Federal Court  Cour fédérale

Date: 20090709

Docket: T-241-08

Citation: 2009 FC 710

Ottawa, Ontario, July 9, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

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

Applicants

and

MINISTER OF ENVIRONMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the 'Recovery Strategy for the Greater Sage-Grouse (*Centrocercus urophasianus urophasianus*) in Canada' (the Recovery Strategy) posted by the Minister of the Environment under the *Species at Risk Act*, S.C. 2002, c. 29 ("SARA") on January 14, 2008.

[2] The applicants are non-profit environmental and natural history organizations that are concerned about the survival and recovery of the Greater Sage-Grouse, and other species at risk. Their specific complaint concerning the Recovery Strategy is that it fails to identify any "critical habitat" for the Greater Sage-Grouse. They submit that the Minister erred in law in his interpretation of the relevant statutory provisions of the SARA. For the reasons that follow, I find that there has been no error of law by the respondent; however, this application for judicial review is allowed as the decision of the respondent, to the extent that it fails to identify any critical habitat, is unreasonable.

Background

[3] There is little dispute between the parties with respect to the fundamental facts concerning the Greater Sage-Grouse, the SARA regime and the process that lead to the drafting and posting of the Recovery Strategy. Where the parties differ concerns the obligation of the Minister to identify the critical habitat of the Greater Sage-Grouse and whether, at the time the Recovery Strategy was prepared and posted, such identification was possible given known facts.

[4] There are approximately 150,000 Greater Sage-Grouse in North America; less than one percent are in Canada. The Greater Sage-Grouse is located in southeastern Alberta and southwestern Saskatchewan as well as in a number of the northwestern States of the United States of America. The Greater Sage-Grouse is dependent on sagebrush for food and shelter.

[5] Greater Sage-Grouse have specific habitat requirements for breeding, nesting, brood-rearing and wintering. The description of these is set out in the Recovery Strategy and may be briefly described as follows.

1. Breeding habitat, referred to as leks, is an open area of sparse vegetation, located slightly lower than surrounding areas and often near standing water. Leks range in size from 1.4 to 16 hectares.
2. Nesting habitat is a broad area of sagebrush with horizontal and vertical vegetative diversity. It is usually located near leks with average lek-to-nest distance in Alberta ranging from 0.42 to 15.4 kilometres.
3. Brood-rearing or summer habitat is usually located within 3 kilometres of nesting habitat.
4. Winter habitat has been little investigated in Canada. During the fall Greater Sage-Grouse congregate in gender segregated flocks.

[6] The Greater Sage-Grouse is listed as an endangered species under Schedule I of the SARA which means that it has been identified as facing imminent extirpation (i.e. no longer existing in the wild in Canada, but existing elsewhere in the wild) or extinction. Section 39 of the SARA provides that when a species is listed as endangered, the competent Minister, in this case the Minister of the Environment, must prepare a strategy for the recovery of that species.

[7] The SARA prescribes a recovery planning process for endangered species. It is a two-step process. The first step is the preparation and posting of a recovery strategy and the second step is

the development and posting of an action plan to implement the recovery strategy. The present application concerns only the recovery strategy step of the process.

[8] Section 41 of the SARA sets out the content of a recovery strategy. Content is dependant on whether the Minister has determined that the recovery of the listed species is feasible or not. In this case, the Minister determined that recovery is feasible.

[9] Subsection 41(1) of the SARA stipulates the content of a recovery strategy when the Minister has determined that recovery of the species is feasible. In so doing the Minister is required, in many instances, to consider the information provided by COSEWIC (the Committee on the Status of Endangered Wildlife in Canada) that is established pursuant to the SARA. Subsection 41(1) of the SARA reads as follows:

41. (1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include	41. (1) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est réalisable, le programme de rétablissement doit traiter des menaces à la survie de l'espèce — notamment de toute perte de son habitat — précisées par le COSEPAC et doit comporter notamment :
(*a*) a description of the species and its needs that is consistent with information provided by COSEWIC;	a) une description de l'espèce et de ses besoins qui soit compatible avec les renseignements fournis par le COSEPAC;
(*b*) an identification of the threats to the survival of the	b) une désignation des menaces à la survie de

species and threats to its habitat that is consistent with information provided by COSEWIC and a description of the broad strategy to be taken to address those threats;

l’espèce et des menaces à son habitat qui soit compatible avec les renseignements fournis par le COSEPAC, et des grandes lignes du plan à suivre pour y faire face;

(*c*) an identification of the species’ critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;

c) la désignation de l’habitat essentiel de l’espèce dans la mesure du possible, en se fondant sur la meilleure information accessible, notamment les informations fournies par le COSEPAC, et des exemples d’activités susceptibles d’entraîner sa destruction;

(*c.1*) a schedule of studies to identify critical habitat, where available information is inadequate;

c.1) un calendrier des études visant à désigner l’habitat essentiel lorsque l’information accessible est insuffisante;

(*d*) a statement of the population and distribution objectives that will assist the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives;

d) un énoncé des objectifs en matière de population et de dissémination visant à favoriser la survie et le rétablissement de l’espèce, ainsi qu’une description générale des activités de recherche et de gestion nécessaires à l’atteinte de ces objectifs;

(*e*) any other matters that are prescribed by the regulations;

e) tout autre élément prévu par règlement;

(*f*) a statement about whether additional information is required about the species; and

f) un énoncé sur l’opportunité de fournir des renseignements supplémentaires concernant l’espèce;

(*g*) a statement of when one or more action plans in relation to the recovery strategy will be completed.	g) un exposé de l'échéancier prévu pour l'élaboration d'un ou de plusieurs plans d'action relatifs au programme de rétablissement.

