

Seattle University School of Law Digital Commons

Faculty Scholarship

2015

Strategic Dodging of ESA Listing Determinations

Madeline Kass

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/faculty>



Part of the [Law Commons](#)

Recommended Citation

Madeline Kass, Strategic Dodging of ESA Listing Determinations, 29 *NAT. RESOURCES & ENV'T* 54 (2015).
<http://digitalcommons.law.seattleu.edu/faculty/750>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons.

Mr. Murphy is senior counsel for National Wildlife Federation and a member of the editorial board of Natural Resources & Environment. He may be reached at jmurphy@nwf.org.

Strategic Dodging of ESA Listing Determinations

Madeline June Kass

Before an at-risk animal or plant species may find shelter under the Endangered Species Act (ESA), the species must first be “listed” as endangered or threatened. Even “candidate” species, those found to warrant listing on biological grounds but which are not designated due to higher listing activity priorities, receive no ESA protection. Simply put: No listing, no protection. This all-or-nothing trigger places considerable significance on listing decisions. A decision to list can elicit the full force of the ESA’s “pit bull” regulatory authorities and, potentially, result in onerous regulatory constraints on land uses. A decision not to list can continue the status quo and, potentially, result in species extinction.

Given the great stakes, it’s not surprising that listing determinations create a focal point for controversy and litigation. Increasingly, efforts to avoid application of the ESA’s protective measures include anticipatory efforts to avert, divert, or postpone listing determinations. Some of these efforts, described below, have potential to benefit at-risk species while others seem destined to subvert mandated statutory protections.

One strategy to avoid, or at least postpone, a formal listing decision relies on adoption of voluntary conservation measures in advance of listing. Increasingly accomplished with candidate conservation agreements (CCAs), candidate conservation agreements with assurances (CCAAs), and conservation plans, the objective is to alter the federal assessment of a species’ status—its need or priority for listing—by implementing conservation measures in advance of a formal listing decision. See 68 Fed. Reg. 15,100 (Mar. 28, 2003) (Policy for Evaluation of Conservation Efforts When Making Listing Decisions); 64 Fed. Reg. 32,705 (June 17, 1999) (Final Policy for Candidate Conservation Agreements with Assurances); Allison Winter, *Voluntary Agreements Gain Traction at FWS*, E&E REPORTER, Oct. 5, 2012. The U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS)—the federal agencies primarily responsible for listing determinations (the Services)—must consider explicit statutory criteria in determining whether to list species. The ESA sets out five criteria: present or threatened habitat modification; overutilization (e.g., commercial or recreational overuse); disease or predation; inadequacy of existing regulatory mechanisms; and other factors affecting the species’ survival. See Endangered Species Act of 1973, 16 U.S.C. § 1533(a)(1) (2013). The Services may list a species based on a combination of these factors or because of any one of them. *Id.* Anticipatory conservation measures seek to affect the Services’ listing calculus by implementing mitigation measures designed to reduce identified threats to a species and thereby diminishing the significance of

one or more of the statutory factors.

By way of illustration, both federal and state authorities have proposed anticipatory conservation measures to avoid formal listing of the greater sage-grouse (*Centrocercus urophasianus*). The greater sage-grouse, a distinctive game bird, inhabits areas across eleven western states. The FWS has identified fragmentation and loss of sagebrush habitat as the primary threats to the species. See Press Release, U.S. Fish & Wildlife Service, U.S. Fish and Wildlife Service Seeks Science, Data Related to Greater Sage-Grouse and Efforts to Protect Sagebrush Habitat (Aug. 11, 2014). Agricultural conversion, energy development, urbanization, conifer encroachment, exotic grasses, and amplified wildfire cycles factor into sagebrush habitat modification and contribute to “significant and ongoing population declines” across the bird’s range. *Id.* In 2010, the FWS determined that the greater sage-grouse merited ESA listing but that listing was precluded by higher-priority listing actions. See 75 Fed. Reg. 13,910 (Mar. 23, 2010). The warranted-but-precluded determination led to the grouse’s designation as a candidate species, thereby providing for yearly status reviews but conferring no statutory protection. See 77 Fed. Reg. 69,993, 70,015 (Nov. 21, 2012). Thereafter, in settlement of litigation, FWS agreed to propose the bird for listing or remove it as a candidate by September 30, 2015. See FWS, Overview of Greater Sage-Grouse and Endangered Species Act Activities, www.fws.gov/greatersagegrouse/factsheets/Primer4SGOverviewESAActivities.pdf.

