not an advocate for the recent US regulatory changes, but strongly argue that effective long-term solutions require the impetuses for those changes and all stakeholder interests to be heard and addressed.

Unfortunately, this paper cannot provide clear solutions to the issues involved, however, it has attempted to identify important issues and provide points for consideration. It takes the position that future progress will demand pragmatism, and interdisciplinary collaboration between scientists, ranchers, resource developers, as well as government agents and regulators, along with economists, contextual assessments and reporting. The emerging trends in species conservation, being prioritization, multi-species and ecosystem-based planning, and incentivized voluntary collaborative stakeholder efforts are a positive development, and ongoing reflective analysis and planning will determine the best ways for law and policy to support and protect these initiatives.

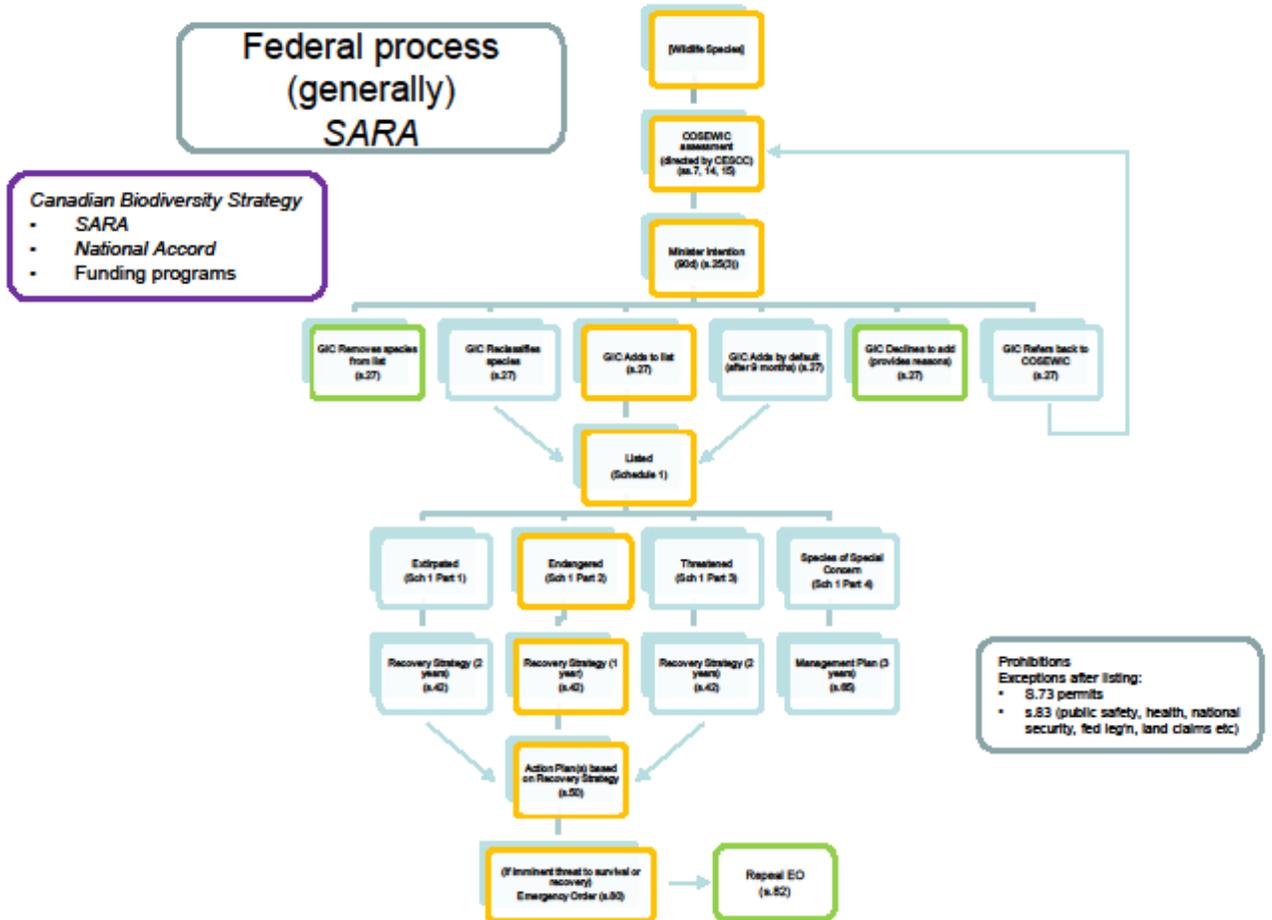
8.0 CONCLUSIONS

The iconic sage grouse is a symbol of the North American west and of modern species protection legislation in Alberta and Saskatchewan, Canada, and much of the US West.