[10] The Recovery Strategy issued by the Minister did not identify any critical habitat but did contain a schedule of studies to identify critical habitat. The relevant position of the Recovery Strategy is as follows:

> **2.6 Critical Habitat**
>
> Critical habitat cannot be identified for the Sage-Grouse at this time. While a considerable amount is known about Sage-Grouse habitat requirements, several knowledge gaps and technical activities must be addressed before critical habitat can be identified.
>
> Partial identification will be based on currently available information and information that will be available from ongoing studies (initial results available as of March 2008). The general approach to identify Sage-Grouse critical habitat will be to use the nesting and brood rearing habitat model in Aldridge (2005) and extrapolate it to the recent historic distribution of sage grouse in Alberta and Saskatchewan. When available, recent information on wintering habitat will be added to this model. Only partial critical habitat identification is possible, as the information necessary for this model does not exist for the entire recent historic Saskatchewan distribution. Additionally, ongoing research is contributing new information on Sage Grouse habitat requirements.
>
> A schedule of studies and supporting activities including an approach for consultation has been prepared. Completion of these steps should enable the identification of partial critical habitat in an addendum posted in December 2008. It is expected that with new information the majority of existing critical habitat in Alberta and Saskatchewan will be identified. Information on habitat requirements from studies in progress will facilitate our understanding of Sage Grouse habitat requirements. Comprehensive identification of critical habitat, necessary for the recovery of the species, will probably contain

degraded habitat. Plans for restoring Sage-Grouse habitat will be part of the action plan.

[11] “Critical habitat” and “habitat” are both defined terms in the SARA:

"critical habitat" means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species.	« habitat essentiel » L'habitat nécessaire à la survie ou au rétablissement d'une espèce sauvage inscrite, qui est désigné comme tel dans un programme de rétablissement ou un plan d'action élaboré à l'égard de l'espèce.
“habitat" means	« habitat »
(a) in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and	a) S'agissant d'une espèce aquatique, les frayères, aires d'alevinage, de croissance et d'alimentation et routes migratoires dont sa survie dépend, directement ou indirectement, ou aires où elle s'est déjà trouvée et où il est possible de la réintroduire;
(b) in respect of other wildlife species, the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced.	b) s'agissant de toute autre espèce sauvage, l'aire ou le type d'endroit où un individu ou l'espèce se trouvent ou dont leur survie dépend directement ou indirectement ou se sont déjà trouvés, et où il est possible de les réintroduire.

[12] In their memorandum of argument, the applicants state that the respondent "failed to perform a mandatory statutory duty as required by s. 41(1)(c) of the SARA, namely, to include an 'identification of the species' critical habitat, to the extent possible, based on the best available information.' "

[13] The development of the Recovery Strategy occurred over many months and involved a number of parties. In June 2005 lead responsibility for the development of the Recovery Strategy was assigned to Parks Canada Agency ("PCA"). Cheryl Penny, Field Unit Supervisor for the Saskatchewan South Field Unit at Val Marie, Saskatchewan, was given responsibility for reviewing and recommending posting of the Greater Sage-Grouse Recovery Strategy to Alan Latourelle, the Chief Executive Officer of PCA.

[14] Responsibility for the planning process for the Greater Sage-Grouse Recovery Strategy was shared by Shelley Pruss, a Species-at-Risk Recovery Specialist working for PCA in the Western and Northern Service Centre, Calgary, Alberta and Pat Fargey, a Species-at-Risk Recovery Specialist working for PCA at Grasslands National Park at Val Marie, Saskatchewan.

[15] For the purposes of funding a recovery planning process, PCA requires that a project charter be prepared identifying the recovery planning to be undertaken and the approaches to it, including major recovery planning issues. The project charter for the Greater Sage-Grouse is dated July 5, 2006, and contains the following statement with respect to identifying critical habitat:

> The strategy will **not** include the identification of critical habitat. Critical Habitat designation has been deferred due to lack of

> <u>comprehensive information particularly in Saskatchewan</u> but a schedule of studies is included in the Recovery Strategy.
>
> [bolded emphasis in original; underlined emphasis added]

[16] The respondent submitted in oral argument that the decision not to include the identification of critical habitat in the Recovery Strategy was taken at or following a meeting held July 19 and 20, 2005, at Medicine Hat, Alberta. This was a meeting of the National Sage Grouse Recovery Team. The record does not list the participants at this meeting but Pat Fargey attests that he and Dale Eslinger, the Alberta government biologist responsible for the Greater Sage-Grouse, organized the meeting at which the next steps in recovery planning were discussed with "provincial agency representatives and other interested parties." He further attests that "one of the key outcomes was agreement on the approach for strategy development" and that "critical habitat identification in Alberta and Saskatchewan for the Greater Sage-Grouse should be done by extrapolating Cameron Aldridge's nesting and brood-rearing habitat models."

