

When Protection Isn't Enough



By Ruiping Luo

When greater sage-grouse was proposed for listing under the United States *Endangered Species Act* (ESA), it spurred an unprecedented collaborative conservation effort to save the failing species. This was, to an extent, successful; while sage-grouse populations still struggle south of the border, they are doing significantly better than their relatives in Canada.

Sage-grouse is an iconic prairie bird found only in Canada and the United States. Like in Canada, the species has seen massive declines in the interior United States, with the United States Geological Survey reporting an 80 percent loss from 1965 to 2019. Sage-grouse are highly reliant on their sagebrush habitat, and their decline is mainly attributed to the destruction and fragmentation of this landscape, particularly through the development of oil and gas in critical habitat.

In Canada, despite current protections and recovery efforts, sage-grouse are still sliding towards extirpation. Mostly, this is because we are not doing enough to protect habitat: Canada's *Species at Risk Act* (SARA) applies almost exclusively to federal lands, excluding most terrestrial species on provincial or private lands. Provincial protections for endangered species, like Alberta's *Wildlife Act*, often fail to protect critical habitat at all.

Here we look at how North America is handling endangered sage-grouse, and where protections are not enough.

First, a look at how America is handling sage-grouse

In 2013, the US Fish and Wildlife Service (USFWS), after several delays, proposed greater sage-grouse for listing under the *Endangered Species Act* (ESA).

In response to the possible listing, conservationists, ranchers and landowners, states and industry all came together, working to restore the vulnerable species. Over the next five years, the Sage-Grouse Initiative (SGI), through voluntary partnership with local landowners, worked to conserve over 5.6 million acres of vital sagebrush habitat, and the 11 western states that hosted sage-grouse populations cooperated with federal agencies and conservationists to produce new recovery plans. Even the oil and gas industry became involved, funding research and habitat restoration, and altering some practices to minimize land disturbance. In September 2015, the Bureau of Land Management (BLM) and US Forest Service (USFS) announced the finalization of 98 land-use plans to conserve greater sage-grouse, placing protections on nearly 70 million acres, and 10 million acres of land across 6 states were withdrawn from development to protect valuable habitat.

In 2015, a survey of sage-grouse leks conducted by the Western Association of Fish and Wildlife Agencies (WAFWA) found that sage-grouse populations had grown by over 60 percent in the last two years, reaching over 80,000 males, a potential positive reaction to widespread conservation efforts. In October, USFWS declared that sage-grouse would not be listed under the ESA, as the "primary

threats to greater sage-grouse have been ameliorated by conservation efforts implemented by Federal, State, and private landowners." While the decision was criticized by several conservation organizations as capitulating to industry, and later policy changes would test the implemented land-use plans, the actions leading up to the decision nevertheless indicate that extensive collaboration across sectors is possible and can help recover a vanishing species.

Had greater sage-grouse been listed under ESA, it would have been illegal to harm sage-grouse, including through habitat modification or destruction. Large-scale projects likely to threaten or harm the existence of sage-grouse would be regulated, and development would have been restricted for most of the interior United States. The threat of these sweeping protections provided a strong motivator for collaborative conservation and compromise to reduce the threat to sage-grouse.

Conservation under the Species at Risk Act

Meanwhile, in Canada, greater sage-grouse has been listed as 'Endangered' under the *Species at Risk Act* (SARA) since 2003, yet populations are still declining. Already extirpated from British Columbia, the species is found only in the shrinking sagebrush flats of Alberta and Saskatchewan. Canada's entire sage-grouse population is estimated at less than 250 individuals, with only 18 males counted in Alberta earlier this year. These populations have shown little to no signs of recovery over the past two decades.

Recovery measures and protection for



Sage-grouse is one of over 600 species at risk listed under Canada's Species at Risk Act. For many of these species, the federal legislation has not been enough to prevent their decline. Photo © C. Olson

greater sage-grouse in Canada have been piecemeal. In Grasslands National Park, on federal lands in Saskatchewan, extensive efforts have been completed to improve habitat, including marking, removing or replacing fences, planting 93.7 hectares of habitat with sagebrush and restoration of areas damaged by human activities. In 2021, Parks Canada reported the population had not declined or increased since 2016, suggesting population numbers are mostly stable.

