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A New Paradigm for Species Listings?

What the Greater Sage Grouse Listing Decision May Tell Us About the Future of Species Conservation

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Last week Secretary of the Interior Sally Jewel announced that the U.S. Fish and Wildlife Service (Service) has determined that the greater sage grouse (*Centrocercus urophasianus*) does not warrant protection under the Endangered Species Act (ESA). The highly anticipated announcement follows years of intense debate and clashes between conservation groups, industry, Congress, and the Service over a species whose range spans more than 170 million acres across 11 Western states. The Service's finding that a listing was not warranted was based largely on collective conservation efforts by the federal Bureau of Land Management (BLM) and U.S. Forest Service (USFS), state agencies, and private landowners. Those conservation efforts were implemented following the Service's 2010 finding that a listing of the greater sage grouse was warranted but precluded by other ESA priorities. This article briefly explains the Service's "not warranted" finding and considers the potential implications of the Service's approach to this listing decision in the context of other recent listing decisions and those due in the years to come.

The "Not Warranted" Finding - In its 2010 finding that listing of the greater sage grouse was warranted but precluded, the Service identified habitat loss, fragmentation, and the inadequacy of existing regulatory mechanisms as the primary threats to the species. In reaching its decision last week that a listing of the greater sage grouse is no longer warranted, the Service determined that since 2010, regulatory mechanisms contained in federal and state conservation plans have substantially reduced these risks in approximately 90% of greater sage grouse breeding habitat. This conclusion was based on the Service's analysis of the regulatory conservation actions mandated by state plans in Wyoming, Montana, and Oregon (collectively, the State Plans), and the federal BLM and USFS land management plans (collectively, the Federal Plans). Each of these Plans takes a slightly different approach to sage grouse conservation, but in general they all identify important conservation objectives for the greater sage grouse, provide mechanisms that limit disturbance and development in important habitat areas, and require avoidance and minimization strategies such as lek buffers and noise restrictions.

Because the Federal Plans were finalized simultaneously with the Service's "not warranted" finding and the Oregon and Montana plans are not yet fully implemented (in contrast to the Wyoming plan which has been in effect for the past 7 years), to avert a listing of the greater sage grouse based on these conservation efforts the Service had to be certain that they will improve the status of the species after considering all available information. To reach that conclusion, the Service evaluated the plans under its Policy for Evaluation of Conservation Efforts (PECE). The PECE provides a framework for the Service to evaluate formalized conservation efforts that are not yet fully implemented or too recent to have yet demonstrated their effectiveness. The PECE requires a two-part analysis. First, the Service evaluates whether the conservation effort will be implemented. Second, the Service considers whether it will be effective.

In step one of its PECE analysis, the Service concluded that there was reasonable certainty that the Federal Plans would be implemented, emphasizing that the Federal Plans provide mandatory conservation measures that were established after notice and comment and review under the National Environmental Policy Act (NEPA). All future activities in areas subject to the Federal Plans are required to conform to the conservation measures outlined in the plans, and, any significant changes to the Federal Plans would require notice and comment and further NEPA review. Additionally, the Service noted that based on past federal land planning efforts it expects the Federal Plans to be implemented for the next 20–30 years. The Service similarly concluded that the Montana and

Oregon plans were sufficiently certain to be implemented. This determination was based largely on commitments by those states to fund these conservation plans in the future.

In step two of its PECE analysis, the Service concluded that the State and Federal Plans would be effective. It based this conclusion on the expectation that the conservation measures in the Plans would reduce potential impacts from the threats identified in the 2010 "warranted but precluded" finding in approximately 90 percent of greater sage grouse breeding habitat range-wide. By contrast, the Service did not rely upon conservation plans developed in Colorado, Idaho, Nevada, North Dakota, South Dakota, and Utah in reaching its "not warranted" determination, concluding that while those plans may provide long-term benefits to the species, they lacked certainty of implementation and effectiveness.

In addition to the State and Federal Plans, the Service also pointed to the effective use of Candidate Conservation Agreements and other conservation mechanisms entered into by private landowners since 2010 to support its "not warranted" finding. Based largely on these collective conservation efforts, the Service ultimately concluded that the greater sage grouse does not face the risk of extinction now or in the foreseeable future and thus does not need protection under the ESA. Notably, despite concluding that the conservation plans relied upon to support its "not warranted" finding were reasonably certain to be implemented and effective, the Service indicated that it will conduct another status review of the greater sage grouse in five years to ensure that the conservation efforts continue to benefit the species.

Implications of the Decision - The immediate implications of the Service's decision are fairly straightforward – companies must comply with any Federal or State Plan applicable to the lands on which they are operating, but do not require authorization for incidental take and are not required to implement avoidance, minimization or mitigation measures in other areas. But the broader implications of the decision are more interesting, and perhaps even more significant, particularly when viewed through the lens of recent ESA policy and legal developments.

