



Fly South YOUNG GROUSE

BY IAN URQUHART



Male greater sage-grouse courtship display
PHOTO: JEREMY R. ROBERTS, CONSERVATION MEDIA

These are desperate times for greater sage-grouse in Alberta. Their desperate straits prompted the provincial government to introduce a translocation program. For the last two years Montana sage-grouse have been captured and released in Alberta in order to postpone the species' extinction here. I wish those birds could have been volunteers because, as stunning as Alberta's prairie grassland landscape may look to me, it's no longer a place where sage-grouse are likely to survive, let alone thrive. Mortality sink... that's the phrase I think the experts use to describe what most of southeast Alberta has become for sage-grouse. It's a place where the grouse's premature death is the norm.

Those unlucky guinea pigs from Montana don't know what their few remaining Canadian cousins do. The provincial and federal governments won't hear and act on the diagnoses and prescriptions many doctors have delivered. Critical sage-grouse habitat – its loss, fragmentation, and degradation – is the key to the species' population collapse over the last twenty years. Habitat – its protection and restoration – is the key to the bird's survival in Canada's grasslands.

If the few Alberta sage-grouse left had a choice, they should try to book passage south on the translocation train. In several ways the situation south of the border looks much more promising

for the recovery of greater sage-grouse populations than it does here.

Yes, recovery or restoration of sage-grouse numbers is also needed in the American West. Numbers there are well below the historical norms and the population trends are discouraging. Comparing 2007 data with data from the 1960s and 1970s the U.S. Fish and Wildlife Service reported sharp drops in the percentages of males per lek (leks are traditional courting sites used year after year by sage-grouse males to attract females). They also reported fewer active leks; these percentage declines were not as severe.

But in most of the American West those sharp declines haven't yet put the sage-grouse on the brink of extinction or extirpation from most of its historic range. Canadian conservationists would celebrate for weeks if their governments could announce that more than 98,700 sage-grouse were strutting across southern Alberta and Saskatchewan. That's the number of sage-grouse the Idaho Department of Fish and Game estimated could be found in Idaho in 2007. Montana estimated its population at more than 62,000 birds.

Greater Sage-grouse, the Endangered Species Act, and the U.S. Federal Courts

According to America's *Endangered Species Act* (ESA) members of the public may submit petitions to list a species as endangered or threatened under the Act to

either the U. S. Fish and Wildlife Service or the National Marine Fisheries Service. Within 90 days of receiving the petition the recipient agency must decide if the published findings submitted with the petition are substantial enough to suggest the proposed listing may be warranted. If the agency believes the petitioner(s) has presented sufficient information it has one year from the date the petition was received to produce a review of the species' status. That review must find the listing to be either warranted or not warranted. If listing a species is warranted the agency may propose listing it immediately; or, the proposed listing may be deferred if the agency judges other listing activities to be more urgent. The latter "warranted but precluded" proposals generally require the agency to revisit the proposed listing annually until either listing the species proceeds or the species' status improves to the point where listing is no longer warranted.

As eye-popping as overall sage-grouse numbers in the American West may be to Canadian eyes they hide sub-populations, such as those in the Columbia Basin and Colorado Plateau management zones, that are no better off than the Canadian populations. These situations plus the perception that a long-term decline in sage-grouse populations throughout their range could not be reversed without regulatory action led conservationists to petition the federal government to list the greater sage-grouse across its entire range

“Canada’s experience with sage grouse has been a dark lesson for biologists here. Western Canada once had flourishing populations. Primarily because of energy development there are now just 200 birds in Saskatchewan and fewer than a hundred in Alberta, and there are concerns the Alberta population will soon disappear.”

– Jim Robbins, *The New York Times*, 7 February 2011.

in the western United States.

These petitions, submitted in 2002 and 2003, did not convince the Fish and Wildlife Service to list the sage-grouse as endangered or threatened. Western Watersheds Project, an environmental organization dedicated to protecting and restoring western watersheds and wildlife, challenged the agency’s 2005 decision in July 2006 in court. The U.S. District Court of Idaho upheld this challenge in December 2007. It found that the U.S. Fish and Wildlife Service “failed to rely on the best science and was influenced by a political appointee who intimidated the scientists in an attempt to block listing.” The Court ordered the Fish and Wildlife Service to reconsider its original finding.

Just over two years ago the U.S. Fish and Wildlife Service issued its second finding on the health of the sage-grouse. The agency found “that listing the greater sage-grouse (rangeland) is warranted, but precluded by higher priority listing actions.” In a more-perfect world a rule would be proposed for sage-grouse. For the time being this would not proceed. “We will develop a proposed rule to list the greater sage-grouse,” said the Fish and Wildlife Service, “as our priorities allow.” A subsequent legal agreement between the U.S. Fish and Wildlife Service and environmental groups requires the federal agency to decide if the sage-grouse is threatened or endangered or not requiring protection under the ESA by September 2015.