In contrast, Alberta's sage-grouse population, which resides on provincial and private lands, suffered a decline of over 30 percent in the same time period, despite measures by the provincial government, non-government organizations and individual landowners to restore the population. Maybe this difference was because Alberta's efforts have been less ordered, with separate groups responsible for habitat improvement, captive breeding and

relocation, and reclamation. More likely, Alberta's sage-grouse decline was caused by a failure to protect the bird's habitat.

Shaun Fluker, an Associate Professor in Law at the University of Calgary and the Executive Director of the Faculty's Public Interest Law Clinic, who has written extensively about the protection of endangered species in Alberta, notes that "The federal *Species at Risk Act* has very limited application on provincial lands and accordingly, even though the Act has regulatory measures to prohibit harm to endangered species, it is not very effective at protecting habitat for a terrestrial species like the sage-grouse." However, the sage-grouse is an exceptional case because the species' habitat is under an emergency protection order (EPO).

Under SARA, the responsible Minister must recommend an emergency order when "he or she is of the opinion that the species faces imminent threats to

its survival or recovery." For sage-grouse, this was issued in 2013, after populations dropped to only 13 males in Alberta. The EPO prohibits damage to sage-grouse critical habitat identified in the Order, covering habitat on provincial lands.

Yet, Fluker cautions that emergency protection orders under SARA are not a panacea for the shortcomings in endangered species protections in Canada. For starters, only TWO such orders have ever been made under SARA despite the demise of hundreds of species in Canada without adequate legal protection. The decision-making process for making an EPO lacks transparency. It is often discretionary, and, based on previous decisions, there is a sense that the application of this power can be politically motivated. For instance, the EPO for sage-grouse was only issued after extensive petitioning and litigation from conservation groups including AWA. Additionally, the effectiveness of an EPO depends on the terms



Elk herd. Alberta's Wildlife Act was historically used as a hunting and fishing regulation, to manage wild game. Alberta does not have a separate Act for endangered species, and the Wildlife Act frequently fails to protect endangered species and their habitat. © A. Teucher

specified, and requires monitoring and enforcement for compliance. In Alberta, the EPO only covers a portion of the sage-grouse range, and development continues to encroach on sage-grouse habitat outside the protected range. SARA also allows for an order to extend SARA protections to provincial and private lands, known as a safety net provision, if the Minister “is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.” Yet, despite continued biodiversity loss in Canada, this provision has never been used.

How effective has SARA been at protecting Canada's endangered species?

For most at-risk species, SARA has been appallingly ineffective. While it's better

to have a species listed than not at all, getting the listing involves a lengthy bureaucratic process which can delay or prevent many species from receiving federal protection. Even once a species is listed, there are many delays and obstacles to recovery.

Along with greater sage-grouse, over 600 species are formally listed as endangered, threatened, special concern or extirpated under SARA. Recommendations on which species to include are made by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), an independent panel that looks at scientific evidence and determines the risk of a species disappearing from Canada, and submitted to the Minister of the Environment, who considers them along with socioeconomic costs. According to

SARA, the minister then has 90 days to decide whether to list a species, although decisions can be delayed for months or years, as the minister can extend the consultation period indefinitely. Listing the species is at the sole discretion of the Governor in Council. Through this process, 85 percent of recommendations made by COSEWIC have been added under SARA. However, likely because of socioeconomic costs, many economically important species, especially marine fishes, are not listed.

Once listed, there are further lags as recovery strategies and action plans are created. Recovery strategies are to be prepared within one to two years of listing, though they are often severely delayed. Action plans, describing projects or activities to meet the recovery strategy objectives, do not have a legislated

deadline, and are often even more delayed. For instance, while greater sage-grouse was listed as 'Endangered' in 2003, a recovery strategy was not produced until 2008. An amended recovery strategy was written in 2014, and although it promised a multi-species action plan "will be completed within one year of final posting of this Amended Recovery Strategy," the *South of the Divide Action Plan* was not completed until 2017, 14 years after the species was first listed. We are still waiting on promised action plans for other parts of the sage-grouse range.