[17] Cameron Aldridge was a Ph.D. student at the University of Alberta. In April 2005, he presented his thesis entitled "Identifying Habitats for Persistence of Greater Sage-Grouse (*Centrocercus urophasianus*) in Alberta, Canada". His thesis research was focused on using a modeling approach to identifying nesting and brood-rearing habitat of the Greater Sage-Grouse in the Manyberries area of Alberta. He used mathematical models to predict nesting and brood-rearing habitat for the Greater Sage-Grouse as well as to predict the quality of habitat in terms of chick survival. He commenced his research by capturing "females at 5 of 8 known active leks in southeastern Alberta during the breeding season (March through May) from 2001 to 2003" and

fitting them with radiotransmitters in order that their movement could be followed and their nests and brood-rearing areas identified: See pages 17-18 of his thesis.

[18] Pat Fargey attests to the following concerning the identification of critical habitat in his affidavit:

> At the time that PCA became the federal lead on the development of the Recovery Strategy, Cameron Aldridge was just finishing his Ph.D. on the Greater Sage-Grouse in a region of Alberta. … His Ph.D. work is highly germane to the identification of critical habitat as he had used radio telemetry location information to develop nesting and brood rearing habitat models. … These models may be used to generate probability maps distinguishing high quality habitat from low quality habitat. The models require highly specific biophysical digital data in a Geographic Information System ("GIS"), and considerable expertise to apply.
>
> Cameron Aldridge's nesting and brood rearing habitat models were developed for a specific region in Alberta. These models had not been applied to Saskatchewan.
>
> …
>
> At the July 2005 Meeting it was also agreed that critical habitat identification in Alberta and Saskatchewan for the Greater Sage-Grouse should be done by extrapolating Cameron Aldridge's nesting and brood rearing habitat models.

[19] On February 9 and 10, 2006, a further workshop was hosted by PCA in Medicine Hat, Alberta. The respondent in his memorandum of argument writes that "[w]orkshop participants agreed that there was insufficient information to identify critical habitat for the Greater Sage Grouse." However, as was noted by the applicants, the agenda for that meeting stated that following the workshop, a draft strategy would be completed and "the strategy will not include the identification of critical habitat." The applicants submit that the decision that no critical habitat

would be identified must have been made prior to the 2006 workshop. I agree with them that one can only reach that conclusion based on the record.

[20] A draft Recovery Strategy was prepared in April 2006. It did not identify any critical habitat but included a schedule of activities to be completed in order to identify critical habitat for the Greater Sage-Grouse. This flowed from the workshop as one of its agenda items was "Schedule of Studies for Critical Habitat". This draft was circulated in May and July 2006 to those attending the February 2006 workshop as well as to Dr. Aldridge and all of the applicants, with the exception of Western Canada Wilderness Committee. None of them responded save for the Research Director of Nature Saskatchewan who "liked" the work plan to determine critical habitat but thought more time might be needed to complete it.

[21] On September 25, 2007, PCA posted the proposed Greater Sage-Grouse Recovery Strategy. None of the applicants commented on the proposed Recovery Strategy. Some comments were received from others, including Environmental Law Centre and Nature Canada, which both registered complaints about the failure to identify any critical habitat for the Greater Sage-Grouse. PCA reviewed this criticism; however, as Pat Fargey attests: "The conclusion was that while there had been significant progress in the last year in gathering the information needed to extrapolate the Aldridge and Boyce models, it still would not be possible to identify critical habitat without significantly delaying the posting of the Recovery Strategy." Accordingly, the only change was to slightly revise the timelines in the schedule of studies for the critical habitat to include a partial

identification of critical habitat by December 2008. That deadline was not met and partial identification had still not occurred at the time of hearing.

Issues

[22] The applicants identified three issues:

1. What is the correct standard of review of the respondent's decision to not identify any critical habitat in the Greater Sage-Grouse Recovery Strategy?
2. What is the correct interpretation of subsection 41(1)(c)? In particular
   (a) Must as much critical habitat be identified as possible in a recovery strategy even if all critical habitat or all critical habitat of a particular type cannot be identified at that time?
   (b) Must the population and distribution objectives in the recovery strategy be used as a basis to determine the amount of critical habitat that is needed?
3. Did the respondent meet the mandatory requirements of subsection 41(1)(c) for the Greater Sage-Grouse?

[23] The respondent submits that the applicants have incorrectly framed the issues in dispute and submits that the points properly in dispute are:

1. What is the applicable standard of review of the finding in the Recovery Strategy that critical habitat identification was not possible at the time of posting, and setting a schedule of studies for the purpose of accomplishing partial critical habitat identification?

