Dances With Chickens

The sage grouse is not endangered, but westerners sure seem to be.

By Dave Skinner

Sixteen long years ago, environmentalists first petitioned to list the greater-sage grouse as threatened or endangered under the Endangered Species Act (ESA). Almost everyone involved, whether environmentalists, agency staff, or western producers, is aware a sage-grouse listing and its "protections" will have economic and policy consequences akin to those from the listing of the northern spotted owl in the Pacific Northwest. Those consequences, of course, are craved by the Greens and feared by producers. Agency staff? Cravers and fearers both, apparently.

Thanks to 2011's notorious "multispecies settlement" with WildEarth Guardians and the Center for Biological Diversity, Sept. 30, 2015, was the court-mandated deadline for the U.S. Fish & Wildlife Service (FWS) to decide either way.

Listing, of course, would spur an immediate avalanche of further litigation from Greens newly empowered by the ESA's "critical habitat" court precedents, not only on federal lands, but also on private lands. The potential for economic disruption, and therefore political backlash opening the door to substantive reform or even repeal of the ESA, is obvious.

Not listing? The need is similar; save sage grouse, but above all, save the Endangered Species Act itself.

The Political Chicken Dance

To minimize political risk to the ESA, the Obama administration conducted a four-year campaign to enlist state and local interests in "cooperative" efforts, calling on the governors of the 11 affected western states to craft state sage-grouse plans. The governors, faced with balancing their political survival with that of grouse, duly produced plans acceptable to their voters, but in May 2015, the Bureau of Land Management released an avalanche of proposed land-plan amendments that were, in the main, far stricter than most state-based efforts.

Those amendments (and the land-use restrictions therein) drew heavily from the February 2013 "Conservation Objectives: Final Report," jointly prepared by the Conservation Objectives Team (COT) of 10 state and five federal biologists. While FWS director Dan Ashe wrote in the report's cover letter that the report was "guidance only" that "does not create a legal obligation beyond existing legal requirements," it was clear as early as May that COT's report would run the policy table.

However, there was another fly in the ointment, a private October 2014 memo from Ashe to BLM director Neil Kornze and Forest Service (FS) chief Tom Tidwell that was "acquired" by *Energy and Environment News* reporter Phil Taylor in February 2015. In response "to a request from [BLM] to identify a subset of priority habitat," not only would the COT "objectives" be met and "institutionalized," but the goals of a prior,

controversial National Policy Team report would also be followed.

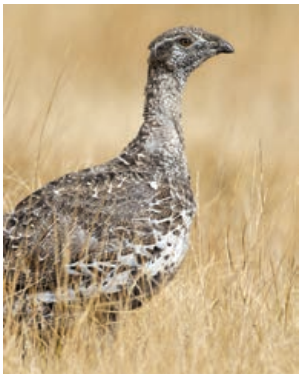
Upset at the memo, participating states duly commented, grumbled and objected, but the final federal plan amendments changed very little before finalization was announced on Sept. 14, 2015, covering 98 land-use plans for over half the 173 million acres of occupied range. The Forest Service signed its Record of Decision on September 16, the BLM five days later.

Also on September 16, Interior announced it would be withdrawing 10 million acres from mining claims and entry, imposing an immediate moratorium on new claims and starting the two-year clock for a 20-year formal withdrawal.

On Sept. 22, 2015, "because of an unprecedented effort by dozens of partners," Interior Secretary Sally Jewell animatedly announced the U.S. Fish & Wildlife Service would not list the bird.

SAGEBRUSH © C.J. HADLEY. INSET: MALE SAGE GROUSE © MARION DICKINSON

Is "not listing" greater-sage grouse different from listing? Well, the overall impact of the plan amendments is least painfully found in the FWS's 12-month "finding" not to list, signed by Ashe. Published in the Federal Register Oct. 2, 2015, 86 pages of three-column fine print bury the devil in stultifying detail.



FEMALE SAGE GROUSE © DIANE MCALLISTER

Interior's rationale for not listing, after a planning process "unprecedented in scope and scale" implementing "a significant shift from management focused within administrative boundaries to managing at a landscape scale," was based on new "regulatory mechanisms [that] reduce threats on approximately 90 percent of the breeding habitat." In the end, after four years of alleged cooperation in which FWS declared, "We were a key partner working closely with BLM and FS [but not the states, apparently] throughout the process," only three state plans (Colorado, Wyoming and Nevada) out of 11 met FWS muster.

