

Client Alert

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Service's Decision Not to List the Greater Sage Grouse Carries Significant Implications for Regulated Industry, States, Utilities and Local Governments

On September 22, 2015, the US Fish and Wildlife Service ("Service") announced its decision not to list the greater sage-grouse under the Endangered Species Act ("ESA").¹ Although not yet published in the Federal Register, this closely watched [decision](#) — one of a handful involving extensive stakeholder efforts to avoid an ESA listing through alternative conservation measures — followed a decade of often contentious reviews, public comment and private and public initiatives.² The decision not to list the greater sage-grouse was welcomed by some industry members whose activities would have been subject to significant regulatory burdens and costs had the species been listed. But serious concerns have been raised by what many see as equally costly and burdensome back door regulation of greater sage-grouse habitat through land management actions simultaneously announced by the Bureau of Land Management ("BLM") and US Forest Service ("FS"), which were relied upon by the Service in its decision. Those regulations place new restrictions on about 35 million acres of federal lands spanning 11 States, and have important immediate as well as long-term implications for regulated entities, States and local governments alike. Multiple suits challenging the various greater sage-grouse decisions have been filed, and more are likely to come.

Background

The greater sage-grouse is a species of bird found in sagebrush country at elevations from 4,000 to over 9,000 feet. Its range covers approximately 165 million acres across 11 western States (California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming) and two Canadian provinces.³ Federal lands encompass the majority of sage-grouse occupied range; 51 percent of which is BLM and FS land.

In response to environmental groups' petitions for listing, the Service issued an initial determination in 2005 that the greater sage-grouse did not warrant listing under the ESA. The decision not to list the species was challenged and remanded to Service for failure to adequately consider the "best available science" and the adequacy of existing regulatory mechanisms. In 2010, the Service determined that listing was warranted, but precluded by higher listing priorities. Thereafter, federal agencies, states, local governments, conservationists, industry and private landowners joined forces to undertake extensive conservation efforts designed to prevent a future listing of the species, and thereby avoid the associated costs and burdens of a listing.

¹ See <https://twitter.com/SecretaryJewell/status/646304660114903040>. The decision was later followed up with a press conference and press release; <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse>.

² US Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Greater Sage-grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species," Prepublication Decision Document (9/21/15), *available at* http://www.fws.gov/greatersagegrouse/PDFs/20150921_GRSG_FR_Signed.pdf, last visited 9/29/15 at 10:22 a.m.

³ See, e.g., <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?sPCODE=B06W>; http://www.fws.gov/nevada/nv_species/sage_grouse.html.

On September 22, Secretary Jewell announced that, “[t]hanks to the largest land conservation effort in US history, the greater sage-grouse does not need protection under the [ESA].”⁴ Secretary Jewell stated that the Service’s decision resulted from “an unprecedented effort by dozens of partners across eleven western states.”⁵ Although Secretary Jewell noted climate change and other threats to the population, she remains “optimistic that, today, we have shown that epic collaboration across a landscape guided by sound science is truly the future of American conservation.”⁶

In the prepublication decision document, the Service announced that, “[b]ased on the best available scientific and commercial information, [the Service has] determined that the primary threats to greater sage-grouse have been ameliorated by conservation efforts implemented by Federal, State, and private landowners.”⁷ The Service noted that the 2010 warranted determination was based on habitat loss, fragmentation, and inadequacy of existing regulatory mechanisms.⁸ These risks, the Service concluded, had been substantially reduced in approximately 90 percent of breeding habitat through avoidance and minimization measures adopted through Federal and State plans.⁹ Additionally, the Service indicated that future impacts on the greater sage-grouse and its habitat would be limited by advancement in oil and gas technologies, avoidance of sage-grouse habitat for renewable energy development, and fire and invasive species management. The Service dismissed agricultural conversion of sagebrush habitats as “unlikely to impact greater sage-grouse because high densities of breeding sage-grouse do not occur in habitats that are suitable for agriculture.”¹⁰

BLM and FS Land Management Plans Governing Over Half of Occupied Range

The BLM and FS greater sage-grouse planning effort is “unprecedented in scope and scale, and represents a significant shift from management focused within administrative boundaries to managing at a landscape scale.” Prepublication Decision at 66. The BLM and FS completed this effort by issuing amendments or revisions to 98 land use plans, which govern over half of the greater sage-grouse’s occupied range, or approximately 35 million acres across 11 States. These land management plans are established under the Federal Land Policy and Management Act and National Forest Management Act, and are at the core of the agencies’ strategy to conserve the species.