With a set date for a listing decision on the calendar, federal and state authorities proposed conservation measures to avert an endangered or threatened listing. The federal Bureau of Land Management (BLM), in cooperation with the U.S. Forest Service (USFS), formulated a strategy to incorporate sage-grouse specific conservation measures into existing regional planning documents. The National Greater Sage-Grouse Planning Strategy proposes revision of nearly 100 BLM and USFS management plans, requires preparation of fifteen environmental impact statements (pursuant to the National Environmental Policy Act), and covers tens of millions acres of public lands. See BLM, National Greater Sage-Grouse Planning Strategy (Jan. 2012), at www.blm.gov/epl-front-office/projects/lup/21152/31106/32307/Conservation-508.pdf; Defenders of Wildlife, *In the Red: How Proposed Conservation Plans Fail to Protect the Greater Sage-Grouse* 6, 8 (2014). An explicitly stated goal of this sizable conservation effort is to dodge ESA listing: “[i]deally, the agencies can address the threats posed to the species from the inadequacy of existing regulatory mechanisms through our National Greater Sage-Grouse Planning effort so we can eliminate the need to list the species under the ESA.” BLM, *Grouse and Sage Grouse Conservation*, www.blm.gov/wo/st/en/prog/more/sagegrouse.html (last visited Sept. 12, 2014).

In anticipation of the 2015 sage-grouse listing determination, state authorities have also put forward anticipatory conservation efforts. For example, the governor of Montana issued an executive order convening a “Governor’s Greater Sage-grouse Habitat Conservation Advisory Council” to provide advice and recommendations for a “state-specific strategy” for sage-grouse conservation. See State of Montana Office of the Governor, Exec. Order 2-2013 (Feb. 20, 2013). Dodging ESA listing was an explicitly stated goal of the governor’s creation of the advisory council and development of the state-specific strategy: “It is in the interest of this State to bring

stakeholders and experts together to recommend a course of action that will provide for conservation measures sufficient to preclude the need to list the Greater Sage-Grouse.” *Id.* The Montana State legislature overwhelmingly passed legislation funding the Governor’s Council and supporting its purpose. See Montana’s Greater Sage-Grouse Habitat Conservation Advisory Council, Greater Sage-Grouse Habitat Conservation Strategy 3 (Jan. 24, 2014). And, as acknowledged by the Council, “[p]aramount in the Executive Order and the legislation was a directive to the Advisory Council to craft a strategy that will serve to preclude the need to add sage-grouse to the Endangered Species List.” *Id.* Thereafter, Governor Bullick instituted a state sage-grouse conservation plan establishing the “Montana Sage Grouse Oversight Team” and a “Montana Sage Grouse Habitat Conservation Program.” See State of Montana Office of the Governor, Exec. Order 10-2014 (Sept. 9, 2014). Montana’s strategy follows similar efforts taken by several other western states with sage-grouse habitat. See Western Governor’s Association, Special Report to the Western Governors: Inventory of State and Local Governments’ Conservation Initiatives for Sage-Grouse 2013 Update 2, 4-7 (Feb. 20, 2014) (identifying sage-grouse conservation plans, initiatives, executive orders, statutes, and regulatory measures taken in Idaho, Nevada, Montana, South Dakota, Wyoming, Oregon, North Dakota, and Washington to “avoid a threatened or endangered listing of the species”).

