

## Ruling on Endangered Species Act listing has wide implications -

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*John Kolanz*

Oil and gas and agricultural interests in Colorado and four nearby states celebrated a Texas federal judge's ruling last week vacating Endangered Species Act protections for the lesser prairie chicken. Environmental interests were less enthused. While the ruling may ease the regulatory burden for certain entities in the region, its real significance could reach much further.

The judge found that the U.S. Fish and Wildlife Service misapplied the factors that it must consider to determine whether a species qualifies for ESA protection (i.e., "listing"). The Act requires FWS to consider, among other things, the adequacy of existing regulatory protections. If non-ESA mechanisms sufficiently protect a species, it should not qualify for listing.

The ESA is widely considered the strictest of all environmental laws. Once its protections attach to a species, the Act can severely limit activities that may harm the species or its habitat. In the case of the prairie chicken, this had implications for routine oil and gas and agricultural operations within the species' range.

In an effort to avert a listing, Colorado, Texas, New Mexico, Oklahoma and Kansas teamed with private interests to create a comprehensive rangewide conservation plan for the prairie chicken. When implemented, the plan would raise funds through enrollment and mitigation fees, and use these funds to develop conservation measures. Landowners would dedicate "offset land" consisting of prairie chicken habitat to be enhanced and preserved to counter unavoidable impacts to habitat elsewhere in the range. Landowners would receive payment and other economic incentives to provide offset land to the program.

Despite these efforts, FWS listed the bird as threatened in April 2014. At the time of the listing decision, the plan had not yet been implemented. Therefore, the service determined that participation in the plan, as well as its implementation and funding, were too uncertain to guarantee protection to the bird. FWS further concluded that not listing the bird would discourage participation in the plan. The judge rejected this analysis an improper application of the service's own policy on evaluating forthcoming conservation efforts during listing decisions.

The judge held that for FWS to give weight to such emerging plans in its listing analysis, it need only find that the plans are likely to be implemented and effective. In assessing the likelihood of implementation, FWS should consider prior industry and landowner participation in similar conservation efforts, and whether the plan creates a "good deal" for landowners in which they will want to participate. The judge held that the Service's application of a stricter standard rendered the lesser prairie chicken's listing invalid.

The direct effect of the ruling will take some time to sort out. For instance, it is somewhat unclear whether it vacates the lesser prairie chicken's listing only in Texas, or in all five states where the bird is present.

However, its larger impact will go beyond the present case. For starters, the ruling could influence the upcoming listing decision for the greater sage grouse, due this month, as well as the pending appeal of the recent decision to list the Gunnison sage grouse. Both have significant implications for Colorado.

Moreover, FWS is scheduled to make many more listing decisions for species across the country. Comprehensive mitigation plans have become a popular mechanism to help avoid listings, but have had varying success. The ruling should reinforce the importance of state, local, and private entity cooperation in

developing comprehensive plans to protect vulnerable species. Properly crafted and implemented, these plans can provide numerous benefits.

They can create markets for property owners, who often bear a disproportionate burden under the Act, to get paid for the ecosystem benefits their lands provide. Moreover, these plans offer far more certainty to the regulated community in terms of the cost and timing of activities and projects that would otherwise require ESA review.

The plans also can help local and state governments minimize economic disruptions for their citizens and businesses. They can further help ensure that FWS allocates its limited resources to those species truly needing ESA protection. Finally, at-risk species can benefit from early conservation efforts that could be implemented more quickly than those produced through individual ESA review.

While opportunities presented by each species will vary, in many cases, the potential benefit of encouraging such plans is widespread and substantial. What some may consider a defeat for the lesser prairie chicken actually could be a win for all.

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