A FOWL MESS

Like spotted owl, you will love sage grouse.
By Dave Skinner

On Sept. 30, 2015, under mandate of a massive 2011 settlement of multiple lawsuits, the U.S. Fish & Wildlife Service (FWS) will decide whether or not to list the greater sage grouse as a threatened or endangered species under Endangered Species Act authority.

The approaching deadline has spurred a spiraling frenzy of activity in 11 vulnerable states and in Congress. The concern, or desire, depending on one's interests, is the enormous negative economic impact upon the dry inland West's resource sectors a grouse listing portends—basically it's another spotted owl.

The Perpetual Paralysis Machine

To understand why Sept. 30, 2015, became a red-letter day, one must consider the Endangered Species Act listing process, which follows two basic pathways:

First, federal wildlife managers can initiate listing.

Second, under Section 4 of the ESA, outside entities can submit petitions to place animals or plants under protection, a process whereby most species have gained threatened or endangered status.

Under the law, the species-listing petition process (if warranted by substantial information using the best available science) should take no more than 18 months, which on its face seems a reasonable standard. (See sidebar, page 19.)

In reality, however, listing proceedings are open-ended because the law contains no "stop bothering us" provisions. At every step, petitioners have the right to resubmit with new information which the FWS must examine in case it is "substantial." Most importantly, petitioners have a right to sue in federal court to override FWS decisions at any point in the listing process. So it is no surprise that, in practical terms, "no" means "not yet," while "yes" means "forever."

As of 2000, there have been 1,197 species listed under the ESA, with environmentalists seeking many more. So in recognition of their legal advantage and enraged by an uncooperative Bush administration and Congress, between 2007 and 2011 a handful of environmental groups (primarily the Center for Biological Diversity and Wild Earth Guardians) churned out a blizzard of listing petitions for over 1,000 additional species and dumped them in FWS's inbox. The agency was crushed, unable to meet deadlines in a timely manner. Then the petitioning groups filed multiple lawsuits on their slam-dunk argument that by missing deadlines, the FWS wasn't "following the law." Therefore, the plaintiffs were

Amusing, clumsy, and not very tasty, the greater sage grouse is poised to become the most powerful bird in America, the king of not just this particular cow pie, but every hill and gully in western sage country.

entitled to legal fees.

For example, Wild Earth Guardians (the merged Sinapu and Forest Guardians) brag it has filed 81 marine listing petitions and 681 species petitions on land. The Center for Biological Diversity (CBD) has filed hundreds more of its own, along with petitions jointly pursued with other groups.

The Department of Justice moved to consolidate these "Section 4" cases (some sources say as many as 85 lawsuits involving nearly 800 species) in the federal D.C. District Court and began negotiating with the major plaintiffs.

In May 2011, the Department of Justice settled with Guardians, which agreed to file no more than 10 new petitions a year until the backlog has been cleared up. But CBD held out for more, and in July 2011 reached an agreement that piled its baggage on top of that of the Guardians, while placing no direct limit on petitions. Sure enough, in 2012 CBD came back with another mass petition, for 53 various and sundry amphibians and reptiles.

Both CBD and Guardians may still directly sue to list any species, the caviat being if either successfully sues to list more than three species, the deadlines for the government species could be pushed back a year or two. Somehow not surprisingly, Western Watersheds Project refused to settle, choosing instead to litigate over its sage-grouse petition efforts. But usually sympathetic Idaho U.S. District Judge B. Lynn Winmill ruled, in essence, that WWP would have to wait until Sept. 30, 2015. And then the lawsuit boom might come down.

Overall, "action" is required by date certain on 757 species by 2018. Importantly, 251 of these were already "candidate" species, meaning that the action is to list or not list—no more "warranted but precluded."

What About The Money?