A more invidious dodging strategy is the legislative preemptive strike. This strategy seeks to prevent ESA listing determinations by legislative fiat. In 2011, pursuing this strategy, members of Congress proposed amending the ESA for the sole purpose of blocking a listing of the lesser prairie chicken (*Tympanuchus pallidicinctus*). See Defenders of Wildlife, Assault on Wildlife: The Endangered Species Act Under Attack 20–21 (Sept. 2011); Phil Taylor, *ESA Rider Averted, but Some Species Remain in Cross Hairs*, GREEN WIRE, July 29, 2011 (discussing legislative efforts to “roll back or prevent protections for a handful of individual species, including bighorn sheep, lizards, wolves and grouse”). The proposed ESA amendment simply provided: “The Act shall not apply to the lesser prairie chicken.” S.A. 429 to S. 782, 112th Cong. (2011). Even after the preemptive strike failed—the bill did not pass and FWS listed the bird as threatened—and despite FWS’s adoption of a 4(d) rule exempting take in accord with a conservation plan initiated by affected states, legislators still proposed an amendment to reverse the listing. See 79 Fed. Reg. 19,974 (Apr. 10, 2014); H.R. 4866, 113th Cong. (2014). Federal legislators offered nearly identical language to prevent listing of the sand dune lizard (*Sceloporus arenicolus*). See S.A. 397 to S. 782, 112th Cong. (2011); Defenders of Wildlife, Assault on Wildlife: The Endangered Species Act Under Attack 21 (Sept. 2011). And, more recently, legislators put forth a bill to postpone any listing actions on greater sage-grouse for a decade. See Sage Grouse Protection and Conservation Act, H.R. 4716, 113th Cong. (2014); Phil Taylor, *National Access Issues*, E&E REPORTER, May 22, 2014.

Whether the dodging strategies described above benefit at-risk species remains to be determined. Preemptive strikes seem unlikely to benefit species. Congressional listing exceptions, motivated by political exigencies and special interests, aim to circumvent the ESA’s science-based approach to listing and deprive species of federally mandated protective measures. See Defenders of Wildlife, Assault on Wildlife: The Endangered

Species Act Under Attack 21 (Sept. 2011). Even preemptive strikes that fail legislatively may increase pressure on the Services to delay listing. In fact, this type of pressure may have played a role in the FWS’s decision not to list the sand dunes lizard. Following the legislative attempt to exempt the lizard from the ESA, FWS withdrew its proposal to list the species relying on conservation efforts proposed by Texas, New Mexico, and the BLM, including proposed plans that FWS had previously found inadequate. See *Defenders of Wildlife v. Jewell*, 2014 WL 4829089 (D.D.C. Sept. 30, 2014); Allison Winter, *Voluntary Agreements Gain Traction at FWS*, E&E REPORTER, Oct. 5, 2012. To the extent there’s any upside, it is that exempting individual species may be less extreme than wholesale listing prohibitions (such as the year long listing moratorium for all species imposed on the Services in 1995) and less imprudent than delisting species after years of expensive recovery efforts without adequate state conservation plans (such as the controversial delistings of several wolf species).

In contrast, state and federal anticipatory cooperative efforts have potential to benefit at-risk species by allowing for regionally coordinated but locally tailored, landscape-scale, science-based conservation plans. Anticipatory conservation efforts formulated by state stakeholders have potential to foster greater local community buy-in, reduce opposition to federal conservation efforts, foster innovative program design, and involve local experts to a greater extent than measures imposed by federal mandate. Nevertheless, conservation measures crafted by stakeholders at least as interested in minimizing regulatory protections as in preserving species may turn out too anemic to save imperiled species. See, e.g., Mark Salvo, Defenders of Wildlife, *In the Red: How Proposed Conservation Plans Fail to Protect Greater Sage-Grouse 1* (2014) (finding prescriptions in BLM’s proposal “biologically or legally inadequate” for long-term conservation of sage-grouse). If populations continue to decline, there’s a risk the chances for species recovery will have been squandered and considerable resources wasted. If, however, the anticipatory conservation measures halt, or even slow, sage-grouse declines, dodging may benefit all. And, to the extent anticipatory conservation efforts “succeed”—in both dodging listing and conserving species—it will be a testament to the ESA’s rather extraordinary ability to accomplish species protection, conservation, and recovery. Time will tell.

ADDENDUM:

In December 2014, Congress passed a spending bill with a legislative rider expressly prohibiting federal regulators from devoting funds to Endangered Species Act rulemakings to protect the greater sage grouse. The rider effectively delays listing for at least a year. The rider also postponed protections for the Gunnison sage grouse of Utah and Colorado and for two subspecies of greater sage grouse in Washington, Nevada, and California.

Ms. Kass is a co-chair of the ABA SEER Endangered Species Committee and an associate professor of law at Thomas Jefferson School of Law in San Diego. She is currently a visiting professor at Seattle University School of Law and is a member of the editorial board of Natural Resources & Environment. She may be reached at kassm@seattleu.edu.