The agencies also segregated certain lands inhabited by the greater sage-grouse from location and entry under the mining laws for two years, subject to valid existing rights, while they consider a proposed twenty year withdrawal of those lands from location and entry under the mining laws, again subject to valid existing rights.

These [measures](#) could substantially restrict commercial activity in the West:¹¹

- First, the land use plans will place restrictions on new or additional surface disturbance, in order to reduce habitat fragmentation and protect habitat. This may be accomplished through: surface

⁴ See

https://twitter.com/SecretaryJewell?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

⁵ *Id.*

⁶ *Id.*

⁷ US Fish and Wildlife Service, Prepublication 12-Month Finding on a Petition to List Greater Sage-grouse (*Centrocerus urophasianus*) as an Endangered or Threatened Species, *available at* http://www.fws.gov/greatersagegrouse/PDFs/20150921_GRSG_FR_Signed.pdf at 3, last visited 9/24/15 at 10:52 a.m.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Fact Sheet: BLM, USFS Greater Sage-Grouse Conservation Effort, *available at* <http://www.blm.gov/wo/st/en/prog/more/sagegrouse.html>, last visited 9/22/15 at 5:22 p.m.

disturbance caps; reduction of disturbance from oil, gas and geothermal development; no-surface occupancy measures in new federal oil and gas leases in Sagebrush Focal Areas and, with exceptions, in Priority Habitat Management Areas; lek buffers; steering wind and solar development projects to areas outside of priority greater sage-grouse habitat; avoidance and mitigation for transmission and other linear developments in greater sage-grouse habitat; expanded greater sage-grouse considerations in BLM review of proposed coal mines or coal mine expansions; and a withdrawal of 10 million acres within Sagebrush Focal Areas from hardrock mining for up to 20 years.

- Second, the plans require: mitigation; incorporation of locally developed management objectives for livestock grazing in sage-grouse habitat and prioritizing monitoring and compliance; coordinated monitoring and evaluations; and adaptive management based on pre-determined benchmarks developed with state wildlife agencies.
- Third, the plans include measures to reduce the risk of rangeland fire to sage-grouse and sagebrush habitat.

Implications

The decision not to list the greater sage-grouse avoids the costs and burdens of an ESA listing, including often lengthy section 7 consultation, compliance with a section 4(d) rule, and receipt of incidental take authorization. The decision also provides a potentially positive foundation for future efforts to avoid listings through stakeholder initiatives.

The accompanying land use plans, however, will impose burdensome requirements on regulated industry — in some cases those burdens are considered as or more restrictive than those that might have been imposed if the species had been listed. These measures could hinder economic activities, and may be a disincentive to future voluntary initiatives.

It will be important for regulated industry to build on the positive aspects of the Service's decision while responding effectively to the risks and potentially negative aspects of the associated land use restrictions undertaken by BLM and the FS and relied upon by FWS.

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Our natural resources and public land use practices work with all facets of rulemaking, permitting, litigating, counseling and lobbying under the ESA, the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act, National Forest Management Act, and other wildlife and land statutes and compacts. We advise a broad range of clients on natural resource matters, and help clients address every aspect of the rapidly developing and expanding area of wildlife law, including permitting, consultation, incidental take approval, habitat planning. We also represent clients on complex, public land use projects and issues before BLM and FS. We have extensive experience in litigation arising from ESA rulemakings, and well as arising from BLM and FS public land use and decisions. Hunton & Williams combines deep experience and strong contacts in the wildlife and public land use law arenas (including with the relevant federal agencies) to deliver effective and efficient advice and solutions.

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