2. In light of the applicable standard of review, which the respondent submits is reasonableness, does the finding in the Recovery Strategy that critical habitat identification was not possible at the time of posting, and setting a schedule of studies for the purpose of accomplishing partial critical habitat identification, establish a basis for this Court to interfere in the finding and set aside the Recovery Strategy, as requested by the applicant?

[24] At the hearing of this application respondent's counsel was asked whether the respondent disputed the interpretation of section 41(1) of the SARA proposed by the applicants. The Court was informed that the respondent did not take issue with the statutory interpretation offered by the applicants. Accordingly, the applicants' proposed second issue is not an issue in dispute.

[25] The agreed upon interpretation, which I endorse to the extent that it is relevant to this application, is as follows. There is no discretion vested in the Minister in identifying critical habitat under the SARA. Subsection 41(1)(c) requires that the Minister identify in a recovery strategy document as much critical habitat as it is possible to identify at that time, even if all of it cannot be identified, and to do so based on the best information then available. I note that this requirement reflects the precautionary principle that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation," as it was put by the Supreme Court of Canada, citing the *Bergen Ministerial Declaration on Sustainable Development* in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40.

[26] In light of this agreement on interpretation, the real issues in dispute, in my view, are the following:

1. What is the correct standard of review of the respondent's decision to not identify any critical habitat in the Greater Sage-Grouse Recovery Strategy?
2. Does the decision of the respondent to not identify any critical habitat meet that test and, if not, what is the appropriate remedy?

Preliminary Motion

[27] Prior to the hearing both parties filed motions seeking to strike portions of affidavits filed by the party opposite.

[28] The respondent filed a pre-hearing motion to strike the affidavit of Dr. Mark Boyce, sworn May 6, 2008, and paragraphs 15 to 20 and Exhibit "A" of the affidavit of Dawn Dickinson, affirmed March 25, 2008, on the grounds that they contain opinion evidence, argument, and facts not within the knowledge of the affiant. At the hearing the respondent advised that it was now not seeking to strike Exhibit "A" of the affidavit of Dawn Dickinson, the July 2001 *Canadian Sage Grouse Recovery Strategy*, as it had been before the decision-maker.

[29] The applicants responded by filing their own motion to strike paragraphs 25 to 28 and Exhibit "E" of the affidavit of Pat Fargey, sworn October 3, 2008, on the ground that this was evidence of facts that occurred after the date of the decision under review and was thus irrelevant

and prejudicial. The respondent consented to the motion to strike paragraphs 25 to 28 and Exhibit "E" of the affidavit of Pat Fargey, sworn October 3, 2008, and I so ordered at the hearing.

[30] It is well established that on an application for judicial review in this Court, the scope of admissible evidence is limited. Normally, the Court will only take into account the actual record that was before the decision-maker. Exceptions to the rule may be justified where extrinsic evidence is relevant to an allegation concerning defects in procedural fairness or jurisdictional error. Extrinsic evidence may also be admissible where it describes the proceedings and the evidence before the decision-maker whose decision is under review, as noted by Justice Hughes in *Abbott Laboratories Limited v. Canada (Attorney General)*, 2008 FC 700. This latter exception is consonant with the observation in *Armstrong v. Canada (Attorney General)*, 2005 FC 1013, that parts of an affidavit that provide general background information that may assist the judge should not be struck.

[31] In this case, the applicants have not advanced any allegation going to defects in procedural fairness nor do they raise a true jurisdictional issue, even if they contend that the respondent failed to comply with a mandatory requirement of the SARA. Accordingly, there remains only the exception for helpful, general background information.

[32] Rule 81 of the *Federal Courts Rules* provides as follows:

81. (1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in	81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui

which statements as to the deponent's belief, with the grounds therefor, may be included.	d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[33] Having reviewed the affidavit of Dr. Boyce, it is apparent that much of his testimony is in the nature of opinion evidence that is *prima facie* inadmissible pursuant to Rule 81. However, notwithstanding Rule 81, opinion evidence of a properly qualified expert may be admissible if it is relevant, necessary to assist the trier of fact, and not subject to any exclusionary rule, as it was set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. Despite the fact that the provisions of the *Federal Courts Rules* dealing with expert evidence appear under Part 4 dealing with actions, there is precedent for the admission of expert evidence in judicial review proceedings relating to matters of a scientific nature: *Abbott Laboratories, supra*. I assume, for the purposes of the present motion, that Dr. Boyce could be properly qualified as a Greater Sage-Grouse expert.

[34] I do not find that Dr. Boyce's expert opinion on the issues before the Court, including the issue of "critical habitat," is necessary in the sense that without it, the Court could not appreciate the technical nature of the issues before it, which is how necessity is defined in *Mohan.* Further, the Supreme Court in *Mohan* directs that the necessity requirement is to be interpreted strictly where an

expert provides an opinion on the "ultimate issue." The Boyce affidavit notably includes explicit opinion evidence on the ultimate issue at paragraphs 10, 18, 24 and 27. The statements in these paragraphs go well beyond a description of the evidence before the decision-maker, or helpful background information; their inadmissibility in this proceeding is obvious. The remainder of Dr. Boyce's affidavit contains factual information which arguably constitutes helpful background information on graduate work supervised by Dr. Boyce, which was then relied upon by the respondent in preparing the Greater Sage-Grouse Recovery Strategy. However, in my view, this factual information is so intertwined with unnecessary opinion evidence that it cannot realistically be severed and its admission would prejudice the respondent. As was the case in *Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association*, 2006 FCA 56, the entirety of the contentious affidavit should be struck. Accordingly, the respondent's motion with respect to the Boyce affidavit is granted and it is struck in its entirety.