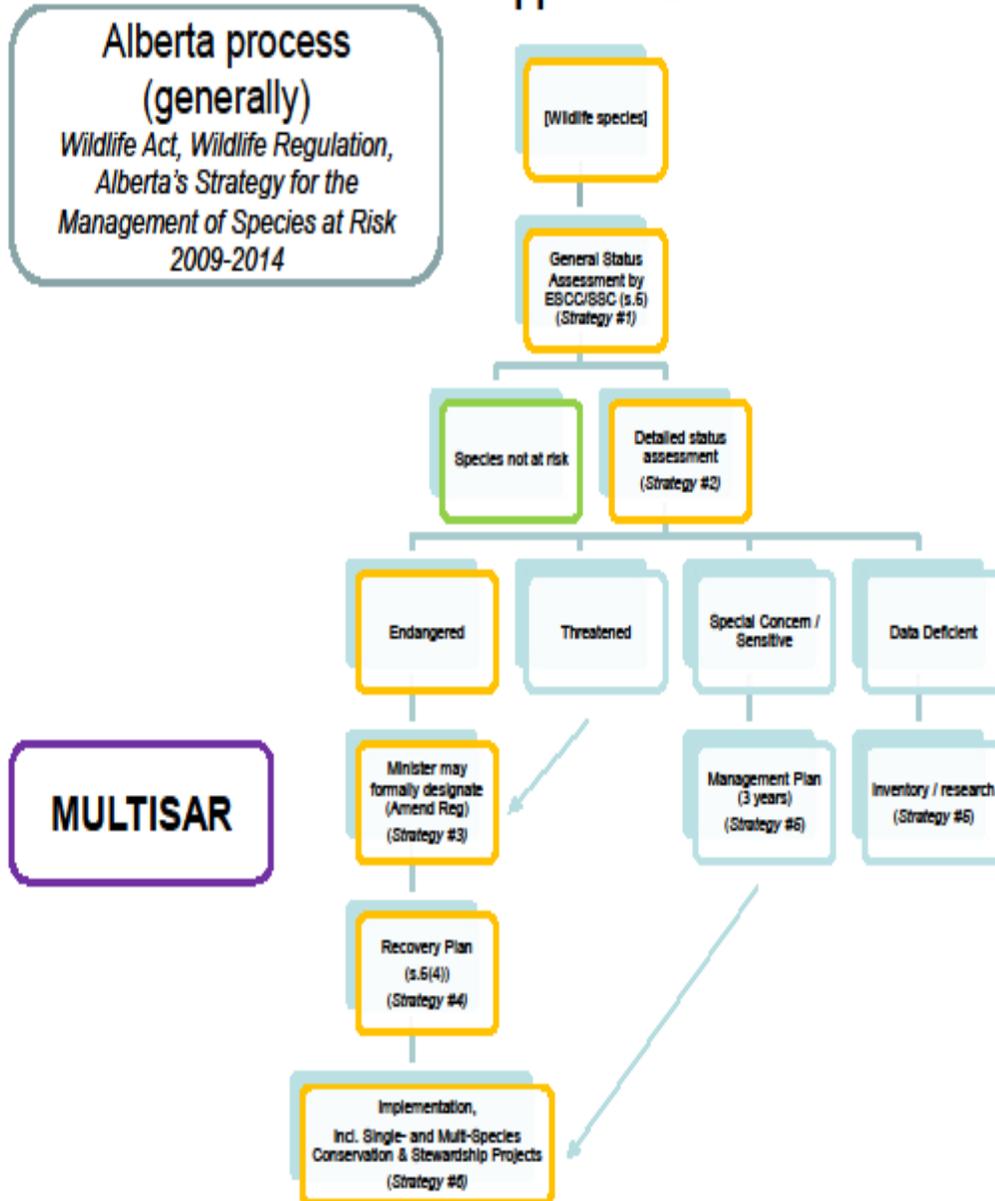
This paper has reviewed the prevailing legislative and policy regimes of each of four jurisdictions: Canada federally, Alberta, Saskatchewan, and the United States, including the 2013 Canadian Emergency Order for protection, and the US Sage Grouse Initiative that successfully kept the species from being listed, and which future is in question due to current political developments. It has critically discussed each regime and contemplated the emerging trends in species protection of: species prioritization, multi-species recovery planning, and incentivized collaborative stakeholder efforts. It has endorsed to the extent possible these emerging trends, and recommended pragmatic approaches going forward, supported by law and policy.