Development of voluntary conservation plans is becoming an increasingly popular tool as states and industries seek to avert new species listings, particularly for wide ranging species such as the greater sage grouse. These may be driven by industry, such as the oil and gas industry's development of the Texas Conservation Plan for the dunes sagebrush lizard, or by governmental entities, as with the Rangewide Plan developed by the Western Association of Fish and Wildlife Agencies for the lesser prairie chicken and the State and Federal Plans for the greater sage grouse. The Service determined not to list the dunes sagebrush lizard based on the Texas Conservation Plan and related efforts. More recently, the Service has seemed to favor the approach of listing species as threatened and issuing a special take rule under Section 4(d) of the ESA, which authorizes incidental take of the species in question for activities addressed by and conducted in compliance with a specified conservation plan or measures. The Service took that approach when listing the northern long-eared bat earlier this year. It did the same when listing the lesser prairie chicken as threatened with a 4(d) rule based on the Rangewide Plan in 2014. Its decision to list the lesser prairie chicken was based in large part on an assumption in its PECE analysis that industry would have no incentive to and would be unlikely to participate in the Rangewide Plan if the species was not listed.

From the Service's perspective, one of the principal benefits of a threatened listing with a 4(d) rule is that it incentivizes implementation of and enrollment in such voluntary conservation plans administered by stakeholders or other state or federal agencies. These conservation efforts enable the Service to provide categorical incidental take authorization and avoid the enormous administrative burden it would incur under an endangered listing, which would require it to process countless individual incidental take permit applications each requiring tremendous time and resources. Recently, however, a federal district court in Texas vacated the Service's listing of the lesser prairie chicken, concluding that the Service's assumption that industry would not participate in the Rangewide Plan without the incentive of a 4(d) rule was arbitrary and capricious. As discussed in our recent article on that case (*Permian Basin Petroleum Association et al. v. U.S. Department of Interior*), that ruling casts doubt on the viability of the threatened listing/4(d) rule approach and creates uncertainty about the role that stakeholder-developed conservation plans will play in future listing determinations.

The Service almost certainly considered a threatened listing with a 4(d) rule based on the Federal and State Plans for the greater sage grouse. The Service likely recognized that given the number of different conservation plans involved and the lack of a single entity with the power or responsibility for overseeing those plans, a 4(d) rule would have been extremely burdensome to implement. Monitoring compliance with so many disparate plans would have severely taxed the Service's resources, and with so many different pieces, it also would have been very vulnerable to litigation alleging that the individual plans and the patchwork they created were not sufficiently robust or reliable. The *Permian Basin* court's vacatur of the lesser prairie chicken listing was likely too recent to have played a significant role in the Service's "not warranted" determination. Nonetheless, the Service had to have been cognizant of the *Permian Basin* case, and its approach to the greater sage grouse points out an interesting contrast with, and a subtle change in strategy from, its approach to the lesser prairie chicken.

In announcing its decision that listing of the greater sage grouse is "not warranted" based in part on the success of the conservation efforts implemented since its previous "warranted but precluded" determination, the Service stated that it would review the status of the greater sage grouse in five years. In so doing, the Service may have found a strategy that will encourage the use of voluntary conservation plans while avoiding the conundrum presented by the lesser prairie chicken case. Instead of relying on an assumption that participation in voluntary conservation plans will not occur absent the mandatory effect of a listing and 4(d) rule – an assumption which the *Permian Basin* court deemed arbitrary and capricious – the Service is incentivizing that participation through the implicit threat that lack of participation may prove its point and warrant a listing in a mere five years. This incentive has already been proven to be an effective one – the 2010 "warranted but precluded" determination put stakeholders on notice of the possibility of a future listing and was the primary driver for the development of the conservation plans that the Service concluded have reduced the risk to the species and justified a "not warranted" determination. With this iterative approach to its determination, the Service avoids the complexity and legal challenges associated with a 4(d) rule based on a patchwork of disparate plans, as well as the enormous administrative burden and political backlash that would have resulted from an endangered listing, while keeping both its carrot and its stick intact.

Unsurprisingly, the "not warranted" determination and the Federal and State Plans upon which the Service relied have already faced harsh criticism from both industry and conservation groups. Conservation groups have expressed concern that the plans do not provide sufficient protection for the species and fail to include critical measures such as protections for winter habitat. Meanwhile, industry has indicated that the Federal Plans' restrictions on development are overly burdensome and perhaps illegal. It appears that Congress will continue to involve itself in the issue as well, as the House Natural Resources Committee has indicated it will hold an oversight hearing on the Federal Plans on September 30th. Such challenges were inevitable no matter what determination the Service reached given the broad geographic range of the greater sage grouse, the economic impacts of the State and Federal Plans, and the political fervor surrounding the species. All of those challenges bear watching, but so too does the Service's approach to future listing determinations, including its eventual reconsideration of the lesser prairie chicken, to see whether it has in fact found a new paradigm.

For more information on the matters discussed in this Locke Lord QuickStudy, please contact the authors:

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