[35] The portions of the affidavit of Dawn Dickinson which the respondent seeks to strike relate to the involvement of Ms. Dickinson's organization, Grasslands Naturalists, in census activities and observation of Greater Sage-Grouse since 1991, as well as Ms. Dickinson's direct involvement in drafting the *2001 Federal recovery strategy for the Greater Sage-Grouse*.

[36] The respondent objects to the admission into evidence of these paragraphs on similar grounds as those advanced in relation to the Boyce affidavit. In the respondent's submission, paragraphs 15 to 20 of the Dickinson affidavit are "composed entirely of opinion evidence."

[37] I disagree with the respondent that paragraphs 15 to 20 of the Dickinson affidavit are composed entirely of opinion evidence. The only portion of the affidavit which seems to me to include opinion evidence is the third sentence of paragraph 20, reading "[w]e did not know everything about Sage-Grouse habitat needs, but we knew enough to identify and protect some Sage-Grouse critical habitat." The 2001 recovery strategy itself may contain much in the way of scientific opinion, but Ms. Dickinson's statements as to what that report does or does not say are themselves statements of fact within her personal knowledge. Having said that, the Court is equally well-placed to discern what the 2001 report does and does not say; her evidence is not helpful.

[38] The 2001 recovery strategy was before the decision-maker as it is listed as a reference at page 31 of the Recovery Strategy which is the subject of this judicial review, and indeed a perusal of the Recovery Strategy confirms that it is cited at various points. It was for this reason that the respondent withdrew its objection to Exhibit "A" of the Dickinson affidavit. I am of the view that the Dickinson affidavit is admissible, with the exception of the third sentence of paragraph 20, on the basis that it describes and introduces, in a way which is helpful to the Court, evidence which was before the decision-maker, at least in a constructive sense.

[39] Accordingly, the third sentence of paragraph 20 of the affidavit of Dawn Dickinson, affirmed March 25, 2008, is struck.

Analysis

1. What is the applicable standard of review?

[40] Subsection 41(1)(c) of the SARA provides that the Minister must identify the species' critical habitat "to the extent possible". The applicants submit that this means that if all of the critical habitat cannot be identified then the Minister is required to identify as much of the critical habitat as is possible. It is only if it is impossible to identify any critical habitat that the Minister may issue a recovery strategy that defines no critical habitat.

[41] The applicants submit that the respondent may have thought that he had discretion as to whether or not to identify critical habitat in the Recovery Strategy in circumstances where only some was identifiable. This submission was premised on a draft document prepared by the respondent entitled "Policy on the Identification and Protection of Critical Habitat under SARA, July 31, 2006". That policy provides, in part, as follows under the heading "Identifying critical habitat to the extent possible":

> The competent Minister must, in either the recovery strategy or an action plan, identify critical habitat to the extent possible. In determining the extent to which critical habitat can be identified, the Minister will apply a precautionary approach consistent with principles set out in this policy, for example to allow for a partial identification of critical habitat. To determine whether precautionary action may be needed, the Minister will consider whether the Committee on the Status of Endangered Wildlife in Canada has identified habitat loss or degradation as a significant factor contributing to the endangerment of the species.
>
> Where the information is available to allow it, the Minister will endeavour to identify, at a minimum, the biophysical and functional attributes of the habitat needed by the species in a recovery strategy. The Minister anticipates that, unless precaution dictates otherwise or sufficient information is clearly available, critical habitat will be identified at the action plan stage. However, whether critical habitat is identified in the recovery strategy or an action plan will be left to the discretion of the competent Minister, who will cooperate with provinces, territories, and any wildlife management boards, other

> federal agency or aboriginal organization likely to be affected by critical habitat …" (emphasis added)

[42] This draft policy does imply that the Minister has discretion whether to identify critical habitat in a recovery strategy or in an action plan and it leans strongly to the identification in the action plan, rather than in the recovery strategy. As the applicants point out, this leaves endangered species at risk as there is no timeline set out in the SARA for posting an action plan, whereas there is a short time frame set out in section 42 of the SARA for the posting of a recovery strategy.

[43] The respondent submits that the document relied on by the applicants is a draft that has never been finalized and that the Minister did not exercise discretion, as alleged, in failing to identify critical habitat. Rather, the respondent submits, the finding that no critical habitat could be identified was based on the evidence of experts. The respondent agrees that the Minister has no discretion under subsection 41(1)(c) of the SARA, that is to say, if any critical habitat is identifiable, the Minister must identify it in the recovery strategy.

