Western Governors’
Species Conservation and ESA Initiative Webinar Series
February 25, 2016

The Role of Conflict and Litigation in the ESA

MODERATOR
Michael Brennan

PANELISTS
Lisa Reynolds
Jason Rylander
Douglas P. Wheeler
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Western Governors’ Species Conservation and ESA Initiative

The Role of Conflict and Litigation in the ESA

Lisa Reynolds
Assistant Attorney General
State of Colorado
<table>
<thead>
<tr>
<th>Species</th>
<th>Deadline</th>
<th>Litigation</th>
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<tbody>
<tr>
<td>Gunnison prairie dog</td>
<td>November 2013 (NW)</td>
<td>✔️</td>
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<tr>
<td>Lesser prairie-chicken</td>
<td>April 2014 (T)</td>
<td>✔️</td>
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<tr>
<td>New Mexico jumping mouse</td>
<td>June 2014 (E)</td>
<td>✔️</td>
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<td>Western yellow-billed cuckoo</td>
<td>October 2014 (T)</td>
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<tr>
<td>Rio Grande cutthroat trout</td>
<td>October 2014 (NW)</td>
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<tr>
<td>Gunnison sage-grouse</td>
<td>November 2014 (T)</td>
<td>✔️</td>
</tr>
<tr>
<td>Greater sage-grouse</td>
<td>September 2015</td>
<td>(✔️)</td>
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</tbody>
</table>
• Lesser prairie-chicken
• Gunnison sage-grouse
• Greater sage-grouse
State Conservation Efforts

• ** Pre-Listing conservation projects **

• Reintroduction and experimental populations

• Recovery planning
Some Impacts of Litigation from a State Perspective

• Conflict vs. partnerships
• Judicial decisions vs. negotiated agreements
• Maximizing state expertise, relationships and resources
• Delays in implementation
• Impacts on available tools
  • No Surprises
  • Regulatory certainty
Endangered Species Act Litigation: A Tool for Recovering Species
Section 4 Litigation

➢ Section 4 – Procedural
  • Listing and Critical Habitat Deadlines

➢ Section 4 Substantive
  • Threatened/Endangered/Not warranted
  • Section 4(d) – Scope/duty to Conserve
  • Critical Habitat – scope of designation/exclusion
Section 7 Litigation

Section 7 – Consultation

• Duty to Consult
• Biological Opinions/Best available science
Take Litigation

➢ **Section 9 – Liability**
  • Direct and indirect take
  • Vicarious liability

➢ **Section 10**
  • Authorization of Take
    • HCPs
    • 10(a)(1)(A)
    • 10(j)
The Effect of Litigation on Listings

Species Listed Per Year 1974-2012

- Agency
- Petition
- Lawsuit +/- petition
Multi-District Listing (MDL) Settlements

• Two Settlements between USFWS and WildEarth Guardians and CBD
  • Ordered on September 9, 2011
  • Require 90 day findings, 12 month findings, and up or down decisions (i.e., listing or not warranted findings)
  • 250 candidate and 600 other species

• Agreement runs through April, 2017 (not including some extensions)
Listing Settlements Are Working

- 2015 Candidate Notice of Review
  - shortest list of candidate species since the 1970s
  - 60 species awaiting protection
    - 42 animals
    - 18 plants
- 2014 Candidate Notice of Review
  - 146 species awaiting protection
    - 79 animals
    - 67 plants
- 2011 Candidate Notice of Review
  - 251 species
What Does the US FWS Think?

“The MDL settlements have accomplished our objectives of making our listing activities more certain and predictable, and allowing the Service to focus more of our limited resources on actions that provide the most conservation benefit to the species that are most in need of help.”

“The MDL provides predictability for stakeholders and local communities.”

The MDL settlements have also served to encourage proactive conservation efforts by landowners, industry groups, local communities, and government agencies.”

Daniel M. Ashe, US FWS Director
2015 Listing Decisions
Litigation Is Enforcement

- Citizen Suits empower individuals to act as private Attorneys General to enforce the law when
  - The level of enforcement necessary to implement exceeds the government’s capacity;
  - The government doesn’t want to enforce the law;
  - Congress wants to ensure deadlines are met.
Piping Plover Case Study

• Critical Habitat Litigation
  ➢ 1996 DOW Lawsuit led to designation of wintering habitat in 2001
  ➢ CHAPA Lawsuit – REMAND in 2004
  ➢ FWS reissued rule in 2008
  ➢ CHAPA Lawsuit 2009 – FAILED

• CAHA ORV Rule Litigation
  ➢ DOW & Audubon sue NPS in 2008
  ➢ Consent decree and Neg Reg
  ➢ CHAPA challenged Final Rule - FAILED

• CALO ORV Litigation??
‘Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed.’ – Richard Nixon
“The one process now ongoing on that will take millions of years to correct is loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us.”

– Edward O. Wilson
Douglas Wheeler
Partner
Hogan Lovells
John Leshy
Emeritus Professor, U.C. Hastings College of the Law
Solicitor of the Interior Department, 1993-2001
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Learn more about the Chairman’s Initiative of Gov. Matt Mead at westgov.org/initiatives/esa-initiative