

# Idaho Federal District Court Vacates Fish & Wildlife Service Decision Not To List Sage-Grouse Under ESA

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On December 4, 2007, Judge Winmill, of the United States District Court for the District of Idaho, issued an opinion in *Western Watersheds Project v. U.S. Fish and Wildlife Service*. He held that the Fish and Wildlife Service's (FWS) decision not to list the greater sage-grouse as threatened or endangered was arbitrary and capricious. The decision granted summary judgment for Western Watersheds Project, vacated the FWS's finding, and remanded the case to the FWS for further consideration consistent with the Court's opinion.

*Western Watersheds* addressed the FWS's "12-Month Finding" that a listing of the sage-grouse as threatened or endangered was not warranted. Prior to issuing the finding, the FWS had considered petitions to list the greater sage-grouse under the Endangered Species Act ("ESA"), and, on an initial 90-day review, the FWS concluded the petitions contained substantial information sufficient to lead a reasonable person to believe listing may be warranted. However, after a more substantial 12-month investigation, which included a risk assessment by a panel of experts, reference to scientific information, and reliance on FWS biologists' recommendations, the Director of the FWS ultimately determined a listing was not warranted.

Western Watersheds Project contested the decision, alleging that in reaching its 12-Month Finding, the FWS failed to rely on the "best scientific and commercial data available," as required by section 4(b)(1)(a) of the ESA. The Court agreed, concluding the FWS decision-making process was flawed. Specifically, the Court held that the FWS did not base its decision solely on the best science available when it failed to involve the panel of outside scientists in its ultimate listing decision and neglected to create a detailed record of the outside experts' opinions. Further, the Court criticized the Director's finding that habitat destruction is not a threat to the greater sage-grouse on a range-wide basis. In light of the FWS's failure to record the outside experts' discussions regarding habitat degradation and the absence of explanation as to why the Director's conclusion differed from those contained in a habitat report issued by state sage-grouse experts, the Court deemed the FWS's 12-Month Finding to be arbitrary and capricious. The Court also questioned the FWS's conclusion that existing regulatory mechanisms were adequate to preclude a listing

when the Court's own review of the data pointed to an "information gap" regarding the existence and efficacy of such programs.

Finally, the Court frowned upon the "brazen . . . political meddling" of a former Department of the Interior official who was involved in the sage-grouse listing decision. The Court cited the former official's involvement as "an independent reason" for the Court's determination that the Director's 12-Month Finding was arbitrary and capricious.

Judge Winmill's judgment orders the FWS to reconsider its decision by addressing the Court's concerns regarding flawed decisional processes. At the conclusion of that process, should the FWS reverse its original 12-Month Finding that the sage-grouse need not be listed as threatened or endangered, existing or proposed projects located in sage-grouse habitat throughout the West will be affected. As of this date, the FWS has not decided whether to appeal Judge Winmill's decision. Project proponents actively participated in the litigation, as did the states of Idaho, Wyoming, and Colorado. These and other governmental and commercial entities will be interested in FWS's deliberations going forward.

*Western Watersheds Project v. U.S. Fish & Wildlife Serv.*, Case No. CV-06-277-E-BLW (D. Idaho Dec. 4, 2007).

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