[44] The applicants' submission on the standard of review was premised largely, if not entirely, on its view that because it was possible, based on the best information available, to identify some critical habitat for the Greater Sage-Grouse in the Recovery Strategy, and since the Minister did not do so, he must have misinterpreted subsection 41(1)(c). In fact, as previously noted, both parties interpret subsection 41(1)(c) in the same fashion; their disagreement is whether, based on the best information available, one could identify some critical habitat for the Greater Sage-Grouse in the Recovery Strategy. The applicants say it was possible to identify some critical habitat; the

respondent says it was not. The issue for the Court's determination is whether the Minister's decision that no critical habitat could be identified, within the meaning of section 41(1) of the SARA, was reasonable; the question defines the proper standard of review.

2. Is the decision to not identify any critical habitat reasonable?

[45] Subsection 41(1)(c) of the SARA requires the Minister to identify critical habitat, to the extent possible, "based on the best available information." The Minister submits that the critical habitat finding was a finding of fact and is entitled to the highest level of deference. It can only be interfered with by the Court if it was unreasonable in that it fell "outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47.

[46] The respondent further submits that under subsection 18.1(4)(d) of the *Federal Courts Act*, a finding of fact ought only to be set aside if it was made "in a perverse or capricious manner or without regard for the material before [the decision-maker]." In *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, the Supreme Court held that the language of section 18.1 of the *Federal Courts Act* sets out the threshold grounds which permit, but do not require the Court to grant relief. The Supreme Court confirmed that there was nothing in section 18.1 that would conflict with the adoption of the reasonableness standard of review it enunciated in *Dunsmuir*.

[47] The applicants submit that the best available information was such that the Minister could have identified some critical habitat for the Greater Sage-Grouse. Specifically, the applicants submit that:

- The location of most if not all active leks have been known for years. Greater Sage-Grouse population has been estimated from annual counts of strutting males at leks. In 2005, there were nine known active leks in Alberta and eight in Saskatchewan.
- Some of the Greater Sage-Grouse's brooding and nesting habitat has been identified by Dr. Aldridge in his 2005 Ph.D. thesis, namely the habitat near Manyberries, Alberta.

[48] The respondent submits that the applicants have confused "habitat" with "critical habitat" and that even if some Greater Sage-Grouse habitat is known, it does not follow that the known habitat is critical habitat for the purposes of the SARA. Critical habitat, it is submitted, is a subset of habitat.

[49] The respondent submits that all of the scientists consulted agreed that the available information did not permit the identification of any critical habitat and that the applicants are asking this Court to become an "academy of science", which is not its role.

[50] The respondent submits that identifying leks, even if it can be done, is not in conformity with the definition of critical habitat in the SARA and that a number of questions need to be answered to determine whether and which active and inactive leks are critical habitat. The

respondent, at paragraph 85 of its memorandum, proposes that some of the essential questions are the following:

> - Is the size and/or exact geographic location of the lek clearly identifiable? Does the size and/or location of the lek change over time? If so, does the "critical habitat" include both the core lek area and a buffer zone, to accommodate changes in size/location? If so, how large should the buffer zone be?
>
> - Which inactive, former leks are "critical" to the species? Is the cut-off 2 years since last sighting of a Sage Grouse at a given former lek, 5 years, 8 years, etc.? Alternatively, is the pertinent criteria (*sic*) the proximity of a lek relative to likely higher quality brooding and nesting areas? If so, how proximate must a lek be before it is "critical habitat"?

[51] With respect to the nesting and brood-rearing habitat identified by Dr. Aldridge, the respondent, at paragraph 86 of its memorandum, writes:

> …Dr. Aldridge's mathematical model of brood and nest habitat does not, in itself, identify "critical habitat" as defined under the SARA, nor does it specify where Greater Sage-Grouse necessarily are located. Rather it provides a mathematical "best estimate" as to general areas where Greater Sage-Grouse are likely to occur, and where there likely is better quality brood and nest habitat for the species.

[52] I agree with the respondent that the Court is not an academy of science and that the determination of what constitutes critical habitat is to be left to experts who have studied the Greater Sage-Grouse. The Court's limited role is to determine whether the Minister's decision to not identify any critical habitat was reasonable. That is to be assessed based on the record before the Court and, with great respect to counsel for the respondent who suggested otherwise, it does not require that the Court engage in any scientific examination. It merely requires an examination of

the evidence that was available to the decision-maker – admittedly most of which has a scientific focus.

[53] In examining whether the respondent's decision was reasonable, it is appropriate to examine the decision not to identify any critical habitat by looking at the Recovery Strategy itself to see whether there is anything in it that leads to a conclusion that the decision (being the Recovery Strategy) was based on an erroneous finding of fact (namely that critical habitat could not be identified) made in a capricious or perverse manner or without regard for the material before it, as described in subsection 18.1(4)(d).