The stipulated agreement mandated that plaintiffs were entitled to legal fees. IRS Form 990 indicates Guardians got $311,000 or so in "program service revenue" in 2011, but less than $22,000 in 2012. Or maybe that's the "government grants" (contributions) line item—$461,098, as Guardians only claims about $21,000 in "legal fees" in the "program service revenue" category—listed with $67 for "riparian restoration services." You know, saving the Rio Grande?

What about CBD? It claimed $503,509 in "legal settlements" for 2011, nowhere near covering its directly declared ESA program expenses for the year of around $2.7 million. And there's another line item for "program service/legal expense": $179,547. In cash terms, the grouse plaintiffs obviously lost money suing, getting less than a million in supplements to cover roughly $7 million... chump change.

But the intent of these groups in secretive, wealthy donors such as CBD megabenefactor Hans Wyss, a Swiss billionaire, is not, and never has been, to profit in court. Suing to protect "species" is a convenient and cheap means of inflicting vastly larger, hopefully damaging costs upon other parties, i.e., producers, government, and taxpayers.

"Thank goodness the spotted owl evolved in the Pacific Northwest. For if it hadn't, we'd have to genetically engineer it."

—Andy Stahl, Earthjustice

Wyoming pro-resource lawyer Karen Budd-Falen notes that FWS's cost of compliance with the multispecies work plan (covering not only 1,201 species, but no fewer than 1,053 "critical habitat" designations) will be $206 million in taxpayer dollars "just to process the paperwork." Not counting private citizens or their state governments, those millions are just entry fees. What about the long term? Billions…not too shabby for a million or so "investment" in attorney fees, is it?

Ergo, in summer 2011 the stipulated settlement set an action deadline for greater sage grouse of September 2015. Ever since, the perfect storm has been gathering.

Another Perfect Candidate

In 1988, Andy Stahl of the Sierra Club Legal Defense Fund (now Earthjustice) told a friendly law audience: "Thank goodness the spotted owl evolved in the Pacific Northwest. For if it hadn't, we'd have to genetically engineer it."

The same will probably be said of the sage grouse. First and foremost, grouse are a sagebrush "obligate" species. Grouse, especially chicks, depend on bugs and succulent plants during spring and summer. But for at least half the year, the bugs are frozen, the grass gone or covered by snow. What's left? Sage leaves. Period. No sage equals no winter grouse food equals no grouse.

Second, grouse will take a long time to refill suitable habitat no matter what. Most spend their entire lives without traveling more than a dozen miles. Bottom line? Homebody grouse don't spread quickly to vacant habitats. If they try, airborne grouse are ridiculously fat targets for predators of all kinds.

Third, grouse have always died in droves. While "smart" grouse can live to age 10, the average sage grouse survives only 12 to 18 months. Natural attrition is so high that grouse evolved "second chance" breeding. If the first nesting cycle (25 to 27 days, six to eight eggs) fails, hens return to the lek (breeding ground) to be serviced a second time.

Fourth, basically everything threatens sage grouse. In 2005, FWS's review finding grouse protection "warranted but precluded" determined no fewer than 19 threats.

The top five?

- Invasive species: cheatgrass, Japanese brome, and junipers.
- Infrastructure: basically everything man-made and higher than sagebrush.
- Wildfire: fire renders habitat ineffective for at least 20 years, or possibly permanently.
- Agriculture: basically conversion of sage to cropland.
- Grazing: cattle can compete for succulents and/or eat down cover in riparian areas.

Despite a major increase in predators in the last 40 years, "predation" ranked 11th, basically tied with "human" in terms of threat level. FWS's only nod to predation comes in a call to remove structures that provide "anthropogenic subsidies" to predators. "Natural" predation? It's all good.