As is usual for federal "buropolitik," the FWS finding uses no less than 48 federal acronyms, including several new ones every sagebrush rebel must now memorize: PHMA, SFA, and GHMA (see sidebar, p. 16), all of which impose major new restrictions on 67 million acres of federal lands, "an unprecedented change" that "substantially reduces the potential for future disturbance" and "signifies a substantial improvement in the effectiveness of regulatory mechanisms [while somehow] still enabling the multiple uses that are part of the BLM and FS missions."

Courthouse Kabuki

It probably won't shock *RANGE* readers to learn that litigation was filed almost immediately against the plan amendments and mining withdrawal. On September 23, one whole day after Jewell's not-listed announcement, Elko and Eureka counties, plus two mining companies, filed in the federal District Court for Nevada.

Plaintiffs seek a preliminary injunction against all "regulatory mechanisms" finalized by the Forest Service and BLM, as well as the segregation of Sagebrush Focal Areas' (SFA) lands from operations of the 1872 mining law. Preliminary injunctions are granted only when plaintiffs can demonstrate they will suffer irreparable harm *and* have a reasonable chance of later winning the case on the merits.

At issue for one mining outfit are more than 400 unpatented claims already covered by a plan of operations for exploration in two projects, which has cost $32 million since 1997. Not until the draft amendments came out in May did the mining company learn a withdrawal was in the works. The other firm was equally surprised.

The county governments have plenty to be upset about as well. For Elko County, the BLM has deferred the China Mountain wind project, $500 million worth of construction with around $10 million in annual property taxes, now located in an SFA. Further, the county "identified 236,000 acres [of ag lands] within or adjacent to the SFA," estimating annual loss of productivity of $31 million based on expected restrictions on use.

In Eureka County, the Priority Habitat Management Area (PHMA) maps included Eureka town site, "farms with alfalfa fields," power lines, the county landfill, and residential subdivisions.

On September 25, Idaho Gov. Butch Otter (R) and the Idaho Legislature filed suit—emphatically *not* in the Idaho federal court district where the case could land on the Green bench of District Judge B. Lynn Winmill. Instead, the 42-page, eight-count complaint was filed in the Washington, D.C., District Court, challenging 64 of the plan amendments in six states, including Idaho. Among other things, Idaho was not allowed sufficient time for a "governor's review" of the final plan amendments, which plaintiffs allege were "materially altered" from the October 2013 draft amendments. One alteration included the previously unheard of SFA's that Idaho interprets as "nothing more than a proxy for designating widespread ACEC's (as in Areas of Critical Environmental Concern), an administrative means of managing as wilderness. The Forest Service equivalent is RNA's, or Research Natural Areas.

Obviously, the plaintiffs were not surprised. Both these complaints took weeks if not months to prepare, and other litigation from other states and entities is pending, likely dependent on the success (or not) of the first filings.

The Nevada lawsuit (64 pages, nine

As of Oct. 2, 2015, the highest and most important task for which millions of acres of western rangeland shall be managed is to grow sagebrush for sage grouse. Everything else matters much less.

Arbitrary and Capricious

Why did Interior go for a mineral withdrawal in so-called SFA? The finding explains, "In 2010, we were aware of approximately [63,000 acres] of existing mining-related disturbance within the range of sage grouse."

Keep in mind, the range of sage grouse is currently 173 million acres, occupied by 432,000 grouse in 2015—just a pinfeather over 400 acres per grouse.

The finding concedes "the extent of these projects directly affects less than 0.1 percent of the sage-grouse occupied range. Although direct and indirect effects may disturb local populations, ongoing mining operations do not affect the sage grouse range wide."

But ban it all anyway? Even if every new mine in the next 100 years is built in the SFA's and left 9.93 million acres of habitat unaffected? Yep!

counts) had its first hearing November 17 and 18 before federal District Judge Miranda Du. By October 22, seven other Nevada county governments had joined as plaintiffs. Nevada Attorney General Adam Laxalt (R) also joined the litigation over the objections of Gov. Brian Sandoval (R), who has "not ruled out" litigation, but calls Laxalt's legal moves "premature," undermining efforts at negotiating "reasonable implementation" with Secretary Jewell. On the other side, three environmental groups joined the feds. Judge Du, however, ruled November 13 that pleadings would be made only by the original parties to the lawsuit.

One point of the Nevada complaint is that "grazing restrictions will result in a buildup of fuel load [and] increase wildfire frequency and intensity, which will destroy [grouse] habitat." Testifying to that point before Judge Du was University of Nevada, Reno, professor of rangeland ecology Barry Perryman, Ph.D. *RANGE* asked Perryman to encapsulate his testimony:

"Everyone agrees that wildfire is the greatest threat to sage chickens, but the Nevada amendments, and I suspect the other state plans, completely omit any and all references to fuels management or targeted grazing of any kind. We now know that cheatgrass success is due to the buildup of litter—forage, feed, fuel—left after the grazing season. We brought that to BLM's attention in the Nevada state alternative, and it was ignored."