APPENDICES A to D

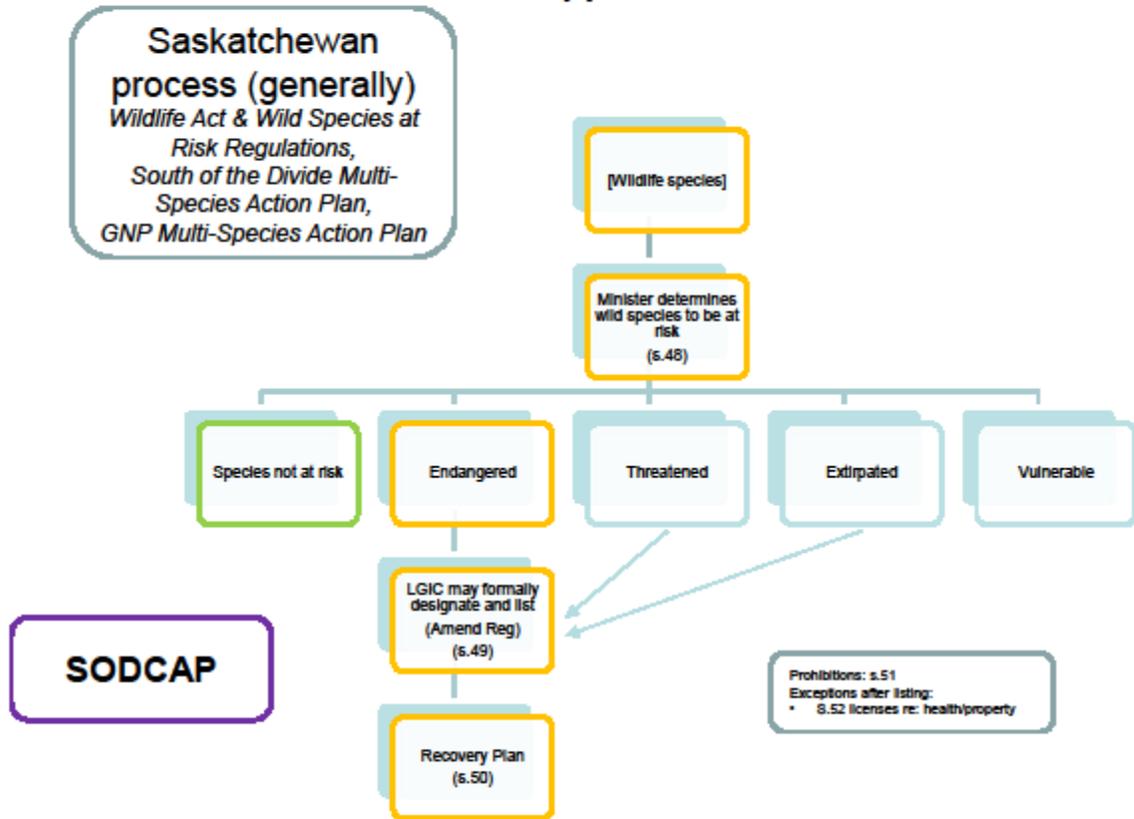
Appendix A



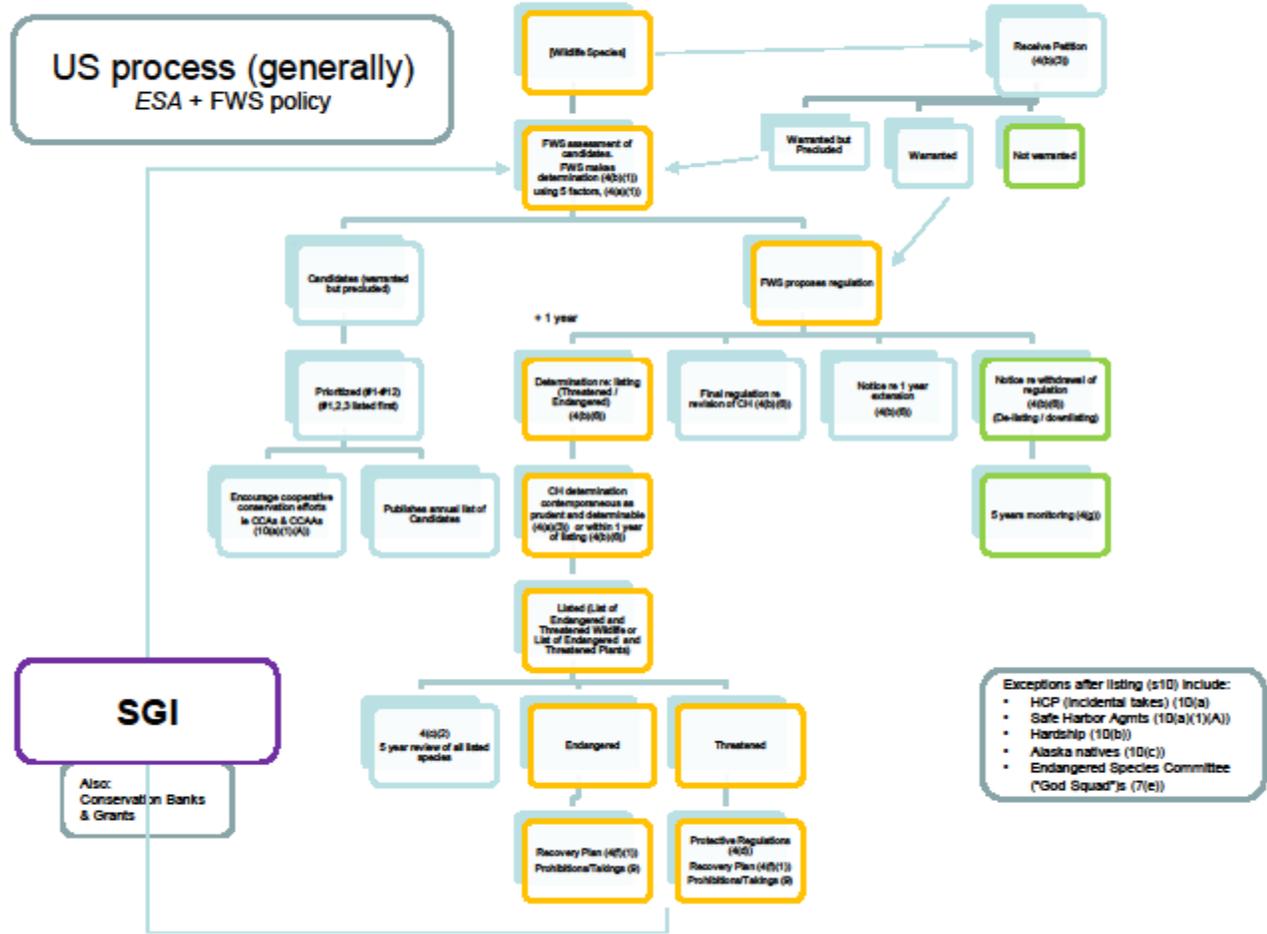
Appendix B



Appendix C



Appendix D



BIBLIOGRAPHY

LEGISLATION

CANADIAN

Alberta, *Lower Athabasca Regional Plan 2012-2022* (Alberta: 2012), online: <
<https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf> >

Alberta, *South Saskatchewan Regional Plan 2014-2024: An Alberta Land-use Framework Integrated Plan, amended May 2018* (Alberta: 2018) online: <
<https://landuse.alberta.ca/RegionalPlans/SouthSaskatchewanRegion/Pages/default.aspx> >

Alberta, *South Saskatchewan Region Biodiversity Management Framework: v.1.0 November 20, 2015* (Alberta: 2015) Draft [unpublished]

Alberta Land Stewardship Act, SA 2009, cA-26.

Canada Wildlife Act, RSC 1985, c W-9

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c11

Constitution Act, 1867 (UK), 30 & 31 Vict, c3, reprinted in RSC1985, Appendix II, No 5

Emergency Order for the Protection of the Greater Sage-Grouse, SOR/2013-202

Emergency Order for the Protection of the Western Chorus Frog (Great lakes / St Lawrence – Canadian Shield Population), SOR/2016-211

Order Declining to make an Emergency Order for the protection of the Killer Whale Northeast Pacific Southern Resident Population, SI/2018-102

Species at Risk Act, SC 2002, c29 [SARA]

Wild Species at Risk Regulations, RRS c W-13.11 Reg 1

Wildlife Act, RSA 2000, cW-10

Wildlife Act, SS 1998, c W-13.12

Wildlife Regulation, Alta Reg 143/1997

AMERICAN

Endangered and threatened wildlife, 50 CFR 17.11

Endangered and threatened plants, 50 CFR 17.12

Endangered Species Act of 1973, 16 USC § 1531 et seq

.