That Other Greater Sage-grouse Dance

I’m addicted to the internet, not least because it offers me a window on aspects of the natural world I may never witness in person. Watching the greater sage-grouse mating dance is one of those

experiences for me (for one example of the male courtship display see <http://www.yellowstonegate.com/2012/04/grand-teton-rangers-lead-morning-tours-watch-sage-grouse-strut/#factsheet>).

Another dance, performed in the U.S. Federal Court system, is at least as important to the future of the sage-grouse in the American West. Western Watersheds Project has turned to the courts on many occasions to try to ensure the U.S. federal government respects the environmental stewardship obligations of ESA and other federal laws. In most cases, as alluded to above, the legal dance begins with the actions of a federal agency. Affected parties such as Western Watersheds may respond to the decision by going to court if they suspect the federal action violates federal law. If the courts uphold the judicial challenge, as Judge Winmill did in 2007, federal agencies must respond.

The possibility or fear of litigation may become a powerful incentive then for federal agencies to take actions to forestall future challenges in the courts. This dance between federal agencies and affected parties such as environmental/business associations and state governments features prominently in recent American sage-grouse politics.

The courts forced the Fish and Wildlife Service to revisit its 2005 finding. This revisitation produced the “warranted, but precluded” finding of 2010. This second finding, in turn, sparked the Bureau of Land Management (BLM) to enter the dance floor and reconsider if sage-grouse protection was figuring prominently enough in its management of public lands. The BLM is the national agency responsible for managing 47 million acres of sage-grouse habitat in the western United States (more than any



This public domain photo by Gary Kramer of the U.S. Fish and Wildlife Service is used on Canada’s Species at Risk Public Registry.

WWW.SARAREGISTRY.GC.CA/SPECIES/SPECIESDETAILS_E.CFM?SID=305

other government agency). It responded to the Fish and Wildlife Service 2010 listing decision by releasing the National Greater Sage-Grouse Planning Strategy in August 2011. The objective of the strategy is “to develop new or revised regulatory mechanisms, through RMPs, to conserve and restore the greater sage-grouse and its habitat on BLM-administered lands on a range-wide basis over the long-term.” (RMPs are Resource Management Plans)

The dancing didn’t stop there. Western Watershed Project believes that the RMPs currently in place violate federal laws and do not give adequate consideration to sage-grouse. Judge Winmill agreed. Last September he issued a partial summary judgment in the case of *Western Watersheds Project v. Salazar*. In this case Western Watersheds challenged the Bureau of Land Management for failing to consider adequately the environmental impacts of livestock grazing and energy development on sage-grouse. The Court ruled that, in the cases before it, the BLM failed to carry out adequately its environmental impact statement and resource management planning obligations under federal legislation. It allowed the case against the government to proceed.

In December the BLM responded with two documents, an Interim Management memorandum and a Planning Direction memorandum, to guide sage-grouse

conservation measures in the short and longer term. The Bureau's director said: "The aim of these science-based measures is to maintain and restore flourishing populations of greater sage-grouse and sagebrush habitat. We are working to do this in a way that protects the health of our land, while also facilitating safe and responsible energy development and recreational opportunities that power our economy."

Enter Idaho's Greater Sage-grouse Task Force

This American greater sage-grouse dance struggles to establish itself on Canada's political and legal landscape. AWA and other conservation organizations have turned to the courts to try to prod the federal government to take some meaningful measures to protect the endangered sage-grouse and its critical habitat. With those organizations and Ecojustice we can claim legal victory too. In *Alberta Wilderness Association v. Canada (Minister of the Environment)* Justice Zinn of the Federal Court of Canada ruled it was unreasonable for the Minister not to identify any critical habitat for greater sage-grouse and that the Minister was obliged to identify such habitat with the best available information.

But, although the federal government responded by identifying some critical habitat, Ottawa doesn't have the political will to implement regulatory measures to protect that habitat. This habitat might be critical on paper and in the view of scientific experts; it's not critical on the ground where it matters most. This lack of a *regulatory* response is one crucial element of the American experience that's missing here. Federal agencies in the U.S., whether on their own volition or whether forced by the courts, regulate to protect sage-grouse habitat. Yet federal agencies, without political will or judicial orders to regulate, are wallflowers in the Canadian version of this dance.