Another issue raised in court was that of replacing a deteriorating water tank supplying Baker in eastern White Pine County. Before the plan amendments, Baker water chairman David Sturlin had expected it to be a fast-track process not needing an environmental impact statement, just a permit change "to extend one section of fence 30 feet." After the amendments, the water district was also told verbally by BLM staff that the new tank would be too high, was the wrong color, a survey for Indian artifacts was required, and the town would have to abandon its right-of-way to a nearby spring that is the system's backup supply.

As for the Department of Justice, Nevada U.S. attorney Daniel Bogden wrote in a brief filed October 23, "An injunction would undo four years of collaboration and could undermine [FWS's not-listing] finding."

On December 8, Judge Du declined to enjoin implementation of the land-use planning amendments prior to a trial expected early in 2017. Associated Press reported some excerpts from the 16-page ruling, which was not an early Christmas present for plaintiffs: Du pointed out while a lot of existing grazing permits will be fast-tracked for grouse-related review, plaintiffs had "conceded that the land amendments themselves do not modify grazing permits and current permit-holders have not yet been affected by those directives." Miners presented only "hypothetical scenarios of adverse consequences," and in general, Du wrote plaintiffs raise "only the possibility—not a likelihood—of irreparable harm."

Confused? Everyone is going to be confused until the feds figure out what they can get away with and what they can enforce. That will take at least a year until Judge Du rules and the other cases start wending through the system. The only confusion I have is—how bad is it going to be and how little difference is this from a full-boat, doom-from-above listing? ■

Dave Skinner writes from northwest Montana. Back when America was a free country, he shot, and ate, a sage grouse. Once.

More Acronyms to Grouse About

PHMA: Priority Habitat Management Areas, 35 million acres
Created from the Priority Areas for Conservation identified in the 2015 COT (Conservation Objectives Team) report, PHMA's impose "No Surface Occupancy" (acronym NSO, sorry) for "fluid minerals" meaning "surface disturbing activity...cannot be conducted on the surface of the land."

For leasable minerals (such as coal in Wyoming), PHMA's are "closed to new permits," and such restrictions "reduce the likelihood that future development to non-energy leasable minerals will occur in these areas," an "effective measure to reduce disturbance."

Even politically correct solar and wind projects in PHMA (except in Solar Energy Zones) "will not be allowed." Rights-of-way? "[M]ust be based on an explicit rationale that biological impacts to sage grouse are being avoided." Grazing? Within PHMA, when grazing leases come up for review, they must "benefit or be neutral to sage grouse, including in times of drought."

Are there exceptions? Only if "activity will have no direct, indirect, or cumulative effect on sage grouse or sage-grouse habitats, or is an alternative action for activities on a nearby parcel and would provide a clear conservation gain to sage grouse."

SFA: Sagebrush Focal Areas, 11 million acres
SFA's, which exist within PHMA's, impose extra restrictions on "new, human-caused surface disturbance," and seem a bureaucratic equivalent to critical habitat as SFA's are "essential for the persistence of the species." In SFA, all PHMA restrictions apply, *plus* withdrawal of all locatable minerals (September 16) as well as blanket NSO restrictions for "fluid" minerals "without waiver, exception, or modification." Best of all, in SFA, grazing rights are now on the fast track for new NEPA (National Environmental Policy Act) compliance review!

GHMA: General Habitat Management Areas, 32 million acres
GMHA's offer "greater flexibility for land-use activities," but even in GHMA, grazing is to "benefit or be neutral to sage grouse."

Disturbance Caps: 67 million acres
Besides these nice new acronyms, the finding also announces the implementation of a three percent "disturbance cap" in all states except Montana and Wyoming, which apparently are allowed a five percent cap. If the cap is reached "at the project level scale, no further anthropogenic disturbances will be permitted by BLM or the Forest Service within PHMA's in the analysis area until the disturbance has been reduced to less than the cap." Alongside is a "density cap" if more than one acre per section is disturbed. Keep in mind that one mile of roadway "disturbs" around four acres, with power lines, buildings and fences disturbing more than their actual physical footprints.

All the "[f]ederal plans require that impacts to sage-grouse habitats are mitigated and that compensatory mitigation provides a net conservation gain to the species, [being] durable, timely and in addition to that which have resulted without the compensatory mitigation."