Fish and Wildlife Service, Interior Department, 80 FR 191 pgs. 59858-59942 - Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species (October 2, 2015), (to be codified at 50 CFR Part 17), online: < <http://www.regulations.gov> at Docket Number FWS-R6-ES-2015-0146 >

Presidential Executive Order on Promotion Energy Independence and Economic Growth (28 March 2017), online: < <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/> >

POLICY

Alberta, *Alberta's Strategy for the Management of Species at Risk (2009-2014)* (2008), online: Alberta Environment and Parks < <http://aep.alberta.ca/fish-wildlife/species-at-risk/documents/StrategyManagementSpeciesRisk2009-14.pdf> >

Government of Alberta, *Land-use Framework (December 2008)*, online: < <https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%202008-12.pdf> >

Alberta Environment and Sustainable Resource Development, *Alberta Greater Sage-grouse Recovery Plan 2013-2018*, Alberta Species at Risk Recovery Plan No. 30 (Alberta: September 2013) online: < <https://open.alberta.ca/publications/9781460107522> >

Environment Canada, *Amended Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) in Canada* (2014) in Species at Risk Act Recovery Strategy Series (Ottawa: 2014 Environment Canada), online: < https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/amended_rs_sage_grouse_e_final.pdf >

Environment and Climate Change Canada, *Action Plan for Multiple Species at Risk in Southwestern Saskatchewan: South of the Divide*, Species at Risk Act Action Plan Series (Ottawa: 2017 Environment and Climate Change Canada), online: < https://www.registrelep-sararegistry.gc.ca/virtual_sara/files/plans/ap_south_of_the_divide_e_proposed.pdf >

K Lungle & S Pruss, *Recovery Strategy for the Greater Sage Grouse (Centrocercus urophasianus urophasianus) in Canada*, (January 2008) in Species at Risk Act Recovery Strategy Series (Ottawa: 2008 Parks Canada Agency), online: < https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs_sagegrouse_0108_e.pdf >

K Lungle & S Pruss, *Replacement of Section 2.6 of the Recovery Strategy for the Greater Sage-Grouse (Centrocercus urophasianus urophasianus) in Canada*, (2009) in Species At Risk Act Recovery Strategy Series (Ottawa: 2009 Parks Canada Agency), online: < https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs_sage_grouse_sec_2-6_1009_e1.pdf >

Parks Canada Agency, *Multi-species Action Plan for Grasslands National Park of Canada*, Species at Risk Action Plan Series (Ottawa: 2016 Parks Canada Agency) online: < <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/action-plans/multi-species-grasslands-national-park.html> >

M Weiss and B Prieto, *A Conservation Plan for Greater Sage-Grouse in Saskatchewan*, Fish & Wildlife Branch Technical Report 2012-01 (2012 (updated 2014) Government of Saskatchewan), Online: GSK < <http://publications.gov.sk.ca/documents/66/86306-English.pdf> >

JURISPRUDENCE

Alberta Treasury Branches v. LGC Oil & Gas Inc., Calgary, 1601-07375 (ABQB) (online: Ernst & Young Inc. Restructuring Document Centre, *LGX Oil & Gas Inc [Receiver]*, online: < <https://documentcentre.eycan.com/Pages/Main.aspx?SID=380> >

Alberta Wilderness Association v Canada (Environment), 2009 FC 710

Alberta Wilderness Association v Canada (Attorney General), 2013 FCA 190

City of Medicine Hat et al v. Attorney General of Canada et al (January 3, 2014), Doc. Calgary T-12-14 (FC) (Notice of Application).

LGX Oil & Gas Inc (Receiver of) v Canada (Attorney General) (in progress), Calgary, 1501-14562 (ABQB) (online: Ernst & Young Inc. Restructuring Document Centre, *LGX Oil & Gas Inc [Receiver]*, online: < <https://documentcentre.eycan.com/Pages/Main.aspx?SID=380> >

W. Watersheds Project v. Zinke, No. 1:18-cv-00187 (Complaint, April 30, 2018), online: < http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180430_docket-118-cv-00187_complaint-1.pdf >

W. Watersheds Project v. Zinke, No. 1:18-cv-00187, 2018 WL 4550396 (D. Idaho Sept 21, 2018), online: < http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180921_docket-118-cv-00187_memorandum-decision.pdf > [injunction]

TREATIES AND AGREEMENTS

Canada – United States – Mexico Agreement, 30 November 2018, online: < <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng> >

United Nations Convention on Biological Diversity, 11 June 1992, 1760 UNTS 79, 31 ILM 818 (1992) (entered into force 29 December 1993)

GOVERNMENT DOCUMENTS

Environment and Climate Change Canada, “Species at risk: the act, the accord and the funding programs,” online: Government of Canada < <https://www.canada.ca/en/environment-climate-change/services/species-risk-act-accord-funding.html> >

Alberta Fish and Wildlife, “Species Assessed by the Conservation Committee: Alberta Species at Risk” (March 2016: Government of Alberta), online: < <https://open.alberta.ca/publications/species-assessed-by-the-conservation-committee-alberta-species-at-risk> > (most recent one online)