[54] As previously noted, the respondent in the Recovery Strategy identifies four habitat requirements of the Greater Sage-Grouse: breeding habitat, nesting habitat, brood-rearing habitat and winter habitat. In so doing the respondent concluded that each habitat is essential to the Greater Sage-Grouse. In determining that no critical habitat could be identified, the respondent concluded that it could identify no critical breeding habitat, no critical nesting habitat, no critical brood-rearing habitat and no critical winter habitat. Had it been able to identify a part of any one or more of these four habitat as critical, then it was required to identify that habitat pursuant to section 41(1)(c) of the SARA, as it is required to identify critical habitat "to the extent possible."

[55] There is nothing in the Recovery Strategy suggesting that any part of the winter habitat could be identified as "there has been little investigation into winter habitat used by Sage-Grouse in

prairie Canada…". The applicants do not dispute the accuracy of this statement. However, each of the other three habitat requires further examination.

[56] Breeding Habitat or Leks. The Recovery Strategy states that it is essential to the recovery of the Greater Sage-Grouse that there be no loss of active leks.

> The following goals focus on the elimination of further losses to population numbers and habitat, while striving to improve availability of quality habitat for population increases via short and long-term targets:
>
> - No loss of active Sage-Grouse leks or Sage-Grouse population numbers in any portion of the current Sage-Grouse range in Alberta and Saskatchewan, …

Since the respondent has determined that the active leks in Alberta and Saskatchewan are "necessary for the survival or recovery" of the Greater Sage-Grouse – all of those active leks are critical habitat as defined in the SARA.

[57] The respondent submits that none of the active leks can be described with accuracy. As noted previously, the respondent poses these questions in his memorandum: "Is the size and/or exact geographic location of the lek clearly identifiable? Does the size and/or location of the lek change over time? If so, does the "critical habitat" include both the core lek area and a buffer zone, to accommodate changes in size/location? If so, how large should the buffer zone be?"

[58] There are a number of difficulties with the respondent's position that the lek sites cannot be accurately described.

[59] Firstly, I note that none of the questions or possible difficulties now posed by counsel is contained in the record before the Court. There is nothing that indicates that the respondent or those who prepared the Recovery Strategy determined that known active leks could not be identified for any of the reasons now suggested. In fact, there is nothing in the record indicating that known active leks cannot be described or are not described in some manner by experts in the area. In fact, at pages 314 and 315 of the record before the Court, being Appendices to the 2001 Sage-Grouse Recovery Strategy, the leks in Alberta are given a numerical identifier and many in Saskatchewan are named. If leks are sufficiently notorious to be so named and labelled, it is unreasonable to state that they cannot be described.

[60] Secondly, the respondent appears to be seeking precision or exactitude in lek location whereas the SARA requires that it be based on the "best available information" which may be less than precise and which may be less than exact.

[61] Thirdly, the Recovery Strategy itself indicates that some lek locations are known:

> Frequent lek counts were conducted in Alberta from 1968 through 1991 (Appendix B). Commencing in 1994, annual lek counts have been conducted at all known active and inactive lek sites in Alberta (Appendix B). … Range-wide counts in Saskatchewan were not conducted until 1987 and 1988 (Harris and Weidl) when 170 potential lek sites were checked (Appendix C) and annual lek counts were initiated in 1994 with varying levels of intensity.

The Appendices in the Recovery Strategy show data from Alberta Sustainable Resource Development and Saskatchewan Environment and Resources Management; both provincial

government departments. In 2004 and 2005, the last two years of data referenced in the Recovery Strategy, the data shows nine active leks in Alberta and eight in Saskatchewan. One can only conclude that these provincial departments were able to locate the leks sufficiently to count those that are active.

[62] Fourthly, the Recovery Strategy's Schedule of Studies necessary to identify critical habitat makes only one reference to leks and that is to leks in Saskatchewan, where, unlike Alberta, the identification of leks appears to have been less thorough. The Recovery Strategy Schedule of Studies, under the heading 'Locate the species and appropriate habitat,' states: "Compile historical information of the Saskatchewan lek (active and inactive) and observation database." The fact that similar information is not required for Alberta can lead to only one conclusion: it is already available.

[63] Lastly, the Recovery Strategy contains a table entitled 'Approaches Recommended to Meet Recovery Objectives' which indicates as an urgent priority "[a]nnually conduct counts of strutting males at all known active and inactive leks in AB and SK" and "[o]nce every 3 years conduct spring surveys to search for new active leks in AB and SK." How is this possible if these leks are not capable of identification?

[64] The respondent determined that all active leks are to be maintained. Thus, the respondent effectively determined that they are "habitat that is necessary for the survival or recovery" of the Greater Sage-Grouse, within the definition of "critical habitat" in the SARA. There is evidence in

the Recovery Strategy that these active leks can be identified, based on the best available information. In deciding that no critical habitat would be identified in the Recovery Strategy, I find that the respondent reached that decision without regard to the material before it. It is not a decision that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[65] Nesting Habitat and Brood Rearing Habitat. The Recovery Strategy endorses the model developed by Dr. Aldridge in his Ph.D. thesis to identify the nesting and brood-rearing habitat of the Greater Sage-Grouse. Dr. Aldridge applied his model to an area in Alberta, the Manyberries area, in order to prove that his model would accurately predict these habitats. The applicants acknowledge that the model has not been applied outside the Manyberries area and that this would have to be done in order to identify nesting and brood-rearing habitat outside the area of his study. However, they submit that as Dr. Aldridge had identified the nesting and brood-rearing habitat within the Manyberries area, this was known and identified habitat, and was also critical habitat.