Cut, Thrust and Parry

Almost all the western states have now approved state grouse conservation strategies aimed at fending off listing and the associated burden. Wyoming, with the most at stake, had not finalized its plan as of June 1. But the jousting between the Obama administration, the states, and the congressional factions has become increasingly complex in the past year. Various tactical political moves help

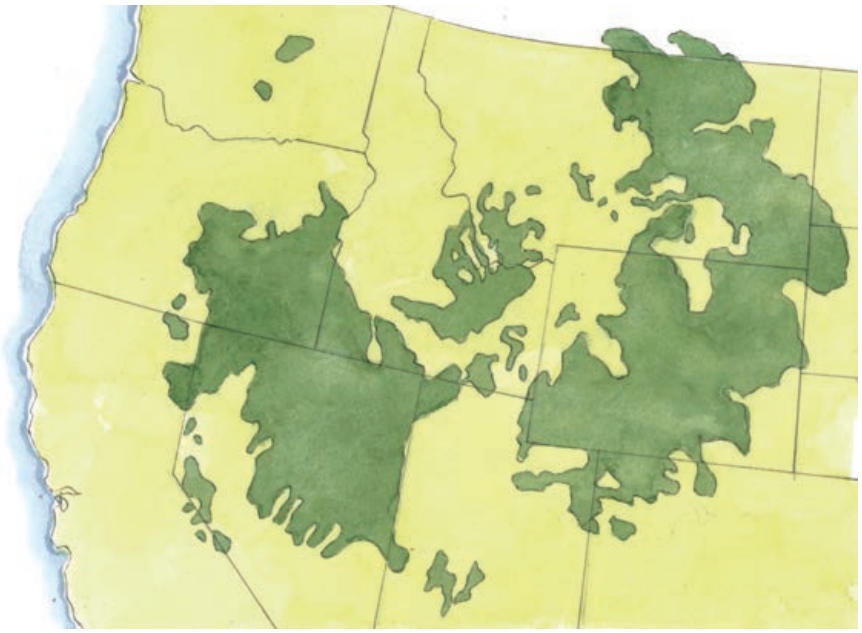

ILLUSTRATION BY JOHN BARDWELL

Over 165 million acres of the inland West, both public and private, are potentially subject to the effects of the greater sage grouse being listed under the Endangered Species Act. Roughly a third of that acreage is up for restrictions that will give grouse "requirements" priority over all other factors—no matter the value or potential for value.

reveal the strategies in play.

To begin, the previous Congress prohibited FWS from "implementing" a sage-grouse listing prior to Sept. 30, 2015, via one of many logrolling "riders" loaded on the must-pass National Defense Authorization Act (NDAA) for fiscal year 2015.

In the current Congress, the most significant move is a rider, again jammed into the "must-pass" defense bill for 2016. Section 2862, spearheaded by Congressman Rob Bishop (R-UT), would stop "any such finding" (listing) until 2025 and retain warranted-but-precluded status for sage grouse. It also would prohibit Resource Management Plan (RMP) amendments "inconsistent" with state strategies, retroactive for one year, with the inconsistency "resolved by the governor of the affected state."

Bishop's rider passed committee on a party-line vote in April. A faction of urban Democrats led by Niki Tsongas of Massachusetts tried and failed to kill the rider on the House floor on May 15. That same day, Oklahoma's congressmen, led by Frank Lucas (R), managed to get a "me-too" defense rider (Section 2865) passed 229-190, which would halt listing of the lesser prairie chicken (the southern Plains' equivalent to owls and grouse) until 2021, as well as delist the American burying beetle. The NDAA then passed to the Senate 269-151. Also on May 15, Colorado Gov. John Hickenlooper (D) ordered implementation of a state grouse plan.

On May 18, FWS and National Marine Fisheries Service (responsible for saltwater endangered-species enforcement) released a 10-part proposal to change the listing petition process.

Major changes:

(a) Multispecies petitions will no longer be allowed.

(b) Petitioners would be required to send their petition to the affected state wildlife agency 30 days before petitioning the feds.

(c) State input would have to be included with the original petition—a huge change.

Aptly and honestly, *High Country News* reporter Elizabeth Shogren nailed this proposal as a "preemptive strike" which "seemed aimed at appeasing Republican congressional leaders."