Commission for Environmental Cooperation, *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Submissions on Enforcement Matters (Montreal: 2000 Commission for Environmental Cooperation of North America), online: < cec.org >

MULTISAR: a multi-species conservation strategy for species at risk in the Grassland Natural Region of Alberta, 2017-2018 report, Alberta Environment and Parks, Fish and Wildlife Policy Branch, Alberta Species at Risk Report No. 162 (Edmonton: March 2018), online: < <https://open.alberta.ca/publications/9781460138694> >

US Department of Agriculture Natural Resources Conservation Service, “Sage Grouse Initiative,” online: US NRCS < https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/initiatives/?cid=steld_evb1027671 >

USDA Natural Resources Conservation Service, *Sage-Grouse Initiative: What’s good for grouse is good for ranching: A Blueprint for Creating Long-term, Market-based Incentives for Ranchers to Conserve Sage-Grouse by Linking NRCS’ Sage-Grouse Initiative with Grassbanks* (July 2011), online: < https://albertawilderness.ca/wp-content/uploads/20110700_doc_SGI_Grassbanking_Business_Plan.pdf >

US Fish & Wildlife Service, Endangered Species Act Document Library, online: < <https://www.fws.gov/endangered/esa-library/index.html> >

Sage Grouse Initiative, “New Sage Grouse Strategy Unveiled: 4760 Million Invested by 2018,” (27 August 2015), online: < <https://www.sagegrouseinitiative.com/new-sage-grouse-strategy-unveiled-760-million-invested-2018/> >

SECONDARY SOURCES - MONOGRAPHS

Nadine Hoffman, *Species at Risk Act: A Comprehensive Inventory of Legislative Documents 1973-2017*, (Paper delivered at the Canadian Institute of Resources Law Symposium on

Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection, 2 & 3 March 2018), online: < <https://cirl.ca/symposium/2018-symposium/download-2018-march-materials> >

Sara L Jaremko, “An Overview of Wildlife Legislation in Alberta” (paper delivered at the Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection symposium convened by the Canadian Institute of Resources Law and the University of Calgary Faculty of Law, 3 March 2018), online: < <https://cirl.ca/symposium/2018-march-symposium/download-2018-march-materials> >

Priscilla Kennedy and John Donihee, *Wildlife and the Canadian Constitution*, Canadian Wildlife Law Project Paper #4 (Canada: Canadian Institute of Resources Law, August 2006), online: < <http://cirl.ca/publications/wildlife-law-papers> >

Laura D Kumpf and Elaine Hughes, “Wildlife Sector Overview”, in Elaine L Hughes, Arlene J Kwasiak & Alistair Lucas, *Public Lands and Resources Law in Canada* (Toronto: Irwin Law Inc, 2016) 293

Devon Page and Melissa Gorrie, “Chapter 18: Legal Efforts to Protect Species at Risk in Canada: A Case Study of the Greater Sage-Grouse” in William A Tilleman & Alastair R Lucas, eds, *Litigating Canada’s Environment: Leading Canadian Environmental Cases by the Lawyers Involved* (Canada: Thomson Reuters, 2017) 329

Monique Passelac-Ross, *Overview of Provincial Wildlife Laws*, Canadian Wildlife Law Project Paper #3 (Canada: Canadian Institute of Resources Law, July 2006), online: < <http://cirl.ca/publications/wildlife-law-papers> >

Smart Prosperity Institute, *Species in the Balance: Partnering on Tools and Incentives for Recovering Canadian Species at Risk* (February 2018), online: < <https://institute.smartprosperity.ca/sites/default/files/sr-02-01-18-final.pdf> >

Dyna Tuytel and Margot Venton, “Challenges in Receiving SARA Protections: A Killer (Whale) Case Study” (paper delivered at the Environment in the Courtroom: Enforcement Issues in Canadian Wildlife Protection symposium convened by the Canadian Institute of Resources Law and the University of Calgary Faculty of Law, 3 March 2018), online: < <https://cirl.ca/symposium/2018-march-symposium/download-2018-march-materials> >

SECONDARY SOURCES – ARTICLES

Bruce Babbitt, “Why We Must Save the Endangered Species Act from the Trump Administration,” Opinion, *Yale Environment* 360 (20 September 2018), online: < <https://e360.yale.edu/features/why-we-must-save-the-endangered-species-act-from-the-trump-administration-babbitt> >

Nigel Bankes, “SARA has a spine as well as teeth,” (3 January 2011), online: ABlawg, < <https://ablawg.ca/2011/01/03/sara-has-a-spine-as-well-as-teeth/> >

