

A Small Bird With a Big Footprint

By Hadassah (Dessa) Reimer

A decision by the Fish and Wildlife Service (the Service) to list the Greater sage-grouse as threatened or endangered under the federal Endangered Species Act (ESA) would have tremendous consequences for public and private land management across the West. The Greater sage-grouse is widely dispersed over 160 million acres of sagebrush habitat in eight western states and Canada. If listed, the protections of the ESA, including prohibitions on “take” and federal agency consulting requirements, will restrict uses of public and private land, such as energy development, agricultural activities, residential and commercial development, and recreation. For example, energy development on public and private surface could be restricted in sagebrush habitat during certain seasons. Livestock grazing on federal allotments could be similarly limited. And developers may be required to prepare habitat conservation plans and obtain incidental take permits before construction. Groups advocating the listing of the species understand and welcome these consequences, viewing a listing decision not only as a means to promote the survival and recovery of the sage-grouse, but as a means to effect policy changes and impose restrictions to slow energy development and other activities affecting western ecosystems.

In 2005, the Service decided not to list the Greater sage-grouse. That decision was reversed and remanded to the Service for reconsideration.¹ As the Service reconsiders its listing decision, western states, federal land management agencies, scientists, environmental and wildlife conservation groups, energy industry representatives, landowners, and ranchers are working to develop and implement conservation strategies to promote the recovery of the sage-grouse. Their common goal is to slow, stop, and eventually reverse the decades-long decline in sage-grouse population by protecting and enhancing sagebrush habitats. They seek to avoid a listing decision that could lead to blanket restrictions on millions of acres of public and private land throughout the West. Some, however, view these efforts as too little and too late, and a listing decision as inevitable.

The Listing Process

Under the ESA, an endangered species is one in danger of extinction,² and a threatened species is “is likely to become an endangered species within the foreseeable future.”³ Once a species is listed as threatened or endangered, it is protected from “take” on both public and private land—including any activity that would or would attempt to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species covered by the Act.⁴

The ESA permits any person to petition the Service to list a species believed to be threatened or endangered.⁵ The Service's listing decisions must be made "solely on the basis of the best scientific and commercial data available."⁶ The Service can take into account protective measures being implemented by governmental entities. Under the Service's 2003 Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE), the Service can also consider formalized conservation efforts—conservation efforts identified in a conservation agreement, conservation plan, management plan, or similar document—that have not yet been implemented or that have been implemented but have not yet demonstrated their effectiveness.⁷

Efforts to List the Sage-Grouse

In 2002 and 2003, wildlife conservation and environmental groups petitioned the Service to list the Greater sage-grouse as endangered across its entire range. Though once abundant throughout the western United States and Canada, threats to the species and its habitat from wildfire, invasion of non-native plants, livestock management, agricultural conversion, urbanization, mining and energy development, natural events such as drought, predation, and disease have led to population declines in recent decades. The Service estimated that sage-grouse populations have declined an average of 3.5 percent per year from 1965 to 1985. In January 2005, the Service determined that listing the Greater sage-grouse was not warranted based, in part, on the fact that populations in several states have increased or generally stabilized since 1985.⁸ That decision was challenged in the Idaho Federal District Court by Western Watersheds Project, and was overturned in December 2007. Judge Winmill held that the Service did not consider the "best science" in making its decision because it failed to ask the panel of experts convened to discuss the status of the species to recommend whether to list the species and failed to make any record of their two-day discussions.⁹ The Service also failed to adequately consider existing regulatory mechanisms and PECE conservation programs in its decision.¹⁰ Finally, the court found fault with the participation of Julie MacDonald, Deputy Assistant Secretary of the Fish and Wildlife Service, who may have intervened in the decision-making process to prevent a listing.¹¹ The court reversed the Service's decision that listing was not warranted and remanded to the agency for reconsideration.¹²

Sage-Grouse Conservation Efforts

A number of regional, statewide, and local efforts to develop and implement conservation plans and measures to improve habitat function and provide protection to the species have been taken since the Service's 2005 decision not to list the Greater sage-grouse.¹³ Depending on their stage of implementation and proven efficacy, these and other conservation measures may be considered by the Service as it re-evaluates the status of the sage-grouse.

Federal land management agencies have stepped up sage-grouse conservation efforts. In 2004, the Bureau of Land Management (BLM), which manages million of acres of sage-grouse habitat on federal land, completed its National Sage-Grouse Habitat Conservation Strategy.¹⁴ BLM imposes seasonal restrictions to protect mating and nesting birds and is working with state wildlife agencies to develop conservation plans. In Wyoming's Powder River Basin, BLM

recently announced its intent to delay consideration of plans of development for coalbed methane wells in certain “polygons” of prime sage-grouse habitat until additional National Environmental Policy Act analysis can be completed.