On May 19, Interior Secretary Sally Jewell traveled to Boise. Alongside Idaho Gov. Butch Otter (R), she announced the release of an 82-page Integrated Rangeland Fire Management Strategy. It notes that 3.8 million acres of grouse habitat burned just from 2012 to 2014, and recognizes that prevention and aggressive suppression of wildfires is necessary. In short, it's an amazing concession to reality.

On May 27, Otter ordered implementation of Idaho's state sage-grouse plan. Also on May 27, five Democratic senators (Michael Bennet, CO; Dianne Feinstein, CA; Jon Tester, MT; Jeff Merkley, OR; and Ron Wyden, OR) asked Senate Appropriations to approve more funding for "cooperative conservation" programs targeted at sage grouse.

However, on May 28, the Obama administration threw down the gauntlet, announcing 14 RMP amendments that, unless blocked, will implement sage-grouse-driven restrictions on federal portions of sage grouse habitat. Overall, the RMP changes are far stricter than those agreed to in state strategies.

The amendments have a 60-day "governor's review" period and concurrent 30-day protest period (multiple local, state and private entities immediately began protesting) and will be finalized in late summer—just in time for the listing deadline and, not coincidentally, precisely what Rep. Bishop's NDAA rider seeks to prevent.

The Big Picture

Obviously, the stakes are high and rocketing higher for congressional action, or inaction. Past endangered species listings, such as for the spotted owl, inflicted unmitigated disaster upon affected communities. Others, such as for wolves, have been rife with broken promises and unforeseen fallout, including impacts on other valued species. Congress was pushed to the brink of taking unprecedented direct action to remove wolves from ESA jurisdiction several years ago as a result.

Furthermore, as is the case with grizzly bears, even with delisting in process, land-use restrictions stemming from protection are being retained and expanded, not relaxed.

Today with grouse it is becoming obvious the Obama bureaucracy is holding out the threat of a listing deadline in order to maneuver cooperators into "voluntary" acceptance of land-use limits and critical habitat designations that will be in the end just as burdensome as what would be imposed by the feared ESA listing.

At the same time, the administration is doing everything it can to keep Congress from taking any direct legislative action, such as direct delisting by law or substantive reform of the Endangered Species Act itself. A fowl mess, indeed—and getting messier. ■

Dave Skinner lives in Montana, where in several fits of young foolishness, he hunted, shot, gutted, plucked, butchered, marinated and then manfully choked down greater sage grouse. They do not taste like chicken.

States vs. Feds?

Eleven states share 165 million acres of sagebrush country inhabited by approximately 500,000 greater sage grouse, far less than estimated historic populations of some 16 million birds. All these states began work on state-driven conservation plans with the intent of protecting both rural economies and the sage grouse.

In Montana, which already wrote a sage-grouse plan in 2005, new Gov. Steve Bullock (D) ordered the creation of a 12-member sage-grouse advisory council in 2013. The council presented its conservation strategy to the governor in January 2014.

Montana's situation is mostly similiar to other states. The Bureau of Land Management claims Montana has over 1,000 lek sites and 18 percent of the total sage-grouse population in the West, about 90,000 birds. Of Montana's 94 million acres, about 34 million is grouse habitat. In contrast to range-wide, where 64 percent of grouse range is federally managed, Montana's habitat is 64 percent private.

The Montana strategy establishes Core Areas (28 percent), Connectivity Areas, and General Habitat. In general, the intent is to avoid impacts, minimize size of impacts, and allow compensation/mitigation for unavoidable impacts. New activities "will not cause declines" in population, while valid and existing rights (grazing, minerals, rights-of-way) "should be" recognized. Other items:

- Wildfires would be immediately suppressed, within bounds of human safety.
- No-surface-occupancy (NSO) buffers of one mile around active leks in core areas.
- Main roads, two-mile buffer; feeders, one mile.
- Total surface disturbance limit of five percent.
- Seasonal restrictions on development activity during March 15 to July 15 breeding/nesting period and from December 1 to March 15 in winter concentration areas.
- Noise restrictions of 40 decibels during breeding season.
- Power lines and other tall structures, one mile from leks.
- Wind energy development will be excluded from core areas.