- Michael C Blumm & Olivier Jamin, “The Trump Public Lands Revolution: Redefining “The Public” in Public Land Law” (2018) 48 *Environmental Law* 311
- Michael C Blumm & Kya B Marienfeld, “Endangered Species Act Listings and Climate Change: Avoiding the Elephant in the Room” (2014) 20 *Animal Law* 277
- Holly Doremus, “The Endangered Species Act: Static Law Meets Dynamic World” (2010) 32 *Wash UJL & Policy* 175
- Shaun Fluker & Jocelyn Stacey, “The Basics of Species at Risk Legislation in Alberta” (2012) 50: 1 *Alta L Rev* 95 at 105
- Shaun Fluker, “The Curious Case of the Greater Sage Grouse in Alberta,” (17 January 2014), online: ABlawg < <https://ablawg.ca/2014/01/17/the-curious-case-of-the-greater-sage-grouse-in-alberta/> >.
- Shaun Fluker, “More Justice for the Western Chorus Frog,” (12 September 2018), online: ABlawg < <https://ablawg.ca/2018/09/12/more-justice-for-the-western-chorus-frog/> >
- Shaun Fluker, “A Proposal for Effective Legal Protection for Endangered Species in Alberta: Introducing the *Wildlife Species Protection and Recovery Act* (Alberta)” (4 October 2017), online: ABlawg < <https://ablawg.ca/2017/10/04/a-proposal-for-effective-legal-protection-for-endangered-species-in-alberta-introducing-the-wildlife-species-protection-and-recovery-act-alberta/> >
- Robin Goose, “Endangered Species Act: If it ain’t broke, don’t fix it,” Op-Ed, *Casper Star Tribune* (25 August 2018), online: < https://trib.com/news/state-and-regional/goose-endangered-species-act-if-it-ain-t-broke-don/article_4f6aab4b-202e-5fe7-b757-e437dc385493.html >
- Dylan Lawrence, “Court Enjoins Streamlined Leasing Procedures in Sage-Grouse Habitat,” XXXV:4 *Mineral Law Newsletter* (2018) 7
- Kerry L McGrath et al, “The ESA Today: Eco-Pragmatism and State Conservation Efforts,” (seminar transcript), (October 2016) 46 *Environmental Law Reporter* 10827, online: < <https://www.eli.org/events/esa-today-eco-pragmatism-state-conservation-efforts> >
- Hannah Nordhaus, “Saving the Sage Grouse”, *National Geographic* 234:5 (November 2018) 68, online: < <https://www.nationalgeographic.com/magazine/2018/11/saving-the-sage-grouse/> >
- Andrea Olive, “Oil development in the grasslands: Saskatchewan’s Bakken formation and species at risk protection,” (2018) *Cogent Environmental Science*, 4: 1443666, online: < <https://doi.org/10.1080/23311843.2018.1443666> >
- Ingrid Rehtin & Kamila Lis-Coghlan, “BLM Drops Sage-Grouse Habitat from Oil & Gas Auction,” (8 November 2018), *National Law Review*, online: < <https://www.natlawreview.com/article/blm-drops-sage-grouse-habitat-oil-gas-auction> >
- >

Temple Stoellinger & David “Tex” Taylor, “A Report on the Economic Impact to Wyoming’s Economy From a Potential Listing of the Sage Grouse,” (2017) 17:1 Wyoming LR 79

David Suzuki, “Beyond the Species at Risk Act: Recognizing the Sacred” (2011) 22 J Env L & Prac 239

Jason Unger, “Habitat, what habitat? The Greater Sage-Grouse emergency order and a call for heightened due diligence” (December 2018) 26:4 Wild Lands Advocate at 7; also (15 November 2018) online: Environmental Law Centre < <http://elc.ab.ca/habitat-what-habitat-the-greater-sage-grouse-emergency-order-and-a-call-for-heightened-due-diligence/> >

Kevin Van Tighem, “Living With the Land,” *Alberta Views* (July/August 2014) 28

SECONDARY SOURCES – MEDIA

The Associated Press, “Lawsuit targeting oil, gas lease sales cites imperiled bird,” (30 April 2018) Montreal Gazette, online: < <https://montrealgazette.com/pmn/news-pmn/lawsuit-targeting-oil-gas-lease-sales-cites-imperiled-bird/wcm/201a287e-ef95-4f28-97b4-b61066790f7c> >

Martin Breum, “How the narrative on polar bears has become a problem for Arctic environmental groups,” *Arctic Today* (21 October 2018), online: < <https://www.arctictoday.com/narrative-polar-bears-become-problem-arctic-environmental-groups/> >

