USFWS Lists Gunnison Sage-Grouse as a “Threatened Species” Under ESA

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On November 12, the U.S. Fish and Wildlife Service ("FWS") listed the Gunnison sage-grouse as a "threatened" species under the Endangered Species Act. The listing drew hostile reactions from the Governors and Congressional delegates of both Utah and Colorado, as well as from environmental groups disappointed that the FWS had not listed the species as endangered.

The listing designated 1.4 million acres of critical habitat within southern Colorado and southeastern Utah, some of it occupied and some of it currently unoccupied. The critical habitat designation prevents federal agencies from taking actions in the habitat that are likely to jeopardize the species or the habitat.

Listing Draws Harsh Reaction from Colorado and Utah Elected Officials

In a statement accompanying the listing, FWS Director Dan Ashe praised the efforts by Colorado and Utah "tribes, local communities, private landowners and other stakeholders to conserve the species and its habitat [which] have helped reduce the threats to the bird sufficiently to give it the more flexible status of ‘threatened.’" Colorado Governor John Hickenlooper (D) characterized the FWS's action differently, issuing a statement saying, "We are deeply disappointed the U.S. Fish and Wildlife Service chose to ignore the extraordinary efforts over the last two decades by the state, local governments, business leaders and environmentalists to protect the Gunnison sage-grouse and its habitat." Utah Rep. Rob Bishop (R), incoming chairman of the House Committee on Natural Resources, said the listing decision usurps "state and local actions," and is an example "of the federal government thinking it is smarter and more capable than the state and communities, a notion I flatly reject." Utah Governor Gary Herbert issued a statement saying, "[l]isting the Gunnison sage-grouse as threatened is a step backward for the conservation effort, for the economy and for the constructive relationship we have tried to develop with all stakeholders."

Mixed Reaction from Environmentalists

Some environmental groups also complained that the listing did not go far enough, and the FWS should have listed the species as endangered. According to Erik Molvar of WildEarth Guardians: "The science is clear: This spectacular dancing bird is endangered and should be afforded the highest level of protection." A coalition formed by WildEarth Guardians, the Wild Utah Project, and the Southern Utah Wilderness Alliance announced that they would challenge the threatened listing decision. However, other
groups, including the National Wildlife Federation, Rocky Mountain Wild, and Defenders of Wildlife, said the threatened listing provided flexibility that will allow ongoing collaboration and local conservation efforts to continue.

**FWS Plans to Issue Draft 4(d) Rule**

The listing becomes effective on December 20, 2014 (30 days from its publication in the Federal Register). In announcing the listing, the FWS said it expects to issue a special rule under Section 4(d) of the Endangered Species Act that will provide regulatory flexibility for oil and gas firms, farmers, and ranchers who enroll in approved voluntary conservation plans. The FWS took this same approach last March when it listed the Lesser prairie-chicken as threatened rather than endangered. According to the Service, a draft of the 4(d) rule will be developed early in 2015 and finalized before the end of the year.

**Listing Decision, the Product of Litigation, May Result in More Lawsuits**

The November 12 listing was required under a 2011 settlement agreement between WildEarth Guardians, the Center for Biological Diversity, and the FWS, after a lawsuit challenged the Service’s action in placing the species on its list of "candidate species." The Service had requested three deadline extensions, all of which were granted by the U.S. District Court for the District of Columbia; WildEarth Guardians refused to agree to yet another extension.

Even before the listing decision, Colorado had threatened litigation and in his statement issued following the listing, Governor Hickenlooper said the state planned to sue over the listing: "[W]e will do everything we can, including taking the agency to court, to fight this listing and support impacted local governments, landowners and other stakeholders." While Colorado has yet to file a lawsuit, on November 20 two different sets of environmental groups filed 60-day notices of intent to sue with the Department of Interior: the Center for Biological Diversity and Western Watersheds Project filed one notice; while WildEarth Guardians, Wild Utah Project, Great Old Broads for Wilderness, and Dr. Clait Braun issued a separate 60-day notice of intent to the Department.

**Possible Implications for the Greater Sage-Grouse Listing**

The Gunnison sage-grouse is considered a distinct species from the Greater sage-grouse. Both the habitat and the population of the species differ significantly, with approximately 5,000 Gunnison sage-grouse residing in habitat concentrated in southern Colorado and portions of Utah, while approximately 500,000 Greater sage-grouse occupy a range covering millions of acres of public, state, and private lands extending across 11 western states. The FWS is currently evaluating the status of the Greater sage-grouse, with a final listing decision (also driven by litigation) due by September 2015.

In the press release accompanying the listing, the FWS explained the
"decision on the Gunnison sage-grouse in no way predetermines a decision on the Greater sage-grouse, which the Service is independently evaluating." States, local governments, and private parties have undertaken massive conservation and planning efforts in an attempt to avoid the listing of the Greater sage-grouse. While some proponents of that effort are encouraged by the fact that the Forest Service recognized similar efforts to protect the Greater sage-grouse, others worry that the Gunnison sage-grouse listing will discourage industry and private landowners from agreeing to adopt any further voluntary conservation efforts.