In December 2006, the Western Association of Fish and Wildlife Agencies developed a rangewide comprehensive conservation strategy for Greater sage-grouse. The conservation strategy includes recommendations for conservation actions, monitoring efforts, research, funding, communication, and adaptive management strategies.¹⁵

In Wyoming, Governor Dave Freudenthal convened a “Sage Grouse Summit” in June 2007 to discuss the consequences to the birds and to the State of ignoring sage-grouse issues.¹⁶ Subsequently, a group of interested stakeholders, including representatives of BLM, the State of Wyoming, private land owners, energy industry, and wildlife conservation organizations, developed a list of 21 recommendations to stabilize sage-grouse populations and promote the long-term survival and recovery of the species.¹⁷ These recommendations include providing additional protection for existing habitat, minimizing the footprint of energy development, and increasing the acreage exemption for subdivision housing from 40 to 640 acres.¹⁸

Implications of Listing the Greater Sage-Grouse

The goal of any listing decision is to prevent the extinction of the species and promote its survival and recovery. To accomplish these objectives, other land uses and activities must give way to the needs of the species and its habitat. As the United States Supreme Court said in *Tennessee Valley Authority v. Hill*, “[T]he language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”¹⁹

The Service’s decision to list the Greater sage-grouse must be based on the best science without consideration of economic and social effects. However, the inevitable consequence of a decision to list the Greater sage-grouse—dispersed across 160 million acres of public and private land in eight western states—will be greater restrictions on public and private land uses, including energy development, farming and ranching, residential and commercial development, and recreation in sagebrush habitat. Much of Wyoming could be blanketed with additional requirements for ESA compliance. Whether conservation efforts made in Wyoming and around the West are enough to protect the species and prevent a listing remains to be seen.

Hadassah (Dessa) Reimer is an attorney in the Jackson, Wyoming, office of Holland & Hart LLP’s Natural Resources Department. Her practice focuses on federal and state environmental regulation, including impact assessment, endangered species, permitting, and other public land issues. Among other federal environmental statutes, Dessa has experience with NEPA, the Endangered Species Act, the Federal Land Policy and Management Act, and cultural resource protection laws. Dessa is a member of the firm’s Environmental Compliance and Global Climate Change practice groups. Prior to joining Holland & Hart, Dessa was a judicial

clerk to the Honorable Williams F. Downes, United States District Judge for the District of Wyoming. Dessa earned her J.D. from the University of Wyoming College of Law and her B.A. from the University of Wyoming.

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¹ Western Watersheds Project v. U.S. Forest Service, No. CV-06-277-E-BLW (Dec. 4, 2007) (slip opinion).

² 16 U.S.C. § 1532(6).

³ *Id.* § 1532(20).

⁴ 16 U.S.C. §§ 1532(13) & (19); 1538(a)(1)(B); 50 C.F.R. § 17.3.

⁵ 50 C.F.R. §§ 424.14(a); 424.10.

⁶ 16 U.S.C. § 1533(b)(1)(A).

⁷ 68 Fed. Reg. 15,100, 15,112-13 (Mar. 28, 2003).

⁸ 70 Fed. Reg. 2241, 2281 (Jan. 12, 2005).

⁹ Western Watersheds Project v. U.S. Forest Service, No. CV-06-277-E-BLW, at 24-25 (Dec. 4, 2007) (slip opinion).

¹⁰ *Id.* at 29-32.

¹¹ *Id.* at 32-34.

¹² *Id.* at 35.

¹³ *See, e.g.*, Strategic Management Plan for Sage Grouse, Utah Division of Wildlife Resources (June 11, 2002), *available at* <http://www.wildlife.utah.gov/uplandgame/pdf/2002manplan.pdf>; Colorado Greater Sage-Grouse Conservation Plan (June 15, 2007), *available at* <http://wildlife.state.co.us/WildlifeSpecies/SpeciesOfConcern/Birds/GreaterSageGrouseConsPlan2.htm>.

¹⁴ BLM, National Sage-Grouse Habitat Conservation Strategy (Nov. 2004), *available at* http://www.blm.gov/nhp/spotlight/sage_grouse/overview.htm.

¹⁵ Stiver, S.J., et al., Greater Sage-Grouse Comprehensive Conservation Strategy, Western Association of Fish and Wildlife Agencies (Dec. 2006), *available at* <http://www.wafwa.org/>.

¹⁶ Brodie Farquhar, *Sage grouse summit seeks elusive nature, energy balance*, CASPER STAR TRIB. (June 25, 2007).

¹⁷ Sage Grouse Team Recommends 21 Conservation Measures, Press Release, Office of the Governor (Sept. 25, 2007), *available at* <http://governor.wy.gov/press-releases.html>.

¹⁸ *Id.*

¹⁹ Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978).