The Canadian Press, “Trump proposes easing oil, gas leasing restrictions put in place to protect sage grouse,” *JWN Energy* (3 May 2018), online: < <https://www.jwnenergy.com/article/2018/5/trump-proposes-easing-oil-gas-leasing-restrictions-put-place-protect-sage-grouse/> >

The Canadian Press, “US unveils plan aimed at protecting Sage Grouse while not impeding oil and gas,” *JWN Energy* (8 August 2017), online: < <https://www.jwnenergy.com/article/2017/8/us-unveils-plan-aimed-protecting-sage-grouse-while-not-impeding-oil-and-gas/> >

Emily Pasiuk, “Sask law falls short when it comes to protecting wildlife: prof,” CBC News (2 March 2018), online: < <https://www.cbc.ca/news/canada/saskatchewan/sask-wildlife-act-andrea-olive-1.4555972> >

Matthew Phelan, “The Menace of Eco-Fascism,” (22 October 2018) NYR Daily, online: The New York Review of Books < <https://www.nybooks.com/daily/2018/10/22/the-menace-of-eco-fascism/> >

Annie Rueter, “Trump’s proposed changes to Endangered Species Act worry Canadian conservationists,” *Canadian Geographic* (14 August 2018), online: < <https://www.canadiangeographic.ca/article/trumps-proposed-changes-endangered-species-act-worry-canadian-conservationists> >

OTHER

- Alberta Wilderness Association, “Sage-Grouse”, online: Alberta Wilderness Association < <https://albertawilderness.ca/issues/wildlife/sage-grouse/> >
- Calgary Zoo, “First Greater Sage-Grouse Reproduce in Human Care in Canada” (18 October 2018) Calgary Zoo News, online: < <https://www.calgaryzoo.com/news/first-greater-sage-grouse-reproduce-human-care-canada> >
- Calgary Zoo, “Calgary Zoo Opens First Greater Sage-Grouse Breeding Facility in Canada” (28 October 2016) Calgary Zoo Members Blog (blog) online: < <https://www.calgaryzoo.com/blog/members/calgary-zoo-opens-first-greater-sage-grouse-breeding-facility-in-canada/> >
- Commission for Environmental Cooperation, Press release, “Negotiations on a new Agreement on Environmental Cooperation (ECA) completed (30 November 2018), online: < <http://cec.org/news-and-outreach/press-releases/negotiations-new-agreement-environmental-cooperation-eca-completed> >
- Office of Attorney General Maura Healey (Massachusetts), “Multistate AG Comments on ESA Listing, Interagency Cooperation, and 4(d) Rules_final” (25 September 2018), online: < <https://www.mass.gov/doc/multistate-ag-comments-on-esa-listing-interagency-cooperation-and-4d-rulesfinal> >
- MULTISAR: At Home on the Range: Partnering with Landowners to conserve Grassland Species at Risk in Alberta, online: < <http://multisar.ca/> >
- Nature Saskatchewan, *Stewards of Saskatchewan 2017 Report: Habitat Conservation for Species of Risk Through Stewardship* (Regina, Saskatchewan: May 2018), online: < http://www.naturesask.ca/rsu_docs/COMPILED--2017-18-Final-Report-19JUNE2018-sm.pdf >
- Sage Grouse Initiative, “The future is bright for conserving western working landscapes,” (18 December 2018), online: < <https://www.sagegrouseinitiative.com/1800-ranchers-and-counting/> >
- Dashka Slater, “Ryan Zinke Throws the Greater Sage-Grouse Under the Bus” (14 December 2017) Sierra Magazine, online: < <https://www.sierraclub.org/sierra/2018-1-january-february/grapple/trump-administration-throws-greater-sage-grouse-under-bus> >
- South of the Divide Conservation Action Program Inc., online: < www.sodcap.com >
- South of the Divide Conservation Action Program Inc, *2016-2017 Annual Report: Providing Habitat on a Working Landscape* (2017), online: < <http://www.sodcap.com/Docs/AnnualReport1617.pdf> >

US Department of the Interior, “Historic Conservation Campaign Protects Greater Sage-Grouse” (22 September 2015) Press Release, online: < <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse> >

Department of the Interior, “Secretary Zinke Signs Order to Improve Sage-Grouse Conservation, Strengthen Communication and Collaboration Between States and Feds,” (8 June 2017), Press Release, online: < <https://www.doi.gov/pressreleases/secretary-zinke-signs-order-improve-sage-grouse-conservation-strengthen-communication> >

US DOI Bureau of Land Management, “Updated Plans for Greater Sage-Grouse Conservation Reflect Wishes of States, Governors,” Press Release (6 December 2018), online: < <https://www.blm.gov/node/18291> >