

Date: 20090909

Docket: T-241-08

Citation: 2009 FC 882

Ottawa, Ontario, September 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

SUPPLEMENTARY REASONS FOR JUDGMENT AND JUDGMENT

[1] In my Reasons for Judgement and Judgment in this application dated July 9, 2009, I reserved the right to issue supplementary judgment as to the appropriate remedy in light of the findings that had been made. Submissions from the parties have been received and considered.

[2] It was further indicated in the Reasons for Judgment that it was my view that it was not appropriate to set aside the Recovery Strategy in its entirety and have it redetermined by the respondent as much of it was without objection. It was my preliminary view that Section 2.6 of the Recovery Strategy 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 the Reasons for Judgment.

[3] The Applicants submit that the appropriate remedy should be to set aside Section 2.6 of the Recovery Strategy as well as the final sentence of the Executive Summary on page v, which states: “Comprehensive critical habitat for Sage-Grouse has not been identified in this document but a schedule of studies to identify partial critical habitat has been included.” They further submit that the redetermination of critical habitat should be made on the basis of the information at hand at the time of the redetermination and they have filed a motion seeking leave to file additional evidence, the affidavit of Mark Boyce, affirmed August 4, 2009, which it submits will assist the Court in determining the appropriate remedy. That affidavit attached email messages from an employee of Parks Canada Agency that outlines more current information on the critical habitat of the Greater Sage-Grouse than that which was before the Court on this application. They further make submissions on the timing of the remedy.

[4] Accordingly, the Applicants submit that the following is the appropriate remedial order:

1. Section 2.6 and the final sentence in the Executive Summary of the Recovery Strategy are set aside.

2. The Respondent must redetermine the identification of critical habitat, in keeping with the Judgment and any additional reasons for this order, on the basis of the information that exists at the time of redetermination.
3. The Respondent must post a Proposed Corrected Recovery Strategy by the end of February 2010. In the alternative and as explained above, the Respondent must post a Proposed Corrected Recovery Strategy within one month of the date of the order.
4. The Respondent must post a Finalized Corrected Recovery Strategy within 90 days after posting the Proposed Corrected Recovery Strategy.

[5] The Respondent takes no position on the motion to admit additional evidence. The Respondent, based on a close reading of the Reasons for Judgment and the findings therein, submits the following is the appropriate remedial order:

1. Section 2.6 of the Recovery Strategy, titled “Critical Habitat” will be referred back to be redrafted to include:
 - (a) identification of all known active leks in Alberta and Saskatchewan as critical habitat (the “Active Leks”);
 - (b) identification of the source habitat identified by Dr. Aldridge in the Manyberries area as critical habitat (the “Manyberries Source Habitat”); and
2. The redrafted Section 2.6 of the Recovery Strategy, titled “Critical Habitat” will be posted on the public registry within 30 days of this order.

[6] In my view, the additional evidence that the Applicants seek leave to file would not assist the Court. The Recovery Strategy at issue indicated that additional work would be done to identify

critical habitat and a timetable was set out for that work. Therefore, it is not surprising that some advancement has been made in that direction.

[7] If the Court's Order usurps the role of the Minister, then it will have become the "academy of science" that is to be avoided. On the other hand, subsection 41(1)(c) of the *Species at Risk Act*, S.C. 2002, c. 29, does provide that critical habitat is to be determined based on the "best available information". Given that there are almost constant developments in all scientific endeavours including those that underlie the Recovery Strategy, the best available information that exists today may well be different and hopefully improved from that which existed when the application was filed.

[8] Nonetheless, the Court's task in fashioning a remedy is to provide an order that will remedy that small part of the Recovery Strategy that was found to be deficient. If the Respondent chooses to redraft the Critical Habitat section only to correct those areas of deficiency found by the Court to be unreasonable in the Judgment dated July 9, 2009, without updating the document to reflect more current information, it will have resolved the deficiencies as found by the Court and, in my view, it would be inappropriate for this Court to order the Respondent in this proceeding to do more.

[9] For these reasons, the Judgment dated July 9, 2009, is supplemented by adding the following Supplementary Judgment.

SUPPLEMENTARY JUDGMENT

THIS COURT ORDERS AND ADJUDGES that in addition to the terms of Judgment in this application that issued July 9, 2009:

1. Section 2.6 of the Recovery Strategy, titled “Critical Habitat” will be referred back to be redrafted to include:
 - (a) identification of all known active leks in Alberta and Saskatchewan as critical habitat (the “Active Leks”);
 - (b) identification of the source habitat identified by Dr. Aldridge in the Manyberries area as critical habitat (the “Manyberries Source Habitat”); and
2. The redrafted Section 2.6 of the Recovery Strategy, titled “Critical Habitat” will be posted on the public registry within 30 days of this Order.

“Russel W. Zinn”
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-241-08

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

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: June 2-4, 2009

**SUPPLEMENTARY
REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: September 9, 2009

APPEARANCES:

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