[66] The authors of the Recovery Strategy agree that Dr. Aldridge has identified the nesting and brood-rearing habitat in the Manyberries area. This follows from their inclusion, in the Schedule of Studies to identify critical habitat, that there is only a requirement that his model be applied to other areas:

> Compile the GIS base information needed to extrapolate the nesting and brood rearing habitat developed by Aldridge (2005) to the rest of the Albertan and Saskatchewan recent historic distribution to the extent that existing information allows. (emphasis added)

[67] Unlike the active leks, the Recovery Strategy does not indicate that all known nesting and brood-rearing habitats are to be maintained. However, the Recovery Strategy does indicate that source habitat requires maintenance. Source habitat is nesting and brood-rearing habitat that is attractive to the Greater Sage-Grouse and that has low risk; it is habitat where the bird reproduces successfully. In comparison, sink habitat is nesting and brood-rearing habitat that is attractive to the Greater Sage-Grouse and that has high risk; it is habitat where the bird does not reproduce successfully. The Recovery Strategy states:

> Research indicates that Sage-Grouse use both source (net population gain) and sink (net population loss) habitats (Aldridge 2005). Only 11% of the southern Alberta landscape is considered source habitat for nesting and only 5% is quality source habitat for brood rearing (Aldridge 2005). The majority of habitat used by Sage-Grouse is sink habitat. There is a need to identify all existing source and sink habitat within the current range of Sage-Grouse. Source habitats should be protected and managed to maintain or improve current productivity. Sink habitats should be evaluated to determine factors that inhibit productivity and cooperative efforts with land users should be undertaken to convert sink habitat into source habitat. (emphasis added)

[68] As noted, Dr. Aldridge identified nesting and brood-rearing habitat in the area of his study near Manyberries, Alberta. Further, he identified and classified nesting and brood-rearing habitat as source (being described by him as primary habitat and secondary habitat) and sink (being primary sink and secondary sink) habitat: See his Ph.D. thesis figure 4-9 at page 202, and figure 4-11 at page 204.

[69] The respondent has accepted Dr. Aldridge's model and proposes to use it to identify the other nesting and brood-rearing habitat in the remainder of Alberta and Saskatchewan. It may be

that after that has been done, the scientific community will conclude that not all of the identified habitat is critical habitat. However, the SARA stipulates that the respondent must make the determination of critical habitat based on the best available information, which is to say the best information that exists at any one point in time. That information may change over time, but the identification of critical habitat cannot be postponed for that reason alone.

[70] In this case, the respondent concluded that source habitat is to be protected, i.e. that it is "habitat that is necessary for the survival or recovery" of the Greater Sage-Grouse, within the definition of "critical habitat" in the SARA. The respondent also accepted Dr. Aldridge's identification of source nesting and brood-rearing habitat for some of the geographic area where the Greater Sage-Grouse is found and stated that this model would be applied to other geographic areas. It is therefore unreasonable for the respondent to then conclude that no critical habitat can be identified now. The source habitat identified by Dr. Aldridge in the Manyberries area could have been and ought to have been identified by the respondent. It may be that after all of the geography of the Greater Sage-Grouse has been modeled, scientists will determine that not all of the source nesting and brood-rearing habitat is critical habitat. It may well be that some of this habitat in the Manyberries area will be identified as not being critical habitat. However, at the time the Recovery Strategy was drafted and posted, some critical habitat could be identified, namely that identified by Dr. Aldridge as source habitat. Failure to identify any habitat as critical is unreasonable in light of the conclusion that source habitat is to be maintained.

[71] For these reasons the application for judicial review must be allowed.

Appropriate Remedy

[72] It is not appropriate to set aside the Recovery Strategy in its entirety and have it redetermined by the respondent; much of it is without objection. It is my 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.

[73] At the hearing it was agreed that should the application be allowed, the parties would have an opportunity to make submissions as to the appropriate remedy. Accordingly, the applicants shall file and serve written submissions on remedy within 15 days of the date of these Reasons. The respondent shall have a period of 15 days from the date the applicants' submissions are received, to file and serve its submissions and the applicants shall have a further 5 day period to respond.

[74] Both parties agreed that each would bear its own costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed;
2. Paragraphs 25 to 28 and Exhibit "E" of the affidavit of Pat Fargey, sworn October 3, 2008, are struck and form no part of the record before the Court;
3. The affidavit of Dr. Mark Boyce, sworn May 6, 2008, and the third sentence of paragraph 20 of the affidavit of Dawn Dickinson, affirmed March 25, 2008, are struck and form no part of the record before the Court;
4. The Court reserves the right to issue a further Order with respect to remedy after receiving and considering the parties' submissions; and
5. No costs are awarded.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ALBERTA WILDERNESS ASSOCIATION, et al. v. MINISTER OF ENVIRONMENT
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APPEARANCES:

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