BLM and U.S. Fish & Wildlife Service submitted Montana strategy comments that signal the federal government's intentions. FWS objected rather strongly to Montana's recognition of valid and existing coal-mine rights in core areas. BLM concurred, as "problematic." Also, because so much of core (54 percent) was private and therefore "fragmented" ownership (if not habitat), FWS "encourage[d] the state to exercise all applicable regulatory authority" on private lands.

One telling BLM comment is the note that of existing sage-grouse working groups, "very few private landowners have been participating in the meetings." BLM also asked for a noise limit of 32 decibels, to replace "encouraged" with "required," and "economically" replaced with "technically." Finally, FWS stated that while voluntary actions were all well and good, "effectiveness is greater for measures applied through regulatory means."

BLM AND U.S. FISH & WILDLIFE SERVICE SUBMITTED MONTANA STRATEGY COMMENTS THAT SIGNAL THE FEDERAL GOVERNMENT'S INTENTIONS.

In September 2014, Gov. Bullock approved the modified state strategy. But in mid-May, BLM released its package of Resource Management Plan amendments, which are probably a very good signal of FWS's outlook, considering both agencies are in Sally Jewell's Department of Interior. As an example, the new Environmental Impact Statement for the revised Miles City RMP differs greatly from the Montana strategy.

Lek buffer distances, based on a "lower end" of "interpreted" requirements: roads, 3.1 miles; energy infrastructure, 3.1 miles; fences, 1.2 miles; "low structures," 1.2 miles; "surface disturbance," 3.1 miles; all "noise and related disruptive activities," 0.25 miles.

These buffers are much more restrictive than Montana's "core" strategy—but the feds want them to apply to the general habitat. In state "core," which BLM renamed "primary habitat management area" (PHMA), activity will be allowed only if relaxing the buffer "offers the same or great protection" to grouse, for example, by conserving "seasonal habitat," as in wintering grounds or summer wetlands.

Even more impressive, the five percent "disturbance cap" is reduced to three percent, using the overlap between four-mile lek circles and four-mile facility circles as the area being studied. The disturbance calculation for "minor roads" assumes a 40.7-foot-wide strip, or 4.88 acres per mile—basically, one two-track equals 0.76 percent disturbance all by itself. Only one "facility" per 640 acres will be allowed within PHMA, regardless of lek proximity, and disturbance calculations will include "undisturbed areas within the facility's perimeter."

However, there's an escape: The RMP amendment states that if Montana applies Wyoming's state conservation methodology, an "all lands" approach that covers the 64 percent private ground, *then* the disturbance cap might go back to five percent on BLM.

What about livestock grazing permit renewals in PHMA? Then field-visit information must be no more than five years old and must indicate the allotment meets field-office standards for rangeland health. If "critical habitat," then the allotment is presumed noncompliant and therefore subject to formal National Environmental Policy Act review.—*Dave Skinner*

THE PAINFUL PROCESS

Submission of listing proposal starts clock.

ACTION: Initial Finding
DEADLINE: 90 days
QUESTION: Is data substantial/not substantial?
OUTCOME: Further status review is warranted/not warranted.

ACTION: Status Review
DEADLINE: 12 months after initial warranted finding, total time 15 months
QUESTION: Is listing warranted as either threatened or endangered/warranted but precluded/not warranted for listing?
OUTCOME: Federal Register proposal
NOTE: Warranted but precluded is a "standby" that requires yearly review of whether to propose formal listing in Federal Register or wait another year. Species in this category are "candidate" species.

ACTION: Listing Proposal
DEADLINE: Publish immediately in Federal Register after status review; 60 days public comment, plus 30 days for final decision. Total process time not counting "candidate hold": 18 months
OUTCOME: List, or not list, species/subspecies/distinct population segment as either threatened or endangered.