There is also a reluctance to protect unoccupied habitat, Fluker noted. Most recovery strategies focus on identifying where the species is currently found, even though there is nothing in SARA that prevents including unoccupied habitat — it is simply how officials interpret and operationalize the Act. For species with low populations, unoccupied habitat may be crucial for population growth, and the lack of space for expansion could be preventing recovery.

From 1970 to 2016, populations of COSEWIC assessed at-risk species in Canada declined by an average 59 percent, according to the 2020 World Wildlife Fund (WWF) Living Planet Report. Of the species listed under SARA they were able to track, a 2023 audit report found less than half of populations were making progress towards recovery goals. In 2017, WWF's *Living Planet Report Canada* showed that endangered species declines continued after SARA was enacted and stated the Act "has faltered in its mission to protect Canada's most beleaguered wildlife." The report attributes this failure mainly to delays in listing and action, allowing socioeconomic factors (such as using the species for harvest or wanting to develop on species habitat) to interfere, and a lack of funding towards species recovery.

Alberta's Wildlife Act

In Canada, apart from migratory birds, aquatic species and species on federal lands, provinces have primary responsibility for wildlife species and

their habitat. Alberta is one of the few provinces not to have a dedicated *Endangered Species Act*. Instead, Alberta relies on the provincial *Wildlife Act*, and on government policy, to protect species at risk.

Historically, the *Wildlife Act* was a regulation for hunting and fishing and mostly regards wildlife as a resource. In 1996, Alberta signed the *National Accord for the Protection of Species at Risk* and committed to designating species at risk, protecting their habitats, and developing recovery plans. To meet these requirements, Alberta amended the *Wildlife Act* to include a definition for endangered species as an animal, plant, or other species "prescribed as such."

This definition highlights one of the main weaknesses of the *Wildlife Act*: nearly all aspects of endangered species are at the discretion of the minister and are governed by policy. While the Act requires maintaining an Endangered Species Conservation Committee, which recommends species that should be listed as endangered and advises on recovery plans, the selection of committee members is also under the discretion of the minister, and, unlike with COSEWIC, there is no legal requirement for the members to have the necessary scientific background. There is also no legal obligation for listing a species, providing a recovery plan, or identifying critical habitat.

Protection of species at risk in Alberta is completely unpredictable and relies exclusively on terms and conditions. The strongest protection the *Wildlife Act* provides is making it illegal to "willfully molest, disturb or destroy a house, nest or den." Even this is hardly any protection, since actions can be allowed if specifically authorized or permitted by the minister, and accidental destruction cannot be prosecuted. In other words, if a developer wanted to destroy a habitat that might contain endangered species, they would only need to not verify species presence or get permission from the minister.

Recovery strategies have been written for some of Alberta's endangered species, although these rarely manage

to protect habitat. *The Alberta Greater Sage-grouse Recovery Plan* was released in 2013 and included "protective notations" around the identified sage-grouse range that "restrict industrial surface access and development." However, Fluker confirmed that there is no legal basis for these protective notations, and their use is internal and non-transparent. Basically, protective notations may be considered when a project is under review and serve as an internal flag for government officials to consider the implications of a development project about the notation, but it does not necessarily place substantive limits on development. Many projects are approved regardless of any protective notations, allowing development to continue in the sage-grouse range.

Sage-grouse voluntary protection

Greater sage-grouse populations are still declining, and because of the gaps in legislated protection, endangered species often require voluntary protection, especially for species on provincial or private lands. Fortunately, the value of our native grasslands, forests, wetlands, and other ecosystems is getting more and more recognition. A 2022 survey by Canadian Parks and Wilderness Society (CPAWS) found that 59 percent of Albertans agreed that not enough land was being protected, and over three-quarters support setting aside more land for wildlife. Voluntary protection of lands by landowners, by placing conservation easements to limit development or altering landscapes to be more welcoming to wildlife, is also increasing.

Without legal protection, sage-grouse and many other species rely on the voluntary and collaborative effort of Canadians to prevent this species from being lost. If we want to continue seeing this beautiful species in Canada, we will need to work together to protect these lands and restore the fragmented habitat that they need to flourish. 🌱