State and provincial governments also are a study in contrasts when it comes to the greater sage-grouse issue. Alberta trusts that their ideological soul mates in Ottawa will continue to defer to the province's refusal to regulate to protect sage-grouse habitat. The province also trusts that Canadian courts, out of a mistaken respect for the federal-provincial division of powers,

are unlikely to order Ottawa to regulate activities on provincial Crown lands. The best sage-grouse have got from this provincial mindset is what we opened this essay with – a translocation program to import American sage-grouse into a mortality sink. Ignoring sagebrush habitat may cost the province the species that depends on that habitat but, judging from the record to date, this is a cost Alberta is prepared to pay.

State governments in the American West cannot afford this cavalier attitude. Unlike here they know that the courts are likely to interpret national endangered species legislation in ways that will demand federal action. They generally are very concerned, if not fearful, of what regulations and restrictions federal agencies will impose to protect threatened or endangered species. The threat of the regulatory consequences accompanying the listing of a species under the *Endangered Species Act* will prompt states to take regulatory steps of their own in order to avoid federal action.

This attitude, born of the experience gathered from past listings under the ESA, led Idaho, one of America's most conservative states, to respond to the events of 2010 and 2011 in a way that's unheard of in Alberta. Governor C.L. "Butch" Otter created a Sage-grouse Task Force. The Governor was concerned that, unless Idaho took additional actions to address the developing plight of sage-grouse, the federal government, with or without orders from the courts, would take regulatory matters into its own hands. The Governor was worried that federal agencies might take their endangered species mandate seriously and unilaterally propose measures on federal lands in the American West that would be too hard on ranchers, miners, and roughnecks. As he said when he accepted the Task Force's recommendations he wanted to avoid the "draconian restrictions" he anticipated would attend a listing under the ESA in 2015. Governor Otter therefore accepted the invitation from the federal Secretary of the Interior "to develop state-specific *regulatory* mechanisms to conserve the species and preclude the need to list under the ESA." (my emphasis) Creating the Task Force was the first step.

Anyone who is familiar with Alberta wildlife and environmental politics is likely to detect a refreshing air of

inclusiveness and transparency around the Idaho Sage-grouse Task Force. Six of its 18 members were drawn from industry (none of these from the petroleum industry), three were taken from conservation interests, five were drawn from elected state and local politicians, one was selected from the general public, and one was selected to represent local working groups (these groups provide local forums for discussing sage-grouse and habitat issues). The Director of Idaho Department of Fish and Game was one co-chair; the Counsel to the Governor was the other co-chair. The task force held 12 meetings across the state from March 12th to May 24th. All meetings were open to the public.

Do the Task Force Recommendations Go Far Enough?

The Task Force presented its recommendations to the Governor in June. The Governor established a two-week public comment period on the recommendations and is expected to reach his decision on the content of the state's plan by the end of July. At that point Idaho's plan will be submitted to the Secretary of the Interior. This member of the Obama cabinet will decide if Idaho's commitment to sage-grouse conservation is strong enough to stand as a substitute for federal regulatory efforts in Idaho. This contrasts sharply with the path recommended by the Canadian government. Prime Minister Harper's government is happy to abdicate environmental assessment responsibilities to the provinces without any thought of their adequacy.

One key to the Task Force's approach was to divide Idaho into three sage-grouse habitat zones. They are: Core Habitat, Important Habitat, and General Habitat. The Core Habitat zone covers roughly 5.7 million acres (nearly 9,000 sections of land) of the state. Sixty-seven percent of known active leks in Idaho are found in this zone; 75 percent of the sage-grouse males are believed to frequent these leks. The management goal here is "to maintain or improve sage-grouse populations."

Questions will be raised about whether the Task Force's other recommendations will be strong enough to satisfy the federal government. The Task Force concluded that, for example, "the maintenance of existing, permitted

facilities is acceptable regardless of location or habitat.” Best management practices plus taking into account “to the extent practicable” critical life stages for sage-grouse when constructing essential public services try to make this recommendation more palatable from the conservation perspective.

In the Core Habitat zone infrastructure development is recommended generally to be limited to all projects with established rights to proceed and to incremental upgrades to existing essential developments. A liberal definition of incremental expansion – a 50 percent or less increase in the facility’s footprint – may temper the conservation value of this measure. So too may the fact that the Task Force recommended establishing a Sage-grouse Conservation Committee that could consider exempting certain infrastructure projects if those projects were judged to have a “significant high value to the State of Idaho needed to meet critical existing needs and/or important societal objectives...”

On the other hand, other possibilities discussed in the report seem to offer more certain potential as means to promote sage-grouse conservation. The mitigation framework discussed in the report essentially suggests creating a mitigation bank to fund habitat restoration projects. The Task Force also suggested that the Governor should “consider recommending administrative withdrawal of new oil and gas leasing and hardrock mining claims for a 10-year period.”

The conservation community’s reaction to the Task Force has been mixed. Western Watersheds Project’s

Ken Cole doubted that the Task Force, given the heavy presence of industry representatives, would treat conservation seriously enough in its recommendations. He was reported to be skeptical that the proposed state plan would satisfy the federal government. Laird West, the attorney from Advocates for the West who represents Western Watersheds in its court challenges, sounded more hopeful: “A decade ago nobody was talking about sage grouse and sagebrush. I’m actually very encouraged that the state of Idaho has convened this task force and is taking sage grouse seriously.” The Nature Conservancy’s Will Whelan was one of the Task Force’s representatives from conservation organizations. While he would never suggest that the Task Force recommendations are perfect he sees real conservation value in the recommendations regarding new transmission lines, petroleum and renewable energy developments, fighting wildfires and invasive species, and managing livestock grazing on public lands to satisfy sage-grouse habitat requirements.

Political Will or Judicial Orders: Avenues to Bring the American Experience to Canada

Lisa Eller blogged about the Idaho Sage-grouse Task Force for the Nature Conservancy of Idaho. She said: “The task force members took their task seriously. They knew that a weak plan would simply fail to pass muster with the federal agencies that manage public lands and implement the ESA.” This excerpt underlines just how potent the

U.S. *Endangered Species Act* is as a catalyst to prod federal and state agencies to take actions to protect species at risk even before measures are introduced under the Act. Western states, never fans of the key role the U.S. government plays in public lands management in the American West, responded to the 2010 “warranted, but precluded” finding with a flurry of activity. Wyoming, Nevada and Utah, very conservative and business-friendly jurisdictions, joined Idaho in creating committees or task forces to develop regulatory measures to try to prevent federal action under the ESA in 2015. Without this ESA listing of the sage-grouse looming over the western landscape the odds of these states taking those actions were poor. Those odds were as bad as the ones we should place on the chances of Canadian sage-grouse surviving unless governments here take immediate action to protect sage-grouse critical habitat.

Compared to the ESA the drafters of Canada’s *Species at Risk Act* (SARA) were timid when it came to establishing the status of the national government as a dependable defender of endangered species on provincial Crown or public lands. SARA, as Kate Smallwood of the Sierra Legal Defence Fund observed in 2003, leaves “the primary role for species and habitat protection in Canada to the provinces and territories.” There are provisions in the SARA that could be used to extend federal authority to provincial lands. These provisions constitute the “safety net,” a net giving the federal government the discretion to protect an endangered species and/



Male greater sage-grouse on a lek in the western United States.
PHOTO: JEREMY R. ROBERTS, CONSERVATION MEDIA

or its critical habitat. Ottawa has never used this feature over the eight years SARA has been in force. Potent is not an adjective many use in describing SARA.

I can imagine two scenarios, however, where SARA could become a positive instrument for the protection and recovery of the greater sage-grouse and other endangered species across their historic ranges. Sadly the first scenario may be wildly optimistic in the immediate and medium term: it depends on political will. It hopes Environment Minister Peter Kent and his federal counterparts will tire of presiding over the demise of Canada's flora and fauna. It hopes that, in the case of the greater sage-grouse, they will recognize what a dismal failure Alberta's policies and laws have been in protecting this endangered species. Perhaps Ottawa will one day develop such political will. I wish the smart money was betting this will happen under the current federal government.

The second scenario depends on the courts. It depends on the federal courts forcing Ottawa's hand when, as in the case of the sage-grouse, a provincial government refuses to regulate to protect and enhance critical habitat and Ottawa turns a blind eye to that neglect. This perspective is optimistic that the Federal Court will rule positively on the application filed in April by Ecojustice. On behalf of AWA, Grasslands Naturalists, Nature Saskatchewan, and Wilderness Committee, Ecojustice has applied for a court order to require the Environment Minister to recommend that the federal cabinet issue an emergency protection order for greater sage-grouse. This order would "include provisions prohibiting activities that may adversely affect the species and that habitat."

Given the intransigence of our federal and provincial governments the courts represent the last resort for Alberta's greater sage-grouse. In these desperate times we are left hoping that our courts, like their counterparts in the U.S., will force governments to respect the spirit of the *Species at Risk Act* as outlined in the opening words of the preamble to the legislation: "Canada's natural heritage is an integral part of our national identity and history." Until that spirit is respected on the ground the best option for the few grouse left to strut in southeast Alberta is a simple one. Fly south. 🐦

About the Photographs in this Article

All photos in this article were taken in the United States. At the rate these birds are disappearing in Canada the United States soon may be where we will have to travel to see this prairie icon. Only immediate action from Ottawa and Alberta can make such travel plans unnecessary.

Perhaps it's appropriate then that the greater sage-grouse photos on the Government of Canada's Species at Risk Public Registry website were taken by members of the U.S. Fish and Wildlife Service.



Millwell #1- Athabasca Glacier

48"x36